

TITLE:

**JUDICIAL REVIEW IN ENGLAND AND WALES: A
CONSTRUCTIVE INTERPRETATION OF THE ROLE OF
THE ADMINISTRATIVE COURT**

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PHD

DECLARATION OF AUTHENTICITY

I, Sarah Marie Nason confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Signed... 

Date...15 October 2014.....

ABSTRACT

In this thesis I construct an interpretation of judicial review in England and Wales from the ground up based on an analysis of social practice in the Administrative Court. I argue that whilst judicial review provides a forum for debates about constitutional values and rights, and the inter-institutional balance of power between different branches of state, it is still primarily concerned with doing justice for individuals in relatively non-complex cases. Both in highly contested and technical claims with broader implications, and in cases turning largely on their own facts, justice is done by way of ordinary common law reasoning and specifically by assessing whether the initial decision-maker has taken relevant considerations (including moral considerations) into account, and excluded irrelevant considerations.

My first central argument is that some existing interpretations of judicial review display a lack of appreciation of the social facts of litigation and legal practice, whilst others are based on significant misconceptions about these facts.

My second central argument is against the scholarly tendency to over-emphasise the production and refinement of conceptual doctrinal tests at the expense of addressing the contested nature of the moral values at stake in the practice of judicial review as a whole and in individual cases.

My third central argument is for my own interpretation which both fits with and morally justifies social practice. On this interpretation judicial review is about individual justice, as opposed to jurisdiction (*ultra vires*) or justification.

I conclude that my unorthodox categorisation of the grounds of review, constructivist approach to judicial reasoning (based in part on institutional creativity), and deeper examination of relevant social facts, could form the prologue to a post culture of justification account of judicial review.

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Introduction

In this thesis I construct an interpretation of judicial review in England and Wales from the ground up based on an analysis of social practice in the Administrative Court.¹ I argue that whilst judicial review provides a forum for debates about constitutional values and rights, and the inter-institutional balance of power between different branches of state, it is still primarily concerned with ordinary common law statutory interpretation and doing justice for individuals in relatively non-complex cases. Both in highly contested and technical claims with broader implications, and in cases turning largely on their own facts, justice is done by way of ordinary common law reasoning and specifically by assessing whether the initial decision-maker has taken relevant considerations into account, and excluded irrelevant considerations.

My first central argument is that existing interpretations of judicial review display a lack of appreciation of the social facts of litigation and legal practice, or are based on misconceptions about these facts.

My second central argument is against the scholarly tendency to seek descriptive conceptual solutions to what are in effect interpretive questions of value; this tendency has led to over-complication and correspondingly may weaken access to justice.

My third central argument is for my own interpretation which fits with and morally justifies social practice. On this interpretation judicial review is about individual justice, as opposed to jurisdiction (*ultra vires*) or justification.

¹ An interpretive approach is one that lays principle over practice in order to make the best

Whilst I aim to propose each of these arguments in turn, the specific projects over-lap and my thesis should be read with this in mind.

One broad interpretation of judicial review in the Administrative Court is that it is part of a culture of justification under which public power must be exercised in accordance with some coherently reasoned justification.² The culture of justification has been catalysed by reforms re-shaping the British constitution from a system of parliamentary sovereignty to a vision of constitutional democracy governed by liberal-democratic values and the twin sovereignties of Parliament and the courts.³ The culture is one of open governance and the centrality of rule of law values including clarity, consistency, and impartiality. It is also aligned with the apparent growth of rights-based reasoning and associated concepts of proportionality and balancing.⁴ This culture is said to have instigated a, ‘reinvention’,⁵ ‘reformation’,⁶ or ‘constitutionalisation’,⁷ of judicial review and broader

² This phrase is attributed to Etienne Mureinik who perceived a shift in constitutional and administrative thought from a ‘culture of authority’ to a ‘culture of justification’, Etienne Mureinik, ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 S Afr J on Hum Rts 31, 32-33. It has been taken up and modified by David Dyzenhaus, ‘Law as Justification: Etienne Mureinik’s Conception of Legal Culture’ (1998) 14 S Afr J on Hum Rts 11 and Michael Taggart, ‘Reinventing Administrative Law’ in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-layered Constitution* (Hart 2003) 332-335.

³ Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (7th edn OUP 2011) and Vernon Bogdanor, *The New British Constitution* (Hart 2009).

⁴ Sian Elias, ‘Righting Administrative Law’ in David Dyzenhaus, Murray Hunt, and Grant Hushcroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart 2009) 55; Moshe Cohen-Eliya and Iddo Porat, ‘Proportionality and the Culture of Justification’ (2010) 59 American Journal of Comparative Law 463.

⁵ Michael Taggart, ‘Reinventing Administrative Law’ (n 2) 323-335.

⁶ Thomas Poole, ‘The Reformation of English Administrative Law’ (2009) 68(1) CLJ 142, 144-149.

⁷ Lord Steyn, ‘The Constitutionalisation of Public Law’ (UCL Constitution Unit 1999) available online: <<https://www.ucl.ac.uk/spp/publications/unit-publications/38.pdf>> (accessed 6 October 2014); Jeffrey Jowell, ‘Beyond the Rule of Law: Towards Constitutional Judicial Review’ [2000] PL 671, 674-680; Lord Lester, ‘Developing Constitutional Principles of Public Law’ [2001] PL 684.

administrative law. Despite its popularity, I argue that the reformation conception does not provide a complete fit with the social facts of judicial review litigation, and that it can be distorting.

The majority of Administrative Court claims, including judicial review applications, involve individual grievances against ‘street-level bureaucratic’ decision-makers rather than disputes about the constitutionality of particular rights, or the inter-institutional balance of functions between Parliament, the executive, and the courts. There are ‘higher-level’ claims, such as those involving the exposition of broader legal principle, cases with potentially wide impacts on the public good, and claims that question the proper balance of powers between particular branches of state.⁸ Applications classed as higher-level, at least by litigants and court officials if not by judges, form an increasingly large proportion of claims issued in the Administrative Court; but this finding is not sufficient in itself to support a wholesale reinvention, or specifically a constitutionalisation, of judicial review.

Whilst the reformation conception may not fit entirely, there is moral value in the view that public power requires justification and that the greater the impact on individual rights the more compelling this justification must be. Nevertheless this conception is morally weak if justification is equated merely with efficiency then whatever it takes to achieve a government aim can be

⁸ Peter Cane, ‘Understanding Judicial Review and its Impact’ in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (CUP 2004) 17-19.

capable of justification.⁹ Current scholarly reliance on conceptual formulae (notably proportionality) to determine whether a decision is capable of justification runs the twin risks of obscuring the moral values at stake and equating justification either with the state's own account of efficiency, or with a singular utilitarian conception of moral value.¹⁰

Justification can also be interpreted consistently with the antique conception of judicial review under which the courts were concerned only to ensure that power was exercised in good faith and for purposes that were within the decision-maker's jurisdiction. A jurisdictional error can easily be classed as one rendering a decision incapable of justification.

The jurisdictional or *ultra vires* doctrine in this strict sense does not fit with the social practice of judicial review, nor does it explain the compass of judicial reasoning in the Administrative Court.¹¹

There is a broader interpretation of *ultra vires* under which *vires* is equated to constitutional authority and any exercise of public power that offends liberal-democratic values may be beyond the decision-maker's legitimate jurisdiction. On this account Parliament's powers are granted and circumscribed by constitutional values. Accepting this interpretation will produce largely the same results as endorsing a wider culture of justification.

⁹ Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65(1) CLJ 174, 190. Rivers makes this point specifically in relation to what he terms a 'state limiting' conception of the proportionality test as a method for examining the cogency of justification.

¹⁰ Stavros Tsakyrakis, 'Proportionality an Assault on Human Rights?' (2009) 7(3) ICON 468; Grégoire Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 Can J L & Juris 179.

¹¹ See eg, Dawn Oliver, 'Is the *Ultra Vires* Rule the Basis of Judicial Review' [1987] PL 543 and TRS Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretive Enquiry?' (2002) 61(1) CLJ 87.

So-called common law constitutionalism also fits under the culture of justification banner. Both broader *ultra vires* and common law constitutionalism accept a special role for judges in articulating grounds of review in accordance with rule of law values. However, on most interpretations of *ultra vires* this role has to be linked back to a social rule under which Parliament has accepted some delegation of power to the judiciary; what Parliament delegates it may also be able to withhold or withdraw.

On the other hand, common law constitutionalists argue that the power stems from the common law's authority as a site of community justice which develops over time to express deep-rooted societal values. In this sense the common law may have a greater claim to democratic legitimacy than parliamentary politics.¹²

Recent institutional reforms to regionalise the Administrative Court, and thereby improve local access to public law procedures and remedies, support this conception of common law community justice.¹³ However, significant sections of the population of England and Wales still have difficulty accessing and navigating the judicial review procedure and the broader concerns of local communities are not being addressed by judicial review litigation; I argue that

¹² Though there are differences between these commentators their overall positions support the fundamental nature of common law (constitutional) values. Sir John Laws, 'The Constitution: Morals and Rights' [1996] PL 622; TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003) and 'Constitutional Dialogue and the Justification of Judicial Review' (2003) 23 OJLS 563; Tom Hickman, 'In Defence of the Legal Constitution' (2005) 55(4) UTLJ 981; Paul Craig, 'Political Constitutionalism and Judicial Review' in CFF Forsyth and others (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010) and 'Constitutional Foundations the Rule of Law and Supremacy' [2003] PL 92; TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP 2013). See also Dawn Oliver, 'Ultra Vires' (n 11); Jeffrey Jowell 'Constitutional Judicial Review' and Lord Lester, 'Constitutional Principles' (n 7).

¹³ The 2009 opening of Administrative Court Centres in Birmingham, Cardiff, Leeds and Manchester.

this weakens the common law constitutionalist claim to fit with social practice. As Harlow and Rawlings have noted; ‘...judicial review in England and Wales has a secret dimension; the expansion of parameters runs alongside a large-scale exclusion of people’.¹⁴

Nevertheless, the reformationist, righting, and constitutionalisation visions radiate a perception of judicial review as expanding both in terms of substantive legal doctrine and practical impact. When this is coupled with empirical evidence of exponentially growing caseloads and anecdotes about tactical litigation it is not surprising that a strong response has followed from those sceptical about the value and impacts of judicial review.

A group I shall call ‘empirical sceptics’ assume that since the number of Applications for Judicial Review (AJRs)¹⁵ has expanded, and since the majority of claims do not result in a substantive win for the claimant, there must be a large-scale abuse of the system.¹⁶ This position is based on a failure to distinguish between different topics of AJR and a misunderstanding of the variable nature of success in judicial review litigation.

The second group of sceptics are ‘political constitutionalists’; regardless of the empirical facts these sceptics question the value of judicial review in terms of political morality.¹⁷ They argue that judicial review can be

¹⁴ Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, CUP 2009) 669.

¹⁵ Claims issued in the Administrative Court under the CPR Pt. 54 procedure.

¹⁶ This group primarily includes the current Government, especially in its proposals to reform judicial review. Ministry of Justice, *Judicial Review: Proposals for Reform* (2012) Consultation Paper CP25/2012; *Judicial Review: Proposals for Further Reform* (2013) Cm8703.

¹⁷ Jeremy Waldron, *Law and Disagreement* (Clarendon 1999) and ‘The Core of the Case Against Judicial Review’ (2006) 115 Yale LJ 1346; Adam Tomkins, *Our Republican Constitution* (Hart 2005); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007); Graham Gee and Grégoire Webber, ‘What

undemocratic because it allows moral decisions over which reasonable people disagree to be taken by an un-elected ‘juristocracy’.¹⁸ Better to limit the judicial role to literal interpretation of statute, strict *ultra vires*, and possibly protecting the right of rights, the right to vote itself. The task of supervising the administrative state should largely be reserved to Parliament. A particular target for this group is the rights-based and constitutional review championed by reformationists.

As with empirical sceptics, the political constitutionalists are also largely attacking a straw man, as there is limited evidence of activist human rights-based reasoning in the Administrative Court, or of *explicit* moves towards strong constitutional review. Nevertheless, I argue that the culture of justification is evident in subtler tones; more quiet revolution than reformation, more re-discovery than re-invention.

Based on analysis of over 200 substantive judgments in judicial review claims, I conclude that Administrative Court judges do indeed consider their task to be one of determining whether the challenged decision was justified by reasoning of adequate quality. However, the judges in my sample of cases largely did not apply doctrinal conceptions of justification, such as variable intensity reasonableness or proportionality, they applied ordinary common law principles of statutory interpretation with historical pedigrees; including

is a Political Constitution’ (2010) 30(2) OJLS 273; and see (2013) 14(12) German Law Journal (an entire edition devoted to examining political constitutionalism).

¹⁸ Martin Loughlin, *Sword & Scales: An Examination of the Relationship Between Law & Politics* (Hart 2000) and in international comparative perspective, Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007).

assessing the initial decision-maker's reasoning with reference to statutory purpose, and sifting relevant from irrelevant considerations.

Both reformationists and those who are sceptical about judicial review tend not to notice this more holistic or non-doctrinal practical reasoning in street-level claims; partially due to an empirical misconception, nobody has looked to see how prevalent it is, and partially because the cases in which it takes place are perceived as having little practical impact beyond the individual parties concerned. I argue that this failure to look from the ground up impoverishes analysis, not least since these street-level claims make up the bulk of social practice.

Both judicial review sceptics and some reformationists are uncomfortable with the contentious nature of moral values at stake in higher-level constitutional and rights claims. The former argue that resolution of these issues ought to be reserved to politicians, the latter attempt to entrench degrees of justification through apparently value-free legal doctrines (rendering lawyerly expertise relevant but not overtly political).

I believe the better approach is to go back to judicial review's roots and deploy the more holistic form of moral reasoning, that I have found to be characteristic of street-level claims, in the higher-level constitutional claims as well.

I argue that the proliferation of increasingly complex attempts to entrench degrees of justification of public decision-making through legal doctrine manifests in a search to find conceptual answers to what are in effect interpretive questions of value. This excessive complexity is especially

unhelpful given the difficulties of accessing judicial review, and I think it would be disastrous if such conceptual tests became blueprints for decision-making in street-level claims; this risks over-complication precisely at a time when social practice, notably growing numbers of unrepresented litigants, demands simplification in order to ensure proper access to justice.

I also argue that endorsing a more holistic (or informal) approach to judicial reasoning does not invite uncertainty or sanction judicial activism. Judges in judicial review claims are constrained by institutional and procedural characteristics, the ‘forms and limits of adjudication’,¹⁹ past precedent, their own expertise, and the need to give due respect to the litigants’ contending interpretations of justice; in short the Administrative Court has a limited capacity for creativity.²⁰

A key deficiency in conceptual tests and the culture of justification is that neither lays down any limits as to what counts as an acceptable justification. I argue that appropriate limits can be set by judges outlining relevant and irrelevant moral considerations in particular contexts, and this is precisely what the judges in my case sample were already doing.

I believe that in the judgments analysed in this thesis, the central judicial concern was to ensure that litigants were treated justly, more specifically that

¹⁹ Lon Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92(2) Harv L Rev 353.

²⁰ Dimitrios Kyritsis, ‘Principles, Policies and the Power of the Courts’ (2007) 20 Can J L & Juris 379, 396; ‘...it would be more fruitful to spell out the distinctness and inter-relation of legislatures and courts by introducing the ideas of active and passive institutional roles. Thus, legislatures are generally regarded as entertaining a more creative, that is, innovative, role in the legal system’.

each individual was treated with ‘equal concern and respect’ by the state.²¹ This function, of speaking justice to individuals, harks back to a plausible interpretation of the ancient supervisory jurisdiction of the King’s Bench, under which the judicial role was to provide remedies for individuals in the interests of justice where no other route to redress was available.²²

Those who are sceptical about judicial review pay insufficient attention to this individual grievance or individual justice function, and instead are especially critical of the procedure’s modern use as a form of public interest litigation seemingly circumventing the democratic process. One response to this scepticism is that judicial review is not about the broader public interest, rather it is more specifically about addressing the most grievous of public wrongs,²³ a public wrong is committed whenever a public body abuses its power. The difficulty with this distinction is that it takes little ingenuity to categorise some kind of harm to the public, a wrong, as a failure to confer a positive good, and *vice versa*. Poor administration may be both an abuse of power, and damaging to the overall public good.

The public wrongs account has also been used to support the proposition that judicial review is not about legal rights.²⁴ It is argued that there should then

²¹ Dworkin, *Hedgehogs* (n 1) 2; ‘No government is legitimate unless it subscribes to two reigning principles. First, it must show equal concern for the fate of every person over whom it claims dominion. Second, it must respect fully the responsibility and right of each person to decide for himself how to make something valuable of his life. These guiding principles place boundaries around acceptable theories of distributive justice...’

²² Dawn Oliver, *Common Values and the Public-Private Divide* (CUP 1999) 104.

²³ Carol Harlow, ‘Public Law and Popular Justice’ (2002) 65(1) MLR 1; Michael Taggart, ‘Proportionality, Deference, *Wednesbury*’ [2008] NZ L Rev 423, 471-472 and 477-480.

²⁴ *R v Somerset County Council, ex p Dixon* [1998] Env LR 111, 117-121 (Sedley LJ); JNE Varuhas, ‘Should the common law of review and the law under the Human Rights Act 1998 be “synthesised”?’ UK Const L Blog (28 April 2014) <<http://ukconstitutionallaw.org/>> (accessed 6 October 2014).

be a bi-furcation between human and/or common law constitutional rights claims that are about individual rights, and administrative or ordinary judicial review claims that are concerned with redressing public wrongs.²⁵

I argue that this bi-furcation is not sustainable, partly due to the nature of law itself, but also because judicial review (in the Administrative Court at least) is characterised by each individual claimant's public legal right to be treated with equal concern and respect by the state. This right may be constitutionally fundamental, and it is not dependent upon any form of contract or status beyond that of being subject to public administration. I call it a *right to just administration*.²⁶ The full range of common law grounds of review will be *available* under this right, but that does not mean each will be *appropriate* in every type of claim. Breaching this right constitutes both a public wrong and an action damaging to the broader public good; more specifically a decision which breaches this right will be unjust.

In **Chapter One** I outline the plurality of purposes and values served by judicial review in the Administrative Court. Whilst I support the common law constitutionalist attempt to see judicial review in terms of values rather than *vires*, I think that some analyses lack depth by focusing only the common triptych of constitutional values; the rule of law, separation of powers, and

²⁵ Much of the debate over the reception of proportionality into the administrative law of England and Wales runs along these lines, see eg, Taggart, 'Proportionality' (n 23); Paul Craig, 'Proportionality, Rationality and Review' [2010] NZ L Rev 265; Varuhas, 'Common Law Review and the Human Rights Act' *ibid*.

²⁶ I think it is better to refer to this as a *right to just administration* than, a right to administrative justice, since administrative justice and legal justice are subject to conflicting interpretations. See eg, Andrew Le Sueur, 'Administrative Justice and the Resolution of Disputes' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (7th edn, OUP 2011) 260.

parliamentary democracy. These concepts are subject to competing interpretations and how one understands each will ultimately be based on an interpretation of the meaning of other values; such as equality, justice, and the common good, and largely these latter values are also those from which we develop our conceptions of law.

I argue that a better way to understand judicial review is to begin by examining different interpretations of the values underscoring conceptions of judicial review and conceptions of law.²⁷

The purposes of judicial review extend from handling individual street-level grievances, to exposing and refining legal principles, to public interest litigation, and to determining the inter-institutional balance of power between particular branches of state.²⁸ Behind these purposes lie; legality (so-called rule of law values), democracy, equality, liberty, authority, expertise, the common good, legal justice, administrative justice, and rationality (among others).

My goal is not to provide an extensive critique of particular interpretations of these values, nor *necessarily* to develop my own interpretation,²⁹ rather it is to note how the contested nature of these values bears upon different attempts to understand, or justify, judicial review. How

²⁷ Conceptions are refinements of particular concepts. For example Ronald Dworkin supposes that the concept of courtesy is respect and this can be refined by different conceptions of what respect really requires, is it about showing due deference to someone's age or status, or alternatively is it a quality that must be earned by one's actions? *Law's Empire* (n 1) 70-71 and 90-96 (the latter pages specifically discuss concepts and conceptions of law). In the current context, the concept of judicial review may be understood as ensuring legitimate governance; keeping public bodies within their clearly expressed statutory limitations (*ultra vires*) is one conception, another is that the courts must also examine the adequacy of justification given for the exercise of public powers.

²⁸ Harlow and Rawlings (n 14) 669-670.

²⁹ I tend to think joining the practice by providing one's own interpretation is unavoidable.

each of these values is interpreted will affect what are taken to be the proper functions of judicial review litigation, whether these functions can be labelled ‘constitutional’, and how we can ensure that they are achieved to the greatest degree possible.

In terms of rule of law values I reject any suggestion that the Administrative Court has a monopoly over outlining and enforcing rule of law requirements. The significance and uniqueness of the AJR in the Administrative Court is that the judicial power being exercised (in most cases) stems exclusively from the common law. The Administrative Court projects a symbolic seniority in crafting legal doctrines and ensuring consistency in principle³⁰ across the activities of other decision-makers, including other courts and tribunals, largely untrammelled by statutory restriction.

In terms of democracy, equality, and liberty, I argue for an interpretation that unites these three values under Ronald Dworkin’s overall conception of justice in which the state must treat individuals with equal concern and respect.³¹ Democracy requires more than counting numbers and equality is not specifically about dividing up resources as if they were some big cake. Liberty requires that one’s personal notion of what it means to live a good life is respected, but only to the extent that this does not impinge on treating others with equal concern for their welfare; this conception of justice provides

³⁰ I take consistency in principle to require that judicial pronouncements fit with the legal rights citizens obtain in virtue of morally justifiable past political decisions (including legislation and precedent). Dworkin, *Law’s Empire* (n 1) 219-224.

³¹ Dworkin, *Hedgehogs* (n 1) 2.

the foundations for the culture of justification.³² It also helps us to understand that any broader notion of the common or public good at work in judicial review will necessarily be quite thin and abstract.

It is a misconception to believe that if judicial review is primarily about limiting state power or checking public wrongs then it cannot also be about protecting individual rights and/or fostering the common good. On an equal concern and respect conception of justice a public wrong is committed whenever an individual's right to be treated with equal concern and respect is breached, and overall the protection of this right within society is likely to enhance the common good.

I argue that it is better to see the Administrative Court as concerned both with wrongs, rights, and goods, but in a manner that is constrained by its institutional characteristics and the nature of judicial rationality.

Judicial rationality can conflict with administrative rationality and likewise the demands of administrative justice, such as for swift, private, and informal decision-making, can conflict with an equal concern and respect notion of legal justice. This conflict may be mediated by recognising the role of the Administrative Court in exposing some *core of judicial justice*,³³ trumping elements of administrative justice in context. A defining purpose of judicial review in the Administrative Court is then to fashion individualised conceptions of justice in context that are anchored in common law community values and

³² Its originator, Mureinik, drew on Dworkin's conception of law as integrity. Etienne Mureinik, 'Security and Integrity' in TW Bennett and others (eds), *Law Under Stress: South African Law in the 1980s* (Juta & Co. 1988) 197, 199-200.

³³ Etienne Mureinik, 'Administrative Law in South Africa' (1986) 103 S Afr L J 615.

judicial expertise, so long as that expertise is not understood as overly formalistic.

In **Chapter Two** I explain why it is so important that our interpretations of judicial review are anchored in social practice. I challenge the view that theoretical studies ought largely to be separated from empirical research.³⁴

It is supposed that legal theorists are content to rely on intuitions or stipulations about empirical realities without looking for evidence, and that empirical scholars rely on wide social theories about the nature of law that are not as intricate and elemental as those proposed by jurists.³⁵ My concern is that this can lead to the production of legal theories that are based on misconceptions about day-to-day experiences of law, and to social research that is underpinned by partisan commitments to particular legal and political theories (notably positivism and idealism)³⁶ that are not made clear and capable of refutation.

My second central argument in this thesis is that whilst doctrinal concepts may play an important role in structuring judicial and administrative decision-making, there is little empirical evidence to suggest that doctrines are used in this way by judges and administrators. One response to this is to reject the usefulness of doctrines in their entirety, another is to argue that some

³⁴ DJ Galligan, 'Legal Theory and Empirical Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2012) 976. Galligan argues for more interaction between theorists and empiricists but notes how sceptically this view has been received by scholars in both fields.

³⁵ *ibid* 979-980.

³⁶ Legal positivist theories are those under which the existence of valid law is determined by social facts alone and not by moral judgments. Under an idealist account, moral values, and the individual rights which flow from interpreting these values in context, supply the basic elements of the legal order. Lawful power is justified by the content of legal sources rather than solely by claims to legitimate authority.

conceptual doctrines have fallen into desuetude because they no longer reflect social facts and prevailing interpretations of relevant values; I take the latter view.

Concepts function as mediating devices between the real world and our understanding of it by constituting the theorist's attempt to render explicit what is already implicit in our common understanding of social practice.³⁷ A particular concern with some doctrines is that they prioritise descriptive conceptual analysis over normative methods that directly address the contested nature of values.

The process of conceptual analysis is based on intuitions of the human mind and it may be that concepts have no existence independent of human intuition; the very process of conceptualising alters the subject matter. On this basis those who champion apparently value-free, generalisable conceptual tests in administrative law and judicial review have no greater claim to supply accurate conclusions than those who advocate reasoning based on interpretations of values.

Alongside conceptual analysis, duelling pairs are also characteristic of both legal theory and judicial review. I argue that many of these dualisms, such as fact/law, merits/legality, and jurisdictional/non-jurisdictional errors, have parallels with basic philosophical dualisms³⁸ in that they may be irresolvable

³⁷ Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 19.

³⁸ eg, *a priori* (things that are true independent from our experience of them) and *a posteriori* (things that are true only after our experience of them).

unless we adopt an interpretive methodology that goes beyond both descriptive conceptual analysis and social-scientific empiricism.

I develop a method of constructive interpretation that combines the traditional tools of legal theory and those of empirical legal research. We should not rely on categories such as fact/law, jurisdictional/non-jurisdictional, proportionate/disproportionate, when these are based on generalisable formulae that exist independent of sensory experience and contested interpretations of value. Instead we can contrive or construct categories depending on our interests and ingenuity and what we find useful in a particular context. It is within these constructed categories that judgments as to what is objectively true, fruitful, or best, can be made.³⁹ Categories are useful, but only when they continue to reflect social practice and moral values, and when they are capable of being applied flexibly.

I propose a three-stage methodology for this thesis;⁴⁰ the first is to outline *manifest* interpretations of judicial review, those interpretations based on intuition that form part of the social practice if anything does. The second stage is to develop an *operative* interpretation using empirical methods; including an assessment of which (if any) *manifest* theory fits best with the *operative* account. The final stage is to develop a *target* interpretation that not only fits with the *operative* interpretation but also provides the best moral justification of it based on relevant values of political-morality.

³⁹ Catherine Elgin, *Between the Absolute and the Arbitrary* (Cornell University Press 1997) 13.

⁴⁰ Adapted from, Natalie Stoljar, 'What Do We Want Law To Be? Philosophical Analysis and the Concept of Law' in Wil Waluchow and Steffan Sciaraffa (eds), *The Philosophical Foundations of the Nature of Law* (OUP 2013) 230.

A constructive interpretation must show due regard for the history of social practice and in **Chapter Three** I chart the development of relevant institutions, procedures, and some key legal principles.

The history of judicial review and the developing jurisdiction of the Administrative Court have been marked by tensions as to the constitutional allocation of power between different branches of state, the need for expert institutions of law and administration, and the need to promote swift and efficient access to justice whilst discouraging vexatious claims.⁴¹ Procedural hurdles introduced by Parliament or the executive, and a judicial desire to ensure that cases involving powerful state actors are heard only by expert and experienced judges, have also been central. Spiraling caseloads in particular subjects such as housing, immigration, and asylum, have also driven reforms; academic interest in a rationally systematised public law has been secondary.⁴²

Given these influences it has been argued that public law procedures and remedies owe their development to judicial policy and concrete problems in the administration of justice, not to some coherent framework of values.⁴³ However, I conclude that the judicial review procedure and the broader jurisdiction of the Administrative Court have developed in a principled manner based on the influence of competing interpretations of particular values; most notably, legitimate or democratic authority, justice, and expertise. A contested

⁴¹ Rawlings refers to the, 'tension between a judicial desire to open access to the machinery more widely, so facilitating the vital normative function, and a managerial instinct to protect the efficient functioning of the process by keeping litigants out'. Richard Rawlings, 'Modelling Judicial Review' (2008) 61(1) CLP 95, 97.

⁴² Susan Sterett, *Creating Constitutionalism? The Politics of Legal Expertise and Administrative Law in England and Wales* (Michigan University Press 1997) 99-112.

⁴³ Ivan Hare, 'The Law Commission and Judicial Review: Principle Versus Pragmatism' (1995) 54(2) CLJ 268.

or deficient interpretation of relevant values is still an interpretation of values giving rise to a principled conclusion rather than a policy choice.

At least part of the Administrative Court's judicial review function can be traced back to the supervisory jurisdiction of the King's Bench, and I share the view that this included doing justice for individuals in cases that were compelling because no other remedies were available or appropriate.⁴⁴

Over time substantive law developments have tended to veer between broad principles, such as error of law and abuse of power, and narrower conceptual tests such as the demarcation between jurisdictional and non-jurisdictional errors, various gradations of administrative, judicial and quasi-powers, distinctions between courts and peculiar jurisdictions, and between errors of law and errors of fact. These attempts to stay within the restraints of technical language (conceptual analysis and formal legal rules) remain popular because they allow lawyers and judges to define problems in ways that make their expertise relevant and influential, but not overtly political.

The Chancery Division, as opposed to the seemingly specialised Queen's Bench, determined many of the cases now understood as laying down public law precedents. It is with the judgment of Lord Diplock in *O'Reilly v. Mackman*⁴⁵ that we see a specific bi-furcation between public and private law; yet this vision went against the traditional plurality of the common law with its emphasis on flexible procedures and remedies to ensure that no legal wrongs go unchallenged.

⁴⁴ Oliver, *Common Law Values* (n 22) 43-47.

⁴⁵ [1983] 2 AC 237.

Lord Diplock's image was one of a centralised and elite judiciary imposing standards demanded by formalistic interpretations of the rule of law, on an equally centralised and elite administration.

The harsher elements of procedural exclusivity have been ameliorated by Lord Woolf's access to justice reforms and the Civil Procedure Rules that have encouraged judicial flexibility.

More recently further demarcations have been proposed between administrative review (constituted by ordinary common law principles of good administration), constitutional review (more closely aligned with vindicating rule of law and other liberal-democratic values), and human rights litigation (which is at least in some circumstances not review at all but rather an appeal based on section 6 of the Human Rights Act 1998).⁴⁶

Other contemporary concerns include the global interpretation of legal values and legal doctrines (the influences of international and comparative law) and increased localism (either geographical in terms of devolution and regionalisation, or institutional in terms of particular courts and tribunals; notably the influence of the Leggatt reforms to the tribunals system).⁴⁷

The Administrative Court, especially through its common law supervisory jurisdiction, has the potential to lead the judicial response to these issues in a manner that is consistent and principled. However, there is a risk that the Court may have already become so diverse in its competence, yet so limited

⁴⁶ See eg, Taggart, 'Proportionality' (n 23) and Varuhas, 'Common Law Review and the Human Rights Act' (n 24).

⁴⁷ Sir Andrew Leggatt, 'Tribunals for Users: One System, One Service' (HMSO 2001).

in terms of the number of claims heard annually, that its constitutional authority including its capacity to deliver individualised justice is thereby weakened.⁴⁸

In **Chapter Four** I begin to construct an *operative* interpretation of judicial review in the Administrative Court that I believe is a more accurate account of contemporary social practice.

It is a misconception that the number of AJRs is growing across all topics of claim, and that most claimants are unsuccessful. The majority of potential AJRs are resolved through other means or settle in favour of the claimant either before an application is issued or at some stage prior to a substantive hearing.⁴⁹ Whilst the growth in asylum and immigration AJRs has been massive, the number of ordinary (non-asylum and immigration civil AJRs) has remained steady since 1996; AJR litigation is still infinitesimal in light of the scale of public decision-making.

The limited impact of judicial review is nevertheless coupled with a perceptible increased desire by government to enumerate, sometimes by statute and sometimes by executive measures, more specific and limited grounds on which public power may be challenged. Most often political interference takes the form of additional procedural hurdles and circumscribed remedies designed, at least in part, to avoid the breadth and flexibility of the inherent supervisory jurisdiction.⁵⁰

⁴⁸ Sarah Nason and Maurice Sunkin, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law' (2013) 76 MLR 223; Rawlings, 'Modelling' (n 41) 108-114.

⁴⁹ Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges Before Final Hearing* (Public Law Project 2009).

⁵⁰ Nason and Sunkin, 'Regionalisation' (n 48) 231-233.

The authority of the AJR may be weakened if its use is limited by the availability of other procedures that *may* address individual grievances, but which do not perform many of the other purposes associated with judicial review. Presently,⁵¹ one-third of the Administrative Court's caseload is made up of various types of statutorily-based appeals.

There is some evidence that the Administrative Court's caseload includes a significant proportion of claims with broader connotations in terms of the exposition of general legal principles, constitutional interpretation, or wider public interest.

Recently the greater proportion of asylum and immigration AJRs have been transferred into the statutory judicial review jurisdiction of the Upper Tribunal (UT) and the categories of asylum and immigration AJR retained by the Administrative Court can each be considered more high-level or constitutional in nature.

As to the relationship between these two judicial bodies, the Supreme Court has concluded, in *R (Cart) v The Upper Tribunal* and *R (MR (Pakistan)) (FC) v The Upper Tribunal (Immigration & Asylum Chamber) and Secretary of State for the Home Department*,⁵² that an AJR in the Administrative Court could be pursued in cases where there is no other route to challenging a UT decision, but only in circumstances that raise an important matter of legal

⁵¹ From 1 November 2013 to 30 April 2014 (after the majority of asylum and immigration AJRs were transferred to the Upper Tribunal).

⁵² [2011] UKSC 28; [2012] 1 AC 663.

principle or practice, or that are otherwise compelling.⁵³ In reaching its conclusion the Supreme Court took into account the scarcity of judicial resources and the number of bites of the judicial cherry that claimants seeking an AJR of the UT would have already had.

This analysis has been described as ‘pragmatic’⁵⁴ largely I think because reliance on relevant facts (caseloads, bites of the cherry, the isolationism of the UT) served (perhaps by sleight of hand) to transfer a debate over the value of supervision into one about social facts (the latter supposedly being easier to resolve). Though it can also be argued that the relevant transference was not one of values to facts, but rather of doctrines to facts, and that the Supreme Court’s approach was unorthodox in failing to address centuries of legal doctrine on the matter of jurisdictional and non-jurisdictional review.

My unorthodox interpretation of *Cart* is that the supreme Court in effect (or *operatively*) began with a *right to just administration* (including all the grounds of review) moving on to determine whether a limitation on this particular right was just. Its conclusion was that the second-tier appeals criteria provide a suitable limitation. This was not a question of finality and resource allocation versus justice, but rather what degree of finality and what level of resource provision could be considered just in this context. This more holistic reasoning avoids some of the metaphysics of doctrinal analysis, and what I think is an unsustainable distinction between pragmatism and principle; it is

⁵³ These are the criteria that generally apply when a litigant requests a second appeal on a point of law, CPR 52.13.

⁵⁴ Mark Elliott and Robert Thomas, ‘Tribunal Justice and Proportionate Dispute Resolution’ (2012) 71(2) CLJ 297, 322.

principles such as justice, certainty, and expertise that rendered specific practical consequences relevant in the first place.

Empirically there is some evidence for the reformationist or constitutionalised account of judicial review in both the broader Types⁵⁵ of claim handled by the Administrative Court and in key Topics⁵⁶ of AJRs.

In *Cart* AJRs claimants must argue that their case raises some important point or principle or practice or is otherwise compelling, the latter usually being due to a serious miscarriage of justice; these claims now make up 20% of the Administrative Court's entire civil AJR jurisdiction (asylum and immigration and other civil claims).⁵⁷ Certain classes of more constitutionally flavoured asylum and immigration AJRs (such as applications for a Declaration of Incompatibility and challenging the validity of legislation) make up a further 17%. Taking together these claims (and some others),⁵⁸ I conclude that some 43% of the Administrative Court's AJR caseload may concern broader matters of principle or practice (including constitutional issues), important public interests, or otherwise compelling cases (such as those raising serious miscarriages of justice). This doesn't mean that such higher-level or

⁵⁵ The Type of claim is a classification given by Administrative Court officials categorising the application as either a judicial review claim or one of a number of species of statutory appeals and applications.

⁵⁶ The Topic of claim is again a classification used by Administrative Court officials, this time referring to the subject matter of the claim such as asylum, immigration, planning, education, prisons and so on.

⁵⁷ From and including 1 November 2013 to and including 30 April 2014.

⁵⁸ The others include a set of claims each of which can be categorised as more high-level or constitutional in nature such as; those raising a Welsh devolution issue, claims turning on the proper implementation of European Union law, and significant town and country planning issues with broader public interest connotations.

constitutional matters will be made out in each case, only that claimants must argue as much in order to access judicial review.

Declining claimant success rates at the permission stage may imply that applicants are rarely successful in this endeavour. This decline may also be evidence of what I term ‘function-creep’. This is where the growing number of restrictions on accessing judicial review brings the danger that limitations on accessing justice (or on the breadth of applicable legal tests) legitimately present in one Type or Topic of claim, leak into judicial handling of other applications where restrictions can be damaging to the efficacy of the procedure and to the fundamental values it ought to serve.

Despite the increased prominence of more constitutionally-flavoured claims and the diverse spectrum of activities now subject to judicial review, the majority of the Administrative Court’s caseload (particularly when taking together statutory appeals and AJRs) still concerns a small set of Topics, such as, prisons, town and country planning, housing, and professional discipline, primarily involving individual grievances against routine administrative decisions. Nevertheless, even these routine claims can be part of the constitutionalisation of judicial review depending upon how one interprets constitutionalism.

There are at least two models of constitutionalism in the reformationist image of judicial review. Under ‘top-down’ constitutionalism AJRs should be determined by a small and expert High Court judiciary assisted by an elite Bar. The inference is that this is important to maintain the standing, integrity, and coherence of the system, and that a small expert judiciary is best placed to

balance the competing interpretations of particular values raised by judicial review claims, and to articulate the appropriate inter-institutional balance of power between state actors. It is also assumed that a centralised Administrative Court is likely to possess the status necessary to ensure respect for its judgments.

On the other hand ‘ground-up’ constitutionalism is reflected in some common law constitutionalist accounts of judicial review as community justice which is both constitutive and reflective of the broadest range of societal values;⁵⁹ under this conception, breadth of access to the Court for a wide range of individual citizens is more significant.

In **Chapter Five** I examine whether the data of social practice fits better with top-down or ground-up constitutionalism.

The opening of Administrative Court Centres in Birmingham, Cardiff, Leeds, and Manchester fits better with ground-up constitutionalism than the previous London-centricity. The proposals were developed on the basis that the centralised system was difficult to justify given moves towards devolution and localisation of governance (including the redressing of grievances.) There was also evidence that London’s virtual monopoly over AJRs was likely to have had significant adverse effects on access to justice.⁶⁰

⁵⁹ Roger Cotterrell, ‘Judicial Review and Legal Theory’ in Genevra Richardson and Hazel Genn (eds), *Administrative Law & Government Action* (Clarendon 1994) 18, distinguishing between judicial review as based on top-down *imperium* power or alternatively as grounded in community values.

⁶⁰ Sir Jeffrey Bowman, *Review of the Crown Office List* (Lord Chancellor’s Department 2000) [21]; Maurice Sunkin and others, ‘Mapping the Use of Judicial Review to Challenge Local Authorities in England and Wales’ [2007] PL 545, 566.

Despite approximately one-third of public law claims being issued in the new Centres, the broader rights and interests of citizens outside London and the South East of England continue to be under-represented. In vast swathes of England and Wales there simply isn't a public law culture and in the words of one respondent to this research, citizens are not, 'aware of their public law rights'. The data suggests that the 'righting' of administrative law and judicial review does not extend to the consciousness of most ordinary citizens, especially not to those based in the Midlands and Wales.

Those local claimants issuing AJRs are less likely to have legal representation than their London counterparts. The proportion of claims issued by Litigants in Person (LIPs) has increased across the whole Administrative Court, but except in some specialist fields (such as prisons, education, and community care), one is more likely to encounter an LIP outside London. The overall increase in LIPs may be partly a result of regionalisation, but cuts to frontline advice provision such as Law Centres, and on-going reforms to legal aid and the judicial review procedure are also factors.

LIP Topics primarily concern areas of public decision-making that are of direct and local concern to ordinary citizens. This reinforces the image of an Administrative Court 'for users' and a proportionate dispute resolution focus on resolving individual grievances quickly. Nevertheless, it is questionable whether LIPs are treated fairly within the legal system given the inequalities they face, inequalities that have been stressed in argument against establishing new permission tests (especially in statutory appeals) and against making existing tests stricter (such as in *Cart*-style litigation). Yet LIPs issue the

majority of claims attracting either stricter permission tests or more limited grounds of review.

Despite the variable success of regionalisation in terms of caseloads, access to a local Court Centre is an indication of the value of judicial review as an instrument of community-based justice. The local courthouse can be a symbol of community and equality,⁶¹ and the Centres have heard cases of importance to regional and Welsh populations, including cuts to local authority budgets and the closure of local services. Nevertheless, there are indications that the local Centres have not gained complete trust in their capabilities to handle the full range of AJRs, especially those raising issues of national public importance, consistency in the normative exposition of principles, or the constitutional allocation of powers. It is still largely the Royal Courts of Justice in London, serviced by an elite set of barristers that retains responsibility for, ‘creating constitutionalism’.⁶²

The local Centres are developing as national hubs for certain Types and Topics of claim aligned to the interests of resident specialist lawyers and concern remains that this specialisation is unlikely to meet the full range of needs within relevant communities.

Most practitioners responding to this research thought of specialisation as aligned to expertise in particular Topics such as education, planning, and prisons law. Yet the Constitutional and Administrative Law Bar Association (ALBA) identifies specialisation with the constitutionalisation image of the

⁶¹ Elizabeth Thornberg, ‘Reaping What we Sow: Anti-litigation Rhetoric, Limited Budgets, and Declining Support for Civil Courts’ (2011) 30(1) CJK 74.

⁶² Sterett (n 42).

Administrative Court judge as an expositor of constitutional principles, determiner of fundamental rights, and guarantor of the balance of power between institutions of state.⁶³ A role that is ‘constitutionally’ specialised rather than ‘topic’ specialised, though the two will overlap.⁶⁴

Both types of specialisation appear at odds with the fact that the vast majority of solicitors issuing AJRs issue only one claim in any given year. This is not enough work to develop specialist expertise or to sustain a practice, nor is it a ‘lucrative industry’.⁶⁵

Though the data suggests that judicial review performs a range of functions, any demarcation between administrative, constitutional, and human rights law, or between public law appeals and judicial review, is not reproduced at the level of legal practice, nor is it likely to be given the tiny number of cases involved.

I propose an *operative* interpretation of judicial review in the Administrative Court that reconciles apparent inconsistencies between the two tiers of AJR litigation, high-level (London) and street-level (local), and top-down and ground-up accounts of constitutionalism.

On my interpretation of *Cart*, tensions between competing relevant values could be best addressed by recognising a *right to just administration*, the contours of which can be worked out by assessing competing interpretations of

⁶³ ALBA, *Regionalisation of the Administrative Court: Response of the Constitutional and Administrative Law Bar Association* (May 2008) [34] and [60] available online: <http://www.adminlaw.org.uk/events_consultations/consultation_papers.php> (accessed 6 October 2014).

⁶⁴ With thanks to Maurice Sunkin who first postulated this distinction.

⁶⁵ Chris Grayling, ‘The judicial review system is not a promotional tool for countless Left-wing campaigners’ *The Daily Mail* (London, 11 September 2013).

the meaning of justice in context. Such a reasoning process tends to be most obvious in high profile claims raising matters of public interest or the inter-institutional allocation of powers; that is in top-down constitutionalist, London-centric claims. What is interesting about this assessment of competing conceptions of justice is that it is also characteristic of street-level, ground-up constitutionalist, local applications.

It has been noted that judicial review, ‘promotes values that are central to the ethos of public administration and assists officials in resolving tensions between individual and collective justice’.⁶⁶ This kind of individualised administrative justice focuses on the quality of public decision-making in a way that other grievance measures⁶⁷ do not. This image of judicial review as individualised justice provides the best fit with, and justification for, AJRs in the Administrative Court across all levels, top-down constitutionalist and ground-up constitutionalist, London-based and local.

In **Chapters Six and Seven** I examine what evidence case law can provide for an interpretation of judicial review as individualised justice. I analyse a sample of over 200 Administrative Court AJR judgments with the aim of exposing the *operative* reasons for deciding in particular cases rather than their rationalisation in accordance with particular doctrinal categories. I group these reasons together under six headings: (1) mistake, (2) procedural impropriety, (3) ordinary common law statutory interpretation, (4)

⁶⁶ 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 (suppl 2) *J Public Adm Res Theory* 243.

⁶⁷ Most specifically statutory appeals and applications to the Administrative Court.

‘discretionary impropriety’ or relevant/irrelevant considerations, (5) breach of ECHR protected right and/or equality duty, and (6) inter-institutional (or constitutional) balance of powers, constitutional principle, or constitutional rights.

The mistake category recognises that a decision cannot be lawful if it is obviously wrong, regardless of whether the mistake is one of logic, law, or fact. Examples include sending all communication to the wrong address,⁶⁸ treating the claimant as a Ghanaian national when he was a German national,⁶⁹ and failing to account for inflation in a long-term financial calculation.⁷⁰ In light of the importance of simplicity and the difficulties faced by ordinary litigants (especially LIPs), it is better to bring these cases together as basic mistakes. This category would also include the suitable or rational connection limb of the proportionality test under which the means chosen to achieve a legitimate aim must have some more than negligible impact towards achieving it, if the measures don’t have this impact then they are mistaken.

Procedural impropriety continues to be a useful category despite the unclear boundary between procedure and substance, largely because ordinary citizens can distinguish concepts such as a fair hearing, bias, and the need for some degree of consultation, from the decision itself in a useful (if not absolute) manner. Procedural fairness is recognised as having elastic qualities, not

⁶⁸ *R (Belkevich) v Secretary of State for the Home Department* [2013] EWHC 1389 (Admin).

⁶⁹ *A v Secretary of State for the Home Department* [2013] EWHC 1272 (Admin).

⁷⁰ *R (South Tyneside Care Home Owners Association) v South Tyneside Council* [2013] EWHC 1827 (Admin).

‘engraved on tablets of stone’.⁷¹ It is already understood as an interpretive concept the meaning of which is dependent upon social context.

The orthodox terminology of ‘illegality’ was rarely referred to in the sample, the most common categorisation was ‘unlawful’, and this primarily applied to instances where a public decision-maker had misinterpreted their statutory grant of power. Judges in effect applied ordinary principles of common law statutory interpretation (category 3 on my account) that comprise particular forms of rationality; namely linguistic or ordinary language rationality, systematic rationality,⁷² pragmatic rationality,⁷³ purposive rationality,⁷⁴ and moral rationality. The choice to apply one particular conception of rationality above another ultimately came down to an assessment of the consequences of that choice in light of the values at stake in the claim.

For example, in *R (Kebede) v Newcastle City Council*⁷⁵ Judge Timothy Straker QC relied on an ordinary language interpretation of the meaning of education and rejected the defendant’s systematic account of its meaning in the context of the relevant statute. He did this in order to be fair to the children involved in light of the practical consequences of the decision.

In *R (Stern) v Horsham District Council*⁷⁶ Leggatt LJ decided not to rely on the ordinary meaning of the statutory words because this would have left the

⁷¹ *Lloyd v McMahon* [1987] AC 625, 702 (Lord Bridge).

⁷² Examining a statutory provision in the context of the statute as a whole and other relevant legal materials.

⁷³ Considering the possible consequences of particular interpretations.

⁷⁴ Examining the statute and other materials in light of the purposes (including the policies) they may have been designed to fulfil.

⁷⁵ [2013] EWHC 355 (Admin).

⁷⁶ [2013] EWHC 1460 (Admin); [2013] 3 All ER 798.

claimant without a remedy, this consequence (pragmatic rationality) would be unjust (moral rationality).

It is a misconception to believe that judges primarily use doctrines such as reasonableness, rationality, and proportionality in light of how these concepts have been exposed and refined by scholars. The only consistency in interpretation was consistent inconsistency, but more importantly in most cases these doctrines simply weren't relevant as part of the reasons for deciding.

My fourth category, 'discretionary impropriety', covers what might be termed 'substantive' review under orthodox accounts. The category depicts a reasoning process that may be part of statutory interpretation, but which can also apply where the power is non-statutory or where there is no dispute as to the meaning of particular statutory provisions. 'Discretionary impropriety' denotes reference to an exercise of judgment on the part of the decision-maker which is not necessarily linked to statutory interpretation. The relevant/irrelevant considerations sub-heading both explains the substance of these judgments and fits with orthodox administrative law terminology.

For example, in *R (Blackside Ltd) v Secretary of State for the Home Department*⁷⁷ the claimant challenged the UK Border Agency's dockside seizure of a consignment of approximately 25,000 litres of beer as unreasonable, or irrational, or perverse, or disproportionate. Edwards-Stuart J held that the seizure was lawful given the strength of two relevant considerations; the public interest in preventing smuggling, and the fact that the claimant would have an opportunity to contest whether title had properly

⁷⁷ [2013] EWHC 2087 (Admin).

transferred to Her Majesty's Revenue and Customs through other legal proceedings.

In *R (Khan) v Secretary of State for the Home Department*⁷⁸ the applicant had an unspent criminal conviction causing the Home Secretary to refuse his application for naturalization on the basis of character. The offence was using a mobile phone whilst driving; counsel contended that the refusal was disproportionate to the point of being irrational as the offence is one for which a fixed penalty notice can be issued. However, the availability of a fixed penalty notice for this type of offence was an irrelevant consideration in light of this particular claimant because the punishment he had actually received was a fine and points on his licence.

The cases in in my ordinary common law statutory interpretation and 'discretionary impropriety' categories demonstrate that purpose and relevancy of considerations, properly interpreted, are central to understanding judicial review in the post reformation justificatory era, as opposed to relicts of some jurisdictional past.

My fifth category, breach of ECHR protected right or equality duty, encompasses what are in effect two species of statutory appeals. It is part of the traditionally flexible nature of the common law that statutory human rights claims can be raised in any proceedings. The distinguishing characteristic of the Administrative Court here is its seniority, for example it can issue Declarations of Incompatibility. Determining these claims through the AJR procedure is also convenient since many claims raising human rights or equality arguments also

⁷⁸ [2013] EWHC 1294 (Admin).

include ordinary common law claims of purpose and relevant/irrelevant considerations.

There were less than 20 judgments in my sample of 221 in which a potential rights breach was addressed as part of the reasons for deciding; there was no structured application of the proportionality test. Again in rights-based claims judicial reasoning turned on whether irrelevant considerations had been excluded and relevant considerations properly taken into account. For example, in *R (Y) v Secretary of State for the Home Department*,⁷⁹ a claim raising articles 3 and 8 ECHR, immigration policy was a relevant consideration but it had been overridden by the moral harm done to the individual by the Secretary of State's failure to take his immigration history, and his mental and social disabilities, properly into account.

Given concerns raised at the *operative* level about the need for constitutionally-specialised judges, and evidence of growth in higher-level claims, I argue that it is worth recognising a distinct category of AJRs in which points of highly contested constitutional principle, and in particular the inter-institutional allocation of powers between branches of state, are more directly at issue. In the current sample a defining case was *R (Evans) v Attorney General*⁸⁰ concerning the Attorney General's power to issue a certificate determining that certain correspondence between the Prince of Wales and government departments should not be disclosed under the Freedom of Information Act 2000. The main issue was whether the Attorney General could over-turn the

⁷⁹ [2013] EWHC 2127 (Admin).

⁸⁰ [2013] EWHC 1960 (Admin); [2013] 3 WLR 1631.

decision of an expert, independent, and impartial tribunal (the UT) merely because he took a different view of what the public interest required. The case involved direct discussion of the constitutional role of the Prince of Wales, the Attorney General, Parliament, the UT and the Administrative Court itself.

Other cases that could be classed under this constitutional heading are those concerning the effective implementation of European Union law or raising devolution questions.

In **Chapter Eight** I continue to make a normative argument for a constructive interpretation of judicial review as individualised justice based on proper purpose and relevancy of considerations. The notion of individualisation might in more common parlance be termed ‘contextualism’. Michael Taggart has argued that there is a contextual rainbow of review and cartographers are needed to map it.⁸¹ However, the notion of mapping implies that there is one accurate account of the terrain, whereas my argument is that social practice, and the nature of law itself, does not display such accuracy. The need is rather for coastal navigators who work with minimal fixed points, abstract plateaus of agreement, in order to tri-angulate and plot a position and adjust a course over time. In the case of judicial review the fixed points include the social facts of precedent and the different conceptions of justice (informed by different interpretations of values) held by the parties. These constraints begin to address concerns that judicial review as individualised justice is illegitimate, arbitrary, or uncertain.

⁸¹ Michael Taggart, ‘Proportionality’ (n 23) 454.

The abstract plateaus of agreement in the variable intensity, deference or contextualism debate are, legitimacy, expertise, and institutional constraint.⁸² I argue that the best approach to navigation is one that is able to combine some *prima facie* categorisation with *sufficient* flexibility.

There is no obvious tri-furcation between administrative review, human rights review, and constitutional review as a matter of social practice; and in my view, Chapters Four to Seven go some way to demonstrating that only a small set of elite practitioners and academics have anything much to be gain from a strict separation of legal doctrines along these conceptual lines. Outside my mistake category, each claim turns on an assessment of the quality of reasons given by the initial decision-maker and the deference or variable intensity factors are at work in every type of case even when not directly disputed.

The various possible flaws in purported justifications of state power depend on interpretations of value; they do not easily lend themselves to the clarity of ‘all or nothing’ rules (legal or moral) or conceptual demarcations.⁸³ Human problems are ‘multi-normed, multi-constrained, under-defined and context sensitive’.⁸⁴ There is a natural unity to human forms, but it is a unity that rejects divisions imposed by human fiat. *A priori* metaphysical distinctions such as between mind and nature, normative and descriptive, and in the current

⁸² Jeff King, ‘Institutional Approaches to Judicial Restraint’ (2008) 28(3) OJLS 409; Aileen Kavanagh, ‘Defending Deference in Public Law and Constitutional Theory’ (2010) 126 LQR 222 and ‘Judicial Restraint in the Pursuit of Justice’ (2010) 60(1) UTLJ 23; TRS Allan, ‘Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review’ (2010) 60(1) UTLJ 41 and ‘Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory’ (2011) 127 LQR 96.

⁸³ See eg, Stuart Lakin, *The Moral Reading of the British Constitution* (UCL Ph.D Thesis 2009) Ch 3 ‘Principles of English (Administrative) Law’.

⁸⁴ Cliff Hooker, ‘Rationality as Effective Organisation of Interaction and its Naturalist Framework’ (2011) *Axiomathes* 99.

context, fact and law, jurisdictional and non-jurisdictional and so on, can be rejected. Human beings can still strive for ideals, but the standards that guide our striving must be accessible, learnable, and improvable. The process by which humans come to reach these ideals is more important than formalism's location of reason in the character of the end product, namely certain truth.

The process of adjudication in judicial review is a partnership between the initial decision-maker, the complainant and the judge that may be better captured by a 'non-formal' approach to reasoning.⁸⁵ This conception includes observation; namely obtaining reliable information about empirical features of the world. The standard of proof is not whether the social facts before the court are universally correct, but whether they are sufficient to enable the judge to make an appropriately reliable assessment. The tools of formal rationality (such as logic, and the jurisdictional error and proportionality formulae) can also be used, but they should not become a proxy for judgment. Ultimately the Administrative Court has capacity for creative construction through the common law method of reasoning by analogy in light of prevailing societal interpretations of value, but this capacity is more constrained than that of Parliament and administrators in most contexts.

This kind of informal reasoning has parallels with the balancing in constitutional and rights adjudication. However, the balance I advocate is through moral reasoning as 'situation sense' rather than by weighing or mathematical calculation. Situation sense stems from Aristotle's account of

⁸⁵ Hooker *ibid*, taken further in relation to law by Barry Hoffmaster, 'The Rationality of Judging and Judges' McMaster University, Nature of Law Conference (May 2011) available online: <<http://works.bepress.com/barryhoffmaster/40/>> (accessed 6 October 2014).

doing the right thing, in relation to the right person, at the right time, with the right ends in view.⁸⁶ Someone who exercises public power and has resources to distribute has a duty to act in the public interest which requires them to distribute these resources justly by taking into account relevant considerations and disregarding irrelevant considerations.⁸⁷ This sifting may even be characteristic of proportionality interpreted in its best light.

It is inevitable that many if not most AJRs involve a contestation between different conceptions of justice in light of scarce resources, ultimately a question of distributive justice. It may be better not to see the Administrative Court as conducting a balancing exercise, or refereeing an adversarial contest between individual rights and the state's conception of the public good, but rather as reaching some form of compromise between different conceptions of the meaning of just governance.

This process requires the judge to recognise the authenticity of individual conceptions of justice.⁸⁸ This interpretation accommodates ground-up and top-down constitutionalism and is not based on conceptual demarcations between different types of law or distinct categories of intensity that are not evident in social practice. This is judicial review as individualised justice, rather than as 'jurisdictional review' or 'justification'.

⁸⁶ Aristotle, *Nicomachean Ethics*, Bk II Ch 9, *The Complete Works of Aristotle* (rev trns vol 2. Princeton University Press 1984).

⁸⁷ George Letsas, 'What is Proportionality?' (UCL Research Paper 2009) 9-16, available online:

<http://www.ucl.ac.uk/laws/jurisprudence/docs/2013/George%20Letsas,%20What%20is%20Proportionality.pdf> (accessed 6 October 2014).

⁸⁸ Jerry Mashaw, 'Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State' (2001) 70 *Fordham Law Review* 17, noting the importance of treating individuals with respect.

In **Chapter Nine** I re-state some key conclusions of this thesis and consider the place of this work within future research programmes and within our general understanding of public law.

Chapter One: The Purposes and Values of Judicial Review

*'it is often hard to grasp what it means to be looking for the content of the law without a conception of what law's ethical significance might be if we were to find it'*¹

I once asked a professor of outdoor education about the relationship between practice and theory in an outdoor studies degree course. He answered that he could show me how to tie various knots and I could practise tying them, but I would never understand what a knot really is or which knot to tie in particular circumstances unless I could comprehend what the knot is meant to do; appreciating that sense of purpose could be the difference between life and falling to one's death in outdoor pursuits. Even in what appear to be the most practical subjects we must understand what might be the purpose of relevant principles, practices, and procedures, and largely we should have these purposes in mind before we explore the social facts more deeply (how else could we decide which facts are relevant?)

1.1 The meaning of judicial review

Whenever an individual with legal knowledge assesses some decision or action primarily on the basis of legal principles (as opposed to examining the truth of

¹ Benjamin Zipursky, 'Practical Positivism Versus Practical Perfectionism: The Hart-Fuller Debate At Fifty' (2008) 83 NYU L Rev 1170, 1212.

certain facts) we can say they are conducting a legality review. Whether this is also a judicial review perhaps depends on what it means to be a judge and to act judicially; a big question. However, what really matters in any case is the value of accepting the judgment of a particular person or institution in relation to the issues at hand.

In future years judges of the Upper Tribunal (UT) will handle the majority of Applications for Judicial Review (AJRs) under the CPR Part 54 procedure.² UT judges also hear other legality reviews such as legal appeals from the First-tier Tribunal, and exercising the power to review their own decisions.³ The extent to which an assessment of relevant facts is also required varies across these different types of claim, but they are all claims in which the judge's primary role is to examine matters of law. Lower courts also conduct legality reviews, for example county court judges hear appeals from local housing authorities in homelessness cases that are largely indistinguishable from similar claims issued as AJRs in the Administrative Court.⁴

Public law principles can be raised by way of collateral challenge in a range of civil and criminal courts; for example if the validity of delegated legislation or of a certain policy is crucial to the case.⁵ It is difficult to know

² Tribunals Courts and Enforcement Act 2007 (TCEA), s 15. From autumn 2013 the majority of asylum and immigration AJRs have commenced in the UT Immigration and Asylum Chamber.

³ TCEA, ss 9, 10 and 11.

⁴ Under Housing Act 1996, s 204. This jurisdiction, 'is in substance the same as that of the High Court in judicial review'. *Begum (FC) v London Borough of Tower Hamlets* [2003] UKHL 5; [2003] 2 AC 430, [7] (Lord Bingham).

⁵ 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* (Clarendon 1998) 141; *Boddington v British Transport Police* [1998] UKHL 13; [1999] 2 AC 143 (Lord Steyn).

how many claims these processes produce and the Administrative Court caseload may pale in comparison.

The Administrative Court itself is the venue for other types of legality review, including appeals by way of case stated from lower courts, and various appeals and applications where legal review or reconsideration is provided for under statute. Even under the AJR procedure certain cases are in effect a specific form of statutory appeal; most notably a breach of the Human Rights Act 1998 or Equality Act 2010. Appeals to the Court of Appeal and Supreme Court are also instances of judicial review if the claim concerns the lawful exercise of public power.

The significance and uniqueness of the AJR in the Administrative Court does not lie in the labels ‘legality review’ or ‘judicial review’; it lies more specifically in the origins of the power. Only the High Court has a jurisdiction that is independent of any statutory basis; this is the inherent supervisory jurisdiction, colloquially understood as a power to ensure that public bodies (including courts and tribunals) remain within the limits of their jurisdiction. More expansively interpreted the power includes a capacity to do justice for individuals where no other remedy is available or appropriate.⁶ This is a common law power; on the contrary the powers of the UT, the county courts’, and those of the higher appellate courts, are significantly determined by statute, and what powers Parliament has given it can also take away.

⁶ This history of this power is examined in Chapter Three.

In *Law and Administration*, Carol Harlow and Richard Rawlings present an account of the functions served by High Court judicial review.⁷ Below I develop a slightly amended version of this taxonomy, noting the differences between our respective accounts.

1. Upholding the Constitution (constitutional symbolism and legal authority ‘lions behind the throne’) – in their account Harlow and Rawlings refer to ‘upholding the rule of law’, however, I consider this role to be broader including upholding various constitutional values
2. Protection of the individual (individual grievances)
3. Ordinary common law statutory interpretation (this is an additional function not explicitly referenced in Harlow and Rawlings taxonomy)
4. Determining inter-institutional relationships (constitutional allocation of powers, intra-state litigation)
5. Establishing general legal principles (rationality, proportionality, no-fettering)
6. Structuring deliberative and administrative processes (good administrative procedure, reasons, consultation)
7. Core values of good governance (freedom from bias, keeping promises (legitimate expectations))
8. Public interest litigation (alternative forum for discussion of competing conceptions of the public interest)
9. Elaboration and vindication of fundamental rights

Some of the above can be seen as largely distinguishable functions; purpose 2, providing a means for resolving individual grievances, purpose 4, determining inter-institutional relationships, purpose 8, public interest litigation and purpose

⁷ (3rd edn, CUP 2009) 669-670. The ordering and terminology of this list is not identical to that developed by Harlow and Rawlings, however the categories are the same in substance.

9, elaboration and vindication of fundamental rights, can be seen as relatively distinct functions. On the other hand purposes 5, 6, and 7 can be grouped together under the heading, ‘normative exposition of legal principles’, in many cases this exposition will involve ordinary statutory interpretation (purpose 3). Harlow and Rawlings draw a distinction between core values of good governance, structuring of good administrative processes, and other general legal principles such as rationality and proportionality. Whether one sees the purpose of judicial review as extending to all these types of normative principles, or to some combination of them, will largely depend on one’s interpretation of relevant values, as examined in the remainder of this Chapter.

It may only be purpose 1, a constitutionally symbolic and authoritative role in advancing our understanding and application of constitutional values, including rule of law values, that is unique to Administrative Court AJRs.

There is some consensus that judicial review’s constitutionally symbolic (lions behind the throne) image is more significant than its practical or instrumental effects on public administration, individual grievances, or the broader public interest.⁸

Given that the most important function of judicial review may be constitutionally symbolic, one has to have some idea of what is meant by a constitution.

1.2 What is a constitution?

⁸ Maurice Sunkin, ‘The Impacts of Judicial Review and Effective Redress’ (Cambridge Public Law Conference: Process and Substance in Public Law, September 2014) 2 (unpublished referenced with author’s permission).

In its broadest sense I take a constitution to include; certain values of political morality recognised as fundamental to defining the identity of a polity, and the legal and political frameworks designed to ensure that all branches of state respect these values.⁹ It is by interpreting these values in the context of specific frameworks that we acquire particular individual rights, though it is of course common to see specific rights then enshrined as constitutional provisions.

This is a wide and abstract account of a constitution and it is hard to trace this forward into specific roles for judicial review, beyond concluding that judicial review is there to police respect for values.

When examining a category of ‘constitutional’ statutes, Laws LJ has suggested the following criteria; a constitutional question is one that, ‘(a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights’.¹⁰

I agree with Laws LJ that there is a perceptible category of fundamental common law constitutional rights, incrementally developed by the higher courts. I shall leave open the question of whether this includes the full set of ECHR rights, or only those rights recognised at common law without statutory fiat.

Laws LJ’s first category is so wide as to potentially include the whole compass of legal materials in all areas of civil and criminal law; each exercise

⁹ For an interpretive approach to constitutionalism see Nick Barber, *The Constitutional State* (OUP 2010).

¹⁰ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB151, [62]-[63].

of parliamentary, executive, or administrative power has the potential to alter the relationship between citizen and state, often in a general and overarching manner. Tom Ginsberg suggests in this context that all administrative law is ultimately constitutional:

the average citizen encounters the state in myriad petty interactions, involving drivers' licenses, small business permits, social security payments, and taxes. It is here that the rubber meets the road for constitutionalism, where predictability and curbs on arbitrariness are least likely to be noticed but most likely to affect a large number of citizens...administrative law is constitutionalist in orientation and arguably more important to more people than the grand issues of constitutional law.¹¹

David Feldman has argued that Laws LJ's two categories may be under-inclusive precisely because they do not accommodate some of these grand (but non-rights based) issues, such as legislative instruments (and other legal materials) that concern the relationships between particular branches of state (rather than between state and individual);¹² and I would add between our state and other states in the international community. For Feldman the solution lies in an account of constitutionality based on; 'the contribution of Acts, subordinate

¹¹ Tom Ginsberg, 'Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law' in Susan Rose-Ackerman and Peter Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2010).

¹² David Feldman, 'The Nature and Significance of "Constitutional" Legislation' (2013) 129 LQR 343, 347.

legislation and individual provisions or groups of provisions to establishing institutions of the state, defining their roles and authority, and regulating their relationships with each other'.¹³ Though this is not perhaps where Feldman would take his argument, I think one can say that Administrative Court judicial review is a form of constitutional review when claims turn specifically and directly on the inter-institutional balance of power between particular branches of state (purpose 3).

One can perceive three, overlapping categories of possible constitutional claims; Laws LJ's category (a) (effectively Ginsberg's 'rubber meets the road' category) of individual inter-actions with state powers, Laws LJ's category (b) fundamental constitutional rights, and (c) Feldman's inter-institutional relationships.

These three categories perhaps provide a more practical blueprint than the currently narrow and polarised debate over the extent to which constitutions can be conceptualised as legal or political constructs.

The notion of legal constitutionalism is synonymous with the idea that at least one function of a constitution is to limit the power of the political branches in accordance with certain fundamental values, primarily so-called rule of law values. Exactly how these values impact on political power will depend on how they are interpreted, and in a more positive light such values can be seen as part of a blueprint to facilitate efficient, effective, and 'good'¹⁴ decision-making.

¹³ *ibid* 357.

¹⁴ I consider different interpretations of the good later in this Chapter 93-99.

It is not my aim here to list all these potential constitutional values, but generally I consider them to be those pertinent to answering the question; ‘How is political power to be exercised in order justifiably to lay claim to our allegiance?’¹⁵ I do not think the courts have any monopoly over answering this question, and indeed there is a growing body of scholarly work examining how the legal and political branches of state can reach answers through dialogue or deliberation rather than pitched battles.¹⁶

A central argument of this thesis is that some doctrinal commentators pay insufficient attention to the plurality of purposes (constitutional or otherwise) served by judicial review, largely I think because they fail to appreciate the broad range of purposes that can be served by law itself.

For some the purpose of law (and ruling through law) is merely to coordinate human conduct by social rules (regardless of their content);¹⁷ for others law’s purpose is inherently moral,¹⁸ such as ensuring that state power is morally justified,¹⁹ or accords with some claim to moral correctness.²⁰ Those who align with the reformation and culture of justification, and broader legal constitutionalism, tend to take this latter view.

The culture of justification originates in part from Ronald Dworkin’s argument that the central purpose of law is to ensure that government power

¹⁵ Dimitrios Kyritsis, ‘Principles, Policies and the Power of the Courts’ (2007) 20 Can J L & Juris 379, 393.

¹⁶ See eg. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (CUP 2013).

¹⁷ HLA Hart, *The Concept of Law* (2nd edn, Clarendon 1997).

¹⁸ Lon Fuller, *The Morality of Law* (rev edn, Yale University Press 1969).

¹⁹ Ronald Dworkin, *Law’s Empire* (new edn, Hart 1998).

²⁰ Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* Stanley Paulson and Bonnie Litschewski Paulson (trns) (OUP 2002).

(which he refers to as coercive force) is morally justified.²¹ Those who are more sceptical about judicial review often suppose alternatively that law's purpose is merely to guide human conduct efficiently in accordance with rules, regardless of their moral merit.²² Their scepticism about judicial review stems from its potential to interfere with the content of rules laid down by elected bodies.²³

Rather than beginning with more abstract political values, most analyses of judicial review start from this specific and negative standpoint of examining how, if at all, such interference can be justified; what exactly gives the unelected judiciary the right to review and in doing so interfere with public decision-making? The answer one gives is likely to depend on whether one sees law itself purely as a matter of providing efficient rules, or alternatively as requiring public power to be justified in accordance with substantive moral values.

In scholarship concerning judicial review any debate over the purpose and value of law tends to be subsumed within an examination of three core constitutional concepts; parliamentary sovereignty, separation of powers, and the rule of law. These concepts are taken as both endowing and limiting the High Court's jurisdiction. However, these concepts are subject to competing interpretations and how one understands each will be based on an interpretation

²¹ Dworkin, *Law's Empire* (n 19) 93, taken up by Etienne Mureinik, 'Security and Integrity' in TW Bennett and others (eds), *Law Under Stress: South African Law in the 1980s* (Juta & Co.1988) 197, 199-200 and 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 S Afr J on Hum Rts 31, 32-33.

²² Feldman (n 12) clearly situates himself within this group.

²³ Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale LJ 1346; *Law and Disagreement* (Clarendon 1999); Adam Tomkins, *Our Republican Constitution* (Hart 2005); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007).

of the meaning of other values; such as democracy, justice, and the common good, and largely these latter values are also the values from which we develop our understanding of law.²⁴ In this case to begin with core constitutional concepts is to bypass an important part of the story. This is where I take issue with some common law constitutionalists; I support their attempt to see judicial review in terms of values rather than *vires*, but some of their analyses are ambiguous and lack depth.²⁵

In what follows, my aim is to outline some candidate values and to note that how we interpret each of them will then affect what we take to be the proper functions of judicial review, whether we consider these functions to be constitutional, and how we can ensure that these functions are achieved to the greatest degree possible.

1.3 The rule of law and the value of legality

Legality review can include any instance where a judgment about the proper exercise of public power is made primarily on the basis of law and not as to the

²⁴ Some scholars who focus openly on the centrality of values to judicial review include; Dawn Oliver, *Common Values and the Public-Private Divide* (CUP 1999); Peter Cane, 'Theory and Values in Public Law' in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays for Carol Harlow* (OUP 2003) 3, 14-17; TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP 2013). Paul Daly has recently developed a value-based approach to administrative law, 'Administrative Law: a Values-Based Approach' (Cambridge Centre for Public Law Conference, Sept 2014) (unpublished cited with author's permission). Daly focuses on the rule of law, separation of powers, good administration, and democracy. A distinction between our accounts is that I think we need to go deeper; the rule of law, separation of powers, and good administration are value laden concepts in their own right, but they are underpinned by other values which are also contested and it is some of these deeper individuations of values that are examined in this Chapter.

²⁵ Varuhas argues that some versions of constitutionalised judicial review are, 'shot through with ambiguity', Jason Varuhas, 'The Reformation of English Administrative Law, "Rights" Rhetoric and Reality' (2013) 77(2) CLJ 369, 370.

truth of certain facts. Illegality is also one of Lord Diplock's three categories of grounds of review;²⁶ historically at least this category was largely limited to strict *ultra vires* and manifestly improper purposes. More recently legality has been interpreted similarly to constitutionality, namely there is a strong presumption that public power must be exercised in accordance with constitutional values and individual rights;²⁷ it is this third sense which comes closest to accepting that governance through law has some distinct moral constitutional value.

These three different meanings of legality can be summarised as follows; those who exercise public power are not above the law (legality review/or legal appeal); this includes the law as laid down in statutes (illegality as *ultra vires*); and this also includes principles of constitutional law of which the senior courts are the primary guardians (the principle of legality).

When 'upholding the rule of law' means ensuring that those with public power exercise it in accordance with the law, the practical impact of the Administrative Court AJR pales into comparison with the role of legal advisers to first instance decision-makers, and other redress mechanisms such as ombudsmen and tribunals, all concerned to ensure that relevant law is upheld.

On the other hand, the constitutionally symbolic, 'lions behind the throne' image of the Administrative Court connotes a degree of legitimacy, authority, and expertise that comes only with resolution by a High Court judge

²⁶ *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374.

²⁷ *Ahmed v HM Treasury* [2010] UKSC 5; [2010] 2 AC 534, [111]-[117] (Lord Phillips) and *Jackson v Her Majesty's Attorney-General* [2005] UKHL 56, [2006] 1 AC 262 [201] (Lord Steyn).

possessed of specialist expertise, exercising what Sir Henry Brooke has termed, ‘the judicial power of the state in public law’.²⁸

This specialist expertise is said to be in crafting legal principles by articulating requirements of the rule of law.²⁹ For example, the principles of procedural fairness such as the right to a fair hearing and freedom from bias can be seen as the doctrinal expressions of rule of law values that may include certainty, non-retroactivity, clarity, openness, and independent, and impartial adjudication. Principles that limit administrative discretion, for example that such discretion cannot be completely unfettered, entirely abdicated from, or exercised on the basis of an over-rigid policy, can also be seen as stemming from rule of law values, notably consistency and protected expectations (that official action should conform to stated policy unless this would cause some clear injustice).

However, it is not the rule of law that is doing the work here; the rule of law is a contested concept whose meaning can range from procedural accounts to interpretations that include protection of substantive rights and other values including legal justice and equality.³⁰ The work here is really being done by particular rule of law values (such as certainty, openness, protecting expectations, legal justice, equality and so on).

²⁸ Henry Brooke, *Should the Civil Courts be Unified? A Report by Sir Henry Brooke* (Judicial Office 2008) [493].

²⁹ Jeffrey Jowell, ‘Beyond the Rule of Law; Towards Constitutional Judicial Review’ [2000] PL 671; Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart 2001); Paul Craig, ‘Constitutional Foundations the Rule of Law and Supremacy’ [2003] PL 92; Mark Elliott and Christopher Forsyth, ‘The Legitimacy of Judicial Review’ [2003] PL 286; TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003) and *Sovereignty of Law* (n 24).

³⁰ Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] PL 467.

Formal or procedural interpretations of the rule of law (concerned with how law is created and the form it takes rather than its substantive content) are likely to have been influenced by legal positivism.³¹ For present purposes legal positivist theories are those under which the existence of valid legal norms is determined by social facts alone and not by moral values (it should be noted that this leaves open the matter of whether law itself is morally valuable). Both strict *ultra vires* and its more recently modified³² descendant can be seen as positivist in orientation being based on apparent social rules about parliamentary intentions; in the former case that public bodies must not exceed their powers as determined by the four corners of the relevant statutes, in the latter that Parliament intends to legislate in accordance with constitutional values.

One good reason for governing by way of legal rules (rather than through custom or some form of managerial control) is that this should ensure the efficient pursuit of government goals.³³ However, it is doubtful whether there are sufficient levels of agreement within the social practice of judicial

³¹ Joseph Raz, *The Authority of Law, Essays on law and Morality* (Clarendon 1979) 212; the rule of law, 'is not to be confused with democracy, justice, equality (before the law or otherwise), human rights or any kind of respect for persons or for the dignity of man'.

³² Elliott, *Constitutional Foundations* (n 29) 110: 'Whereas the traditional *ultra vires* principle conceptualises the relationship as *direct* in nature, the present approach maintains that the relationship exists in *indirect* form. While the details of the principles of review are not attributed to parliamentary intention, the judicially created principles of good administration are applied consistently with parliament's general intention that the discretionary power which it confers should be limited in accordance with the requirements of the rule of law'. (emphasis original).

³³ This notion has given rise to considerable debate, most recently between Nigel Simmonds and Mathew Kramer in the tradition of HLA Hart and Lon Fuller examining the efficacy of law as a means to achieve nefarious ends. Nigel Simmonds, 'Straightforwardly False: The Collapse of Kramer's Positivism' (2004) 63(1) CLJ 98.

review to prove that such rules exist,³⁴ though even if they don't there might be good reasons for acting 'as if' they do.³⁵ Judicial review is then supposed to be a means of ensuring that Parliament's statutes are effective; but this renders the rule of law compatible with 'great iniquity'³⁶ and gives little guidance on how to proceed when statutory detail runs out.

There is renewed support for strict *ultra vires* from modern democratic or normative positivists, who are generally political constitutionalists and sceptical about judicial review.³⁷ For these scholars strict *ultra vires* as a legal doctrine is a conclusion to be drawn from particular interpretations of political concepts such as democracy, equality, and liberty. As a politically motivated theory this account aims to minimise the common law method of reasoning in accordance with moral values as an illegitimate usurpation of democratically established political power;³⁸ on this basis much of our ordinary common law would not be law at all. Law is to be identified by reference to the social facts

³⁴ Stuart Lakin doubts whether such rules exist in his analysis of some administrative law precedents, *The Moral Reading of the British Constitution* (Ph.D Thesis UCL 2009) Ch. 3 'Principles of English (Administrative) Law'.

³⁵ Kavanagh argues that sometimes judicial honesty is not the best policy when the reputation of the court and the need to ensure judgment is enforced are at stake. Aileen Kavanagh, 'Judicial Restraint in the Pursuit of Justice' (2010) 60(1) UTLJ 23.

³⁶ Hart, *Concept* (n 17) 207.

³⁷ Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (UCL Press 2004) 7: 'The revolutionary rehabilitation of legal positivism has to start with an awareness of the strong normative aspects running through the writings of Hobbes, Kant, Bentham, Austin, and more recently, Kelsen and Hart'. This group also includes Waldron, 'Core of the Case' and *Law and Disagreement*, Tomkins, 'Republican Constitution' and Bellamy, 'Political Constitutionalism' (n 23). The central features of democratic positivism are support for majoritarian democracy, and the importance of governance through clear, unambiguous, and publicly accessible rules to be interpreted textually.

³⁸ David Dyzenhaus, 'The Genealogy of Legal Positivism' (2004) 24(1) OJLS 39, 45: 'Positive law, properly so-called, is not merely law whose existence is determinable by factual tests, but law whose content is determinable by the same sort of tests, here tests which appeal to facts about legislative intention...the very values that underpin the design of legal order which [normative positivists] favour, are supposed to issue in non-evaluative legal reasoning by judges, reasoning which does not involve moral deliberation'.

of legislative intention, where legislation is silent (at least in relation to public power) there is no law and the rule of law has run out.

Whether more formal and procedural accounts of the rule of law and strict *ultra vires* are capable of ensuring legal certainty depends on the clarity of Parliament's expressed intentions; this degree of clarity will also largely determine whether judicial review renders Parliament's statutes effective.

A judge who accepts a formal account of the rule of law might be comfortable working with grounds of review that appear procedural, including a right to be heard and not to be subject to bias. However, such a judge might be more wary of principles of substantive review such as proportionality and legitimate expectation,³⁹ which more overtly limit the range of legally acceptable conclusions open to a decision-maker. However, the judge ought to be able to justify this view of his role (and this interpretation of rule of law values).

For example, a right to be heard and to unbiased decision-making might be classed as procedural whilst being based on substantive respect for the value of human dignity; that a person must not be used as a means to an end and must know how decisions that affect them have been taken. The judge with a proceduralist interpretation of the rule of law might not initially accept a doctrine such as substantive legitimate expectation, which is not procedural and can be harder to express in a structured manner. However, this doctrine can also be based on the value of dignity (and the value of keeping promises); the

³⁹ Where someone in a position of public power makes a clear and unambiguous representation that a substantive benefit will be conferred they can be held to this in the absence of countervailing public interests.

question then is whether the judge is deploying a consistent interpretation of the value of dignity. If he cannot reconcile his acceptance of the right to be heard and to be free from bias with his rejection of substantive legitimate expectations then he must either amend his interpretation of legal doctrine or his interpretation of the value of dignity; this is what it means to craft legal doctrines from values.

Substantively flavoured interpretations of the rule of law extend to crafting doctrines and delivering judgments based much more *explicitly* on a broader set of moral values such as equality and liberty, and respect for fundamental rights such as free expression and association. These accounts can be seen as based on anti-positivist or idealist accounts of law under which values (or principles) supply the basic elements of the legal order.⁴⁰ The idealist is concerned not just with the form in which law is presented to him but also with the content of purported laws as measured against values of political morality.

For example, Trevor Allan sees equal citizenship as the foundation of both democracy and the rule of law; the generality of law ensures protection from arbitrary power. As Hayek noted; ‘When we obey laws, in the sense of

⁴⁰ As Coyle explains: ‘For the idealist, it is rights, or the principles which define them which supply the basic elements of the legal order. The intellectual shift from a body of evolved practices to a system of intersecting patterns of entitlement required the development of a systematic jurisprudence: an individual’s rights were seen as deriving from universal principles which applied...to all citizens, giving rise to a conception of law as the concrete expression of those principles’. Sean Coyle, ‘Positivism, Idealism and the Rule of Law’ (2006) 26(2) OJLS 257, 258.

general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free'.⁴¹

For Ronald Dworkin the value of ruling through law is the specific value of integrity that the state must, 'act on a single, coherent set of principles, even when its citizens are divided about what the right principles of justice and fairness really are'.⁴² But Dworkin's account of integrity cannot be separated from his understanding of equality, democracy, and justice. Likewise his account of the rule of law cannot be separated from his broader legal and political philosophy under which individuals have legal rights that stem from the best moral interpretation of the past political record (which includes legislation and judicial precedent). As he argues, 'The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights...it requires as part of the ideal of law that the rules in the rule book capture and enforce moral rights'.⁴³

For a judge adopting the modified *ultra vires* approach to judicial review this broader reference to substantive rule of law values and legal rights must be linked to the social facts of Parliament's implicit intention, including an intention to share the interpretation of constitutional values and rights with the judiciary. In practice there may be little difference between the implications of modified *ultra vires* and the alternative common law constitutionalist (idealist) view under which common law values themselves, rather than social

⁴¹ Friedrich Hayek, *The Constitution of Liberty* (University of Chicago Press 1960) 153.

⁴² Dworkin, *Law's Empire* (n 19) 186.

⁴³ Ronald Dworkin, *A Matter of Principle* (Clarendon 1986) 11.

rules about reference to values, supply this link between the legal doctrines of judicial review and values.⁴⁴

David Dyzenhaus has referred to different interpretations of the rule of law as ‘standard packages’ on a continuum of views; on the one hand positivism, proceduralism, and democracy, on the other anti-positivism, substantivism, and liberalism.⁴⁵ These extremes are in a sense caricatures, for there are self-confessed positivists largely concerned with procedural elements of ruling through law who consider their accounts to be both democratic and liberal,⁴⁶ likewise anti-positivist scholars developing substantive accounts of the rule of law do not feel they purchase liberal neutrality, or individual liberty, at the expense of democracy.⁴⁷

Dyzenhaus once promoted his own theory as anti-positivist, procedural,⁴⁸ and democratic,⁴⁹ yet more recently he has aligned closer to legal positivism.⁵⁰ He appears to argue that values are the foundations of law (and therefore of rule through law) but that we should restrict our concern to specifically legal values (as opposed to values of political morality). He argues that, properly interpreted, these rule of law values (such as certainty, clarity,

⁴⁴ Hence I think Dworkin would probably refer to modified *ultra vires* as an under-developed form of common law constitutionalism, much as he refers to legal conventionalism (soft or inclusive legal positivism) as an under-developed form of law as integrity. See in particular TRS Allan, ‘The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretive Enquiry?’ (2002) 61(1) CLJ 87, 91, 97-101.

⁴⁵ David Dyzenhaus, ‘Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review?’ in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart 2000) 141.

⁴⁶ See eg, Jeremy Waldron, ‘Theoretical Foundations of Liberalism’ (1987) 37 *Philosophical Quarterly* 127.

⁴⁷ Dworkin and Allan being the obvious examples in this Chapter.

⁴⁸ More recently he has described it as ‘formal’, ‘Towards a Formal Theory of Public Law’ (Cambridge Public Law Conference: Process and Substance in Public Law, September 2014).

⁴⁹ Dyzenhaus (n 45) 142.

⁵⁰ I take this to be his position in his recent ‘Formal Theory’ (n 48).

and consistency) demand a primarily formal account of the rule of law (and a formal theory of administrative law). I disagree that legal values are somehow conceptually distinguishable in every case from other values of political morality, however, this does not affect the argument of my thesis which is that relevant values (be they legal or political) are subject to different interpretations and it is these differences that characterise our debates over the purposes of judicial review.

1.4 Democracy, equality, and liberty

Modified *ultra vires* is popular because a social rule that Parliament *intends* to legislate in accordance with the rule of law and other constitutional values seems to fit with common interpretations of democracy based on popular sovereignty. An alternative interpretation, that Parliament *should* legislate in accordance with the rule of law not because the people demand it but because this would be the objectively correct moral thing to do, even if the vast majority of people wished otherwise, is based on a different interpretation of democracy.

To say that Parliament simply *is* sovereign is a descriptive empirical claim that seems to have been made by some legal positivists who argue that Parliament's sovereignty can be evidenced by the practice of relevant officials accepting a social rule to that effect.⁵¹ It may also have been a claim made by some political constitutionalists, who argued that the constitution is 'what

⁵¹ Hart may have made this claim, though the descriptive nature of his work is disputed. See Chapter Two 113 esp (n 57) and (n 58).

happens' and what happens is respect for parliamentary sovereignty and political controls over the exercise of public power.⁵²

This (apparently) descriptive account has been criticised by those who hold conceptions under which a constitution is not a matter of fact but rather a framework for debates about values. All branches of state are entitled to participate in this debate and it is the values which are sovereign not any particular institution's interpretation of them.⁵³ Concerns are raised over this conception because it appears to render constitutional compliance dependent upon negotiated answers to questions of value. Value-laden questions, particularly those relating to the common good, justice, and rights, are questions over which reasonable people, and reasonable legislatures, courts, and administrators, often disagree. If society is to function it is argued that somebody has to have the final word (even if the answer given is wrong). For those who tend to be sceptical about judicial review the empirical claim that it is normally Parliament that has the last word is joined by a normative claim that Parliament's answer is always the better one, and so such negotiation (or dialogue) over values is damaging.⁵⁴

⁵² JAG Griffith, 'The Political Constitution' (1979) 42(1) MLR 16, and Graham Gee and Grégoire, 'What is a Political Constitution' (2010) 30(2) OJLS 273, 277-281 arguing that Griffith, 'down-played rather than denied' the normativity of his account of political constitutionalism.

⁵³ Stuart Lakin, 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28(4) OJLS 709, 731: 'Given that Parliament derives its powers from law, we have a *normative reason* to erase the concept of sovereignty from our constitutional landscape...Parliament may only exercise power in accordance with the principles – whatever they may be – that justify that power'. (emphasis original).

⁵⁴ Waldron, *Law and Disagreement*; Tomkins, *Republican Constitution*; and Bellamy, *Political Constitutionalism* (n 23).

It is argued that Parliament's answer is better partially due to its democratic status and partially due to its institutional credentials; its procedures, the capacity to commission detailed research about the impact of its measures, its capacity to be creative in developing legislation, and so on.

Degrees of deference to Parliament's expertise will impact in some way on all the functions of judicial review. However, the impact is more keenly felt when the Administrative Court is tasked to determine the proper inter-institutional balance of power between particular branches of state (purpose 4), to lay down (or expose) principles to govern administrative decision-making (purpose 6), to hear claims of major public interest (purpose 8), or to outline the contours of fundamental rights (purpose 9).

Many of those who are sceptical about judicial review's democratic legitimacy are primarily concerned with constitutional review.⁵⁵ In such cases the judiciary can strike down primary legislative instruments on the basis that they do not comply with constitutional values and/or constitutionally protected rights. The paradigm example of this power is that of the US Supreme Court (though its legitimacy is disputed).⁵⁶

It has been argued that this specific exercise of judicial power is undemocratic because it re-opens the questions that the democratic process is there to settle. Nevertheless, some opponents accept that strong constitutional

⁵⁵ See eg Waldron, 'Core of the Case' (n 23) Part I, outlining what he refers to as 'strong judicial review'.

⁵⁶ The power of constitutional judicial review is not specifically contained in the US Constitution, it is attributed to the Supreme Court's decision in *Marbury v Madison* 5 US 137 (1803), but the nature and extent of the power is disputed. See eg, Mark Tushnet (ed), *Arguing Marbury v Madison* (Stanford University Press 2005).

review might be appropriate where the political institutions of state are not in good (suitably democratic) working order.⁵⁷

This insight suggests that for a complete picture we need to examine the practical working of relevant institutions, hence my aim to expose misconceptions about the social facts of judicial review litigation in the Administrative Court.⁵⁸

Nevertheless, the objection is thrown back on itself, because whether institutions are in democratic working order depends on what we mean by democratic, hence why my first concern is to expose the various interpretations of democracy. If we take democracy to mean simple majoritarianism, then perhaps most institutions in the UK (and the US) could probably be described as democratic, but if we adopt a thicker conception of democracy the answer is not so clear.⁵⁹

The value of democracy is inseparably connected to two other values, equality and liberty, yet these three values are often seen as conflicting.⁶⁰ Those

⁵⁷ Even Waldron seems to have accepted this in his *Core of the Case* (n 23) 1346. Kavanagh argues that this has caused him to back track from his previous position under which his case against judicial review was entirely based on the intrinsic moral value of the right to vote regardless of its empirical consequences. Aileen Kavanagh, 'Constitutional Review, the Courts, and Democratic Scepticism' (2009) 62 CLP 102, 119-120.

⁵⁸ Even Dworkin supposes that; 'Judicial review may be less necessary in nations where stable majorities have a strong record of protecting the legitimacy of their government by correctly identifying and respecting the rights of individuals and majorities'. He further notes that; 'Nothing guarantees in advance that judicial review either will or will not make a majoritarian community more legitimate and democratic'. *Justice for Hedgehogs* (Belknap Press Harvard University Press 2011) 398. Based on socio-legal analysis of a survey of constitutions Dennis Galligan considers there to be a significant democratic deficit when democracy is understood as the sovereignty of the people; DJ Galligan, 'The Sovereignty Deficit of Modern Constitutions' (2013) 33(4) OJLS 703.

⁵⁹ Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22(5) Law and Philosophy 451; Dimitrios Kyritsis, 'Representation and Waldron's Objection to Judicial Review' (2006) 26(4) OJLS 733.

⁶⁰ Bobbio recounts the historical relationship between equality and liberty, and between liberalism and ancient and modern conceptions of democracy concluding that: 'To consider this

who support unlimited parliamentary sovereignty generally subscribe to a vision of equality under which the equal right of all members of society to choose their rulers is paramount. On this account constitutional judicial review may only be legitimate as a means of ensuring that the primary right to vote, and other procedures necessary for free and fair elections, are respected. The rejoinder to this conception is that majoritarianism alone does not provide appropriate protection for individual liberty (especially in the case of minorities).⁶¹ A thicker conception of democracy, one that is based on more than counting voters, has to be based on a different interpretation of equality.

Both Ronald Dworkin and Trevor Allan link equality to some form of legal (or constitutional) justice. Dworkin's account is based on the notion that a state must treat individual citizens with equal concern for their fate and equal respect for their projects. For example, an entirely unconstrained free market may fail to treat individuals with equal concern as it allows their fates to be decided on the basis of undeserved qualities such as genetic traits and arbitrary events (good or bad luck). On the other hand a purely egalitarian society in which all wealth is redistributed equally from time to time fails to treat people with equal respect because it means that individual exercises of liberty to

constant interplay between liberalism and democracy in the perspective of general political theory is to realise that underlying conflict between the liberals, with their demand that the state should govern as little as possible, and the democrats, with their demand that the government of the state should rest as far as possible in the hands of its citizens...is a clash between two different understandings of liberty...These are usually termed negative liberty and positive liberty...Unfortunately not all regimes have the benefit of this conflict, which is denied outlet when the first kind of liberty is usurped by unlimited power; or where the place of the second is usurped by power without accountability. Faced with either of these alternatives, these hostile twins, liberalism and democracy, of necessity become allies'. Noberto Bobbio, *Liberalism and Democracy* Martin Ryle and Kater Soper (trns) (Verso 2006) 89.

⁶¹ Kyritsis, 'Representation' and Kavanagh, 'Participation' (n 59).

choose a life plan (be that employment, recreation, family and so on) would have no personal consequences.⁶² Dworkin then presents an abstract notion of justice which requires a simultaneous equation to be solved in particular contexts; how do we treat individuals simultaneously with equal concern and respect? Different conceptions of justice purport to achieve this in different ways,⁶³ the key concern for judicial review is to ensure that the state deploys its conceptions consistently.

On this account liberty, equality, and democracy no longer conflict; we are entitled only to those liberties that are compatible with showing equal concern to all. Likewise democracy is not merely dependent on giving each citizen an equal right to vote it also requires that one has, 'an equal voice and an equal stake in the result...democracy itself requires the protection of just those individual rights to justice and liberty that democracy is sometimes said to threaten'.⁶⁴

The rule of law is often taken as enshrining some formal sense of equality before the law. Yet this can be seen as conflicting with notions of substantive justice which require like cases to be treated alike, but also that different cases be treated differently. For Both Dworkin and Allan, legal and political distinctions between persons must be capable of reasoned justification consistent with a defensible view of the common good. Whilst procedural due process is an essential element of the rule of law, so is the substantive

⁶² Dworkin, *Hedgehogs* (n 58) 2-3.

⁶³ See eg John Rawls' theory of equal basic liberties and the difference principle; that adjustments in welfare or utility are acceptable if they work to the advantage of the least advantaged in society. John Rawls, *A Theory of Justice* (rev edn, Harvard University Press 1999).

⁶⁴ Dworkin, *Hedgehogs* (n 58) 5.

requirement that treating people differently requires coherent justification. For Allan:

...the relevant distinctions between persons must be capable of justification in terms of legitimate public purposes, so that all are treated fairly in accordance with a coherent conception of the common good. The formal equality secured by adherence to general rules is truly valuable, not merely for its contribution to legal certainty and the personal autonomy that such usually fosters, but as part of a more substantive equality, amounting to an ideal of constitutional justice.⁶⁵

There are distinctions between the accounts of Dworkin and Allan, but both have been criticised for presenting a vision of the rule of law that prioritises a liberal interpretation of the common good⁶⁶ (as opposed to being neutral between competing interpretations of the good). These debates are beyond the scope of the current thesis, though my view is that the notion of equal concern and respect is abstract enough to be neutral between competing interpretations of the good. The central insight for present purposes is that it requires state power to be justified specifically to the individual(s) affected.

Dworkin concedes that it may be justifiable not to have constitutional judicial review in a polity where democratic political institutions are in good working order and capable of protecting minority rights, in this instance review

⁶⁵ Allan, *Constitutional Justice* (n 29) 39.

⁶⁶ See eg, Thomas Poole, 'Dogmatic Liberalism? TRS Allan and the Common Law Constitution' (2002) 65(3) MLR 463.

may be an expensive and unnecessary addition. What is important is not so much the answer but the fact that we have asked this question of justification in first place. Stephen Guest summarises this requirement as a need to treat people as ‘equal in their humanity’, suggesting that it is, ‘sufficiently abstract both to attract support and sufficiently concrete to provide a method of argument in real legal cases...’⁶⁷

Whilst this account is most often deployed in constitutional review I think it also translates to review of delegated administrative power and it is this notion of justification in accordance with equal humanity, equal concern and respect, perhaps what we can also term the value of dignity, that has animated the culture of justification in broader administrative law.

It should be noted that this legal right to be treated with equal concern and respect is different to more narrowly conceived private law rights. A traditional common law role for judicial review has been to redress individual grievances against the state particularly in the context of private rights (most often including the employment and dismissal of public servants, property rights, and taxation) where no other remedies were available. The current right to equal humanity is not a private right earned by contract or status, it is an eponymous public law right⁶⁸ founded on an interpretive theory under which rights and the values that underpin them are the basic elements of law.⁶⁹

⁶⁷ Stephen Guest, *Ronald Dworkin* (3rd edn, Stanford 2012) 252.

⁶⁸ Paul Craig has noted the difficulty of fitting an expanded account of the reach of judicial review with a traditional interpretation of private rights. Paul Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 13-14.

⁶⁹ See eg, Dworkin, *Law's Empire* (n 19) and *Hedgehogs* (n 58). Robert Alexy's work takes a similar line in prioritising moral values above social facts in the identification of valid law, *Argument from Injustice* (n 20).

As far as constitutional review is concerned, the closest British judges have come to striking down primary legislation is to issue a Declaration of Incompatibility (DOI) under section 4 of the Human Rights Act 1998. However, Aileen Kavanagh has argued that the more powerful provision is in fact the obligation under section 3 to interpret legislation compatibly with fundamental rights.⁷⁰ Whilst it may be more common to classify this as weak constitutional review, Kavanagh argues that it has allowed judges to interpret statutory provisions in a way that gives them an immediate and broad capacity to condition the exercise of legislative power, weak in form, but strong in substance. Whilst on the one hand the strong in form power (DOI) is only given to the higher courts, the strong in substance power is one that can be performed also by inferior courts and tribunals. The key issue is then not a division of functions, but a division of seniority with which these functions are performed. Purpose 8 of judicial review (elaboration and vindication of fundamental rights) is not exclusive to the AJR in the Administrative Court. It is in conjunction with the constitutionally symbolic authority of function 1 (lions behind the throne), this time practically supported by the power to issue a DOI, that we see a unique (and potentially constitutionalised) role for the Administrative Court.

The notion that democracy requires individuals to be treated with equal concern and respect does not address the further question of why the courts are well placed to conduct this assessment. Whilst the HRA delegates a particular statutory power to the judiciary to ensure rights compliance, most grounds of judicial review are common law creations. It is argued that the incremental,

⁷⁰Aileen Kavanagh, *Constitutional Review Under the UK HRA 1998* (CUP 2009) 91-137.

organic development of the common law over substantial periods in history may imbue it with a stronger claim than legislation to be both ‘constitutive’⁷¹ and ‘reflective’⁷² of a community’s conceptions of values. As Phillip Selznick has noted, the common law is, ‘an expression of community, a product of shared history and common life’.⁷³ However, critics argue that the reason of the common law aims to discover universal truths of justice and right reason in a manner that is unrealistic given practical real-life problems.⁷⁴

Trevor Allan argues in response that; ‘The relevant criterion is not conformity to any particular conception of justice derived from abstract political philosophy, but with those principles accepted as constitutionally fundamental, within a particular regime or polity’.⁷⁵ On this account, ‘the common law represents neither an assertion of political authority nor the product of anyone’s will’.⁷⁶ Again we meet the notion that there may be some relevant distinction between abstract values of political morality and those values that are somehow immanent to (or form an innate aspect of) the common law tradition. Etienne Mureinik, for example, has referred to these latter values as constituting the, ‘core of the judicial conception justice’.⁷⁷ My view is that we should be less concerned with whether these legal values are somehow

⁷¹ I take ‘constitutive’ to mean having the power to establish or give organised existence to certain interpretations of socially accepted values.

⁷² To be ‘reflective’ in this context means to embody or represent an account of law that is faithful to socially held values.

⁷³ Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (University of California Press 1992) 452.

⁷⁴ See eg, Graham Gee and Grégoire Webber, ‘Rationalism in Public Law’ (2013) 76(4) MLR 708 and Bellamy, *Political Constitutionalism* (n 23) 176-208.

⁷⁵ Allan, *Constitutional Justice* (n 29) 22.

⁷⁶ *id.*

⁷⁷ Etienne Mureinik, ‘Administrative Law in South Africa’ (1986) 103 S Afr L J 615, 617.

conceptually separable from other values of political morality, and more concerned with how we arrive at authoritative judicial interpretations of such values (however they are characterised).

Those who question the credentials of common law reason base their alternative conception on what they term a neo-Roman, republican conception of democracy, under which freedom is understood as ‘non-domination’ and liberty rests on active participation in self-government.⁷⁸

Supporters of this approach trace the concept of positive liberty (positive freedom) back to Aristotle’s conception of man as a political animal who becomes un-free when stripped of his capacity to actively participate in self-government. Positive liberty may be dangerous because when conflated with rationality its exercise can be limited to certain elites or social groups (the Pride of judicial lions), potentially sanctioning collective control by those apparently possessing superior rationality.

The conception of freedom as non-domination rejects positive liberty, but is in a sense stricter than negative liberty as simple non-interference. On this conception we are not free if we are subject to another who has the capacity to dominate us.⁷⁹ All those bodies that dominate have the capacity for oppression, even if they choose not to act in an oppressive manner, what is repugnant is this capacity for oppression.⁸⁰ It may be argued that since judges

⁷⁸ Bellamy, *Political Constitutionalism* (n 23) 179-194.

⁷⁹ Tomkins, *Republican Constitution* (n 23) 22, ‘...we are not free even if such a capacity to interfere is not actually exercised – that is, even if we are not actually restrained. It is the domination that renders us unfree, not the restraint’.

⁸⁰ Quentin Skinner, *Liberty Before Liberalism* (CUP 1998) 49, ‘...a state or nation will be deprived of its liberty if it is merely subject or liable to having its actions determined by the will of anyone other than the representatives of the body politic as a whole’.

are not accountable to the people through the ballot box, giving them the power of judicial review (even in the case of administrative rather than legislative power) instils them with the capacity for oppression and for domination. On this account there may be minimal room for some of the normative exposition functions of judicial review, such as structuring deliberative administrative processes (purpose 6) and protecting core values of good governance (purpose 7). There may also be some regard for judicial protection against the most heinous violations of individual private rights, but no broad conception of a public right to equal humanity, and no wider public interest or inter-institutional allocation of powers roles.⁸¹

This conception of republican freedom is supported by democratic positivists who argue that the more space statutes leave to be filled with judicial moral reasoning, the more judges are endowed with capacity to determine questions of rights, justice, and the common good outside the ordinary political process, thus threatening domination. The danger of domination is the flipside of the value of authority, which is central to understanding the role of the Administrative Court.

1.5 Authority and expertise

Administrative Court judges have authority to establish (or declare) general legal principles, whether this is based on the exposition of political

⁸¹ See eg, Adam Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60(1) UTLJ 1.

constitutional values, such as democracy, equality, and liberty, or other common law values such as keeping promises and acting reasonably. How should we interpret this authority?

Authority could be a matter of social fact if the Administrative Court lays down general principles that are largely followed by lower courts and tribunals, and largely adhered to by public bodies.⁸² This view would also receive support if Administrative Court judgments were rarely overturned or distinguished by the higher appellate courts.

A normative case for the Administrative Court's authority could be that developed by Joseph Raz. Raz argues that law necessarily claims legitimate authority; the directives issued by legal institutions should be based on certain 'dependent reasons' that are readily applicable to subjects. These directives are intended to provide 'pre-emptive reasons' displacing the subject's own assessment of the situation. Once the authority has occupied the territory and supplied 'pre-emptive reasons', the 'dependent reasons' are redundant. This 'service conception of authority' depicts law's mediating role; individuals 'surrender' their judgments to the authority, but the authority cannot introduce new 'dependent reasons', rather it exists to mediate between the ultimate reasons and the people to whom they apply. Under the 'normal justification thesis' it is then argued that:

⁸² This would have to be proven by examining the 'impacts' of judicial review. See eg, Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (CUP 2004), and Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Hart 2004).

...the alleged subject is likely better to comply with the reasons which apply to him...if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them rather than by trying to follow the reasons which apply to him directly.⁸³

In short, an authority is legitimate if I am better off complying with its balance of reasoning than with my own. In this context there is some evidence from impact studies to suggest that judicial review litigation in the Administrative Court can lead to improved decision-making procedures benefitting both individuals and the broader public interest in good administration.⁸⁴

Whatever the empirical picture, Administrative Court expertise does not always fit with the normal justification thesis. Whilst the Court may be able to develop the law in a manner that is consistent and principled across a range of legal regimes (both global and local, general and specific to particular topics of administration) it does not necessarily have superior expertise, compared for example with specialist tribunals, in the many and diverse subject areas over which it has responsibility. In asylum and immigration claims, for example, I may be better off if I follow the Administrative Court's assessment of reasons than my own, but the assessment of the Upper Tribunal might be better still.

Jeremy Waldron cites the public character and generality of law as adding democratic credence to Raz's normal justification thesis, especially in

⁸³ Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1995) 214.

⁸⁴ 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 (suppl 2) *J Public Adm Res Theory* 243.

the case of legislation.⁸⁵ Democratic positivists insist that law at least claims to be in the common interest of all subject to it, thus adding further justification to its authority. For example, if in a particular situation a citizen disagreed that a specific statute satisfied the normal justification thesis we could challenge him that the democratic credence of the source endows it with a claim to track the common good, and as such adds a further important reason to accept the authority's decision. Whilst the initial specialist expertise version of the normal justification thesis might have supported the authority of the Administrative Court in AJR claims, Waldron deploys his enhanced democratic account to support literal interpretation of statute and a marginalised non-constitutional role for judicial review.

This conclusion of course depends upon what is meant by democracy, and this in turn depends on what is meant by other political values such as equality and liberty. The political constitutionalist argument, that making decisions together is better than getting them right, can be rebuffed if togetherness is interpreted differently. Making decisions together is better understood to be about inter-institutional co-operation, rather than a hierarchical system in which any one institution is said to provide the only legitimate solution. This more co-operative role is evident in the culture of justification alongside related accounts of deference designed to expose and clarify the courts' respect for the procedures and expertise of other decision-makers. This

⁸⁵ Jeremy Waldron, 'Can There Be a Democratic Jurisprudence?' NYU School of Law, Public Law Research Paper No. 08-35 (2008) available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280923> (accessed 6 October 2014).

still leaves us with the tricky question of identifying the precise expertise characteristically brought to bear in Administrative Court AJRs.

Expertise in particular fields of law is valuable as it leads to greater competence in dealing with disputes, this in turn means that the expert lawyer is more likely to work quickly and cost effectively, producing the best outcome for their client. The expert judge will also work quickly and efficiently and is more likely to reach a correct judgment, lessening the potential for further appeal.⁸⁶ Judicial expertise gives added *gravitas* to the proceedings increasing the likelihood that even the losing party will be satisfied with the result. This is especially important when the losing party is in government, particularly given the Administrative Court's limited enforcement powers.⁸⁷

Judicial review is said to be concerned only with specialist (expert) public law issues. However, in England and Wales there is no strict separation between public and private law, and between constitutional and administrative law, nor is there a specific sub-set of human rights law, though some argue that the law ought to be developed in this bi-furcated or tri-furcated direction.⁸⁸

An initial working distinction between public and private law is that public law doctrines have unique characteristics because they apply only to public bodies and those exercising public functions. Different standards should apply because public bodies and those exercising public functions have a

⁸⁶ Though on the problems of over-specialisation see Sir Rabinder Singh, 'The Unity of Law – or the Dangers of Over-specialisation' *Society of Legal Scholars Centenary Lecture* University of Birmingham (2013) available online: <<http://www.judiciary.gov.uk/announcements/sir-rabinder-singh-speech-sls-centenary-lecture-28112013/>> (accessed 6 October 2014).

⁸⁷ Sarah Nason and Maurice Sunkin, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law' (2013) 76(2) *MLR* 223, 229-231.

⁸⁸ See my Chapter Five 263-264 and Chapter Eight 344-360.

general duty to act in the public interest.⁸⁹ Of course this leads us to the further question of what constitutes a public power or public function (and what is the public interest).

I am initially attracted to the notion that private power is largely concerned with self-regarding behaviour, and relativist or particularist (as opposed to universal)⁹⁰ interpretations of value. On the other hand public power is primarily concerned with other regarding behaviour and the articulation of universally valid interpretations of values.⁹¹ Whilst this boundary between self-regarding and other-regarding behaviour, and particular and universal interpretations of values, is not capable of clear demarcation, it can be argued that judges are well placed to enforce its permeable contours via judicial review.

The boundary is beset by clashes between individual and collective interpretations of justice. The judicial role is to find some resolution to the dispute; articulating a conception of justice in the case at hand that takes the parties' contending interpretations seriously, aims to find some common ground between them in light of precedent and some (most likely thin) universal principles, conditioned by the institutional limitations of the Administrative Court architecture.

⁸⁹ See eg, Lord Woolf, 'Public-Private, Why the Divide?' A Personal View' [1986] PL 220 (but cf Dawn Oliver, *Common Law Values* (n 24).

⁹⁰ On this account there are no universally valid values only culturally defined or individually perceived values. Bernard Williams' work is especially helpful in explaining how morality can be understood in these different senses, *Morality: An Introduction to Ethics* (new edn, CUP 1993).

⁹¹ Louis Seidman, 'Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law' (1987) 96 Yale LJ 1006, 1008.

This role of examining the parties' conceptions of justice, alongside the demands of precedent, any possible universal principles (or values), and institutional limitations, defines the judicial role without reference to bright line distinctions between self-regarding behaviour and other-regarding behaviour, between public and private domains, or indeed between constitutional and administrative domains.

Whilst Administrative Court judges are valued for their expert knowledge of broad principles of public law that apply across a range of topics, the value of expertise might be better served by judges (and other legal actors) who are specialists in particular subjects (e.g., planning, social welfare, education) and all the legal regimes (public, private, national, global, and local) that apply to those subjects. Some Administrative Court AJRs are distributed to judges with this kind of subject-specialist expertise, but increasingly it is tribunal judges and other tribunal members who have the greater subject-specialist expertise.⁹²

This raises the question of whether there is a distinction between the kinds of judicial expertise (and the unique doctrinal principles) brought to bear specifically in judicial review claims, and that applied in subject-specialist legal appeals.

I have noted above that many legal appeals appear to be largely indistinguishable in substance from AJR claims. However, at least one commentator has argued that there is a conceptual difference between

⁹² Emma Laurie, 'Assessing the Upper Tribunal's Potential to Deliver Administrative Justice' [2012] PL 288; Sarah Nason, 'The Administrative Court, the Upper Tribunal and Permission to Seek Judicial Review' (2012) 21 Nottingham Law Journal 1.

‘principles of review’, as developed and applied by the High Court to determine if the separable ‘principles of legality’, to which public powers are subject, have been breached.⁹³

Whilst I am wary that this is precisely the kind of conceptual over-complication that I think ought to be avoided, this attempt may track a useful distinction between legal principles and the tools judges utilise to determine if those principles have been breached; this is a matter to which I shall return.⁹⁴

For present purposes it can be concluded that judicial review in the Administrative Court is defined by expertise in ‘review’ that may be distinguishable from a legal ‘appeal’. This distinction is flexible and influenced by; the scope for judicial creativity in interpreting relevant values, experience, legitimate constitutional status, and common law foundations largely unconstrained by statutory interference. More needs to be said about the nature of this judicial expertise, and in particular its link to legal rationality.

1.6 Legal justice and legal rationality v’s administrative justice and administrative rationality

Harlow and Rawlings refer to three types of normative expository role for judicial review; they distinguish general legal principles, core principles of good governance, and principles for structuring administrative processes.⁹⁵ The value of this latter normative expository role is disputed as it may prioritise

⁹³ Tom Hickman, *Public Law After the Human Rights Act* (Hart 2010) 99-101.

⁹⁴ Chapter Six, 298-309 and Chapter Eight, 347, 369-372.

⁹⁵ *Law and Administration* (n 7) 669-670,

judicial rationality over and above the rationality of other players (notably Parliament and administrators) who may claim greater expertise in structuring good administration.

Under so-called legalistic accounts, the prime example of rationality is a set of clear and comprehensive rules to be interpreted only in accordance with their ordinary meaning. There may be value in presumptive rules, but as Dworkin has argued, there is endemic disagreement among judges and lawyers (and in this case administrators too) about the content and status of purported rules (including rules about how to reason with rules).⁹⁶ Determining the extent of this disagreement is an interpretive, partially empirical question, and one that Dworkin accepts would require an ‘Everest’ of data to address.⁹⁷

Judges impose constraints on public power even when statutes clearly confer unlimited discretion on the decision-maker. Judicial intervention here might be premised on logic, namely that Parliament cannot delegate authority to an administrator whilst at the same time announcing that the administrator may in effect do as they please.⁹⁸ But this of course does not tell us what standards of decision-making ought to apply. These standards are unlikely to follow from some shared social rules that *require* statutes to be interpreted *contrarily* to their plain meaning. Rather I think legal reasoning in judicial review is based on an idealist account of legal rationality under which values,

⁹⁶ Dworkin, *Law's Empire* (n 19) 43-46, developing his ‘semantic sting’ argument.

⁹⁷ Ronald Dworkin, *Justice in Robes* (Belknap Press Harvard University Press 2006) 167.

⁹⁸ David Dyzehaus, ‘Dignity in Administrative Law: Judicial Deference in a Culture of Justification’, (2012) 17 *Rev Const Stud* 87, 92 and Christopher Forsyth, ‘Showing the Fly the Way Out of the Flybottle: The Value of Formalism and Conceptual Reasoning in Administrative Law’ (2007) 66(2) *CLJ* 325.

and the individual rights which follow from interpreting these values in context, supply the basic elements of the legal order.⁹⁹

Typical concerns about this account are that judicial interpretations of value could be arbitrary expressions of the judge's personal moral views or approximations towards an ideal that can never be reached. This is an objection that can be weakened by considering institutional constraints, especially the constraint of fit with past precedent.

An alternative concern is that moral reasoning can itself be rule-based when the intersections between certain rights and values are fashioned to form a universal, general, and systematised pattern of entitlement. On this account legal rules (textual interpretation of statute especially) have been replaced by moral rules that might be equally inflexible and insensitive to context; a triumph of universalism over particularism one might say.¹⁰⁰

This systematic application of moral rules (and the conflation of legal justice with moral rules generally) may fail to pay due regard to more administratively flavoured values at stake in judicial review claims.

Administrative justice (like legal justice) is a concept open to interpretation, and for present purposes I draw on Jerry Mashaw's three models of administrative justice; bureaucratic rationality, professional treatment, and moral judgment.¹⁰¹

⁹⁹ I have referred to this account above as 'idealism'. It is clearly the stance taken by Ronald Dworkin and Trevor Allan, but also I think supported by Dawn Oliver, *Common Law Values* (n 24); Jeffrey Jowell, 'Beyond the Rule of Law' (n 29) and Sir John Laws, 'The Constitution: Morals and Rights' [1996] PL 622.

¹⁰⁰ David Dyzenhaus, 'The Very Idea of a Judge' (2010) 60(1) UTLJ 61.

¹⁰¹ Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press 1983).

Bureaucratic rationality is concerned more with the administrative body's broader success in achieving its policy objectives than with the treatment of individual citizens. The values at stake include efficiency, effectiveness, accuracy, and value for money. Procedures are likely to be designed in a way that minimises scope for discretion on the part of individual administrative decision-makers who implement legislative or government policy.¹⁰² Policies have been calibrated to serve some conception of the common good; too much interference by the judiciary (beyond enforcing the procedures specifically laid down as part of the policy) will disturb this fine balance. In the case of judicial review, the Upper Tribunal (with specialist expertise in particular subject areas, variable membership, and procedures) might do better than the more generalist Administrative Court at showing due respect for bureaucratic rationality.

Mashaw's second model is of professional judgment (the paradigm example being healthcare) where the public decision-maker is concerned specifically with the welfare of the individual in a service-orientated approach. The key element is judgment, and the appropriate standard of legal review is likely to be based on how a reasonable person possessing that kind of professional expertise would have been expected to behave. It is sometimes assumed that professional ombudsmen may be better equipped to handle these types of claims. However, 37% of the Administrative Court's civil non-

¹⁰² *ibid* 26; 'The legitimating force of this conception flows both from its claim to correct implementation of otherwise legitimate social decisions and from its attempt to realise society's pre-established goals in some particular substantive domain while conserving social resources for the pursuit of other valuable ends'.

immigration and asylum caseload in the final year of this research (1 May 2013 to 30 April 2014) was made up of either statutory appeals or AJRs in the field of professional discipline (most notably claims relating to doctors' fitness to practice), where precisely this kind of professional judgment is at issue.

Mashaw's third model of moral judgment is described as a 'value-defining' approach in which the competing interests of individual parties must be assessed. Questions are not primarily focused on whether proper procedures were followed, professional judgment appropriately exercised, or on disputes of fact. This model is closest to court based adjudication where each party must be given an equal opportunity to present their case. The administrative process is designed as if the applicant were claiming a particular right and the decision-maker is balancing this apparent right against the other values at stake. Courts and sophisticated tribunals are said to be on firmer ground in this context.

It has been argued that the administrative justice values engaged by the Administrative Court's task of resolving individual grievances proportionately can conflict with its role of upholding constitutional values, exposing normative legal principles, assessing the inter-institutional balance of power between state actors, and protecting fundamental rights.¹⁰³ Traditional proportionate dispute resolution (PDR) attempts towards 'nipping the problem in the bud' quickly, informally, and in private, may lead to a result that satisfies the individual aggrieved, but that does damage to rule of law values precisely because the decision is not reviewed openly and impartially in accordance with clear

¹⁰³ Andrew Le Sueur, 'Administrative Justice and the Resolution of Disputes' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (7th edn OUP 2011) 260.

principles equally accessible to both parties in advance. In short the decision may provide a remedy for the individual whilst failing to treat them with equal concern and respect.

Andrew Le Sueur has argued that this tension between legal constitutional values (e.g., openness, independence, and impartiality) and the values associated with PDR (e.g., speed, informality, and privacy) may be addressed by the recognition of a constitutional right to administrative justice.¹⁰⁴ The content of such a right would include all existing grounds of judicial review.

Whilst there are examples of such a right in some constitutions,¹⁰⁵ it seems to me strange to call this a right to administrative justice if its purpose is understood as giving some assurance that the values of legal or constitutional justice will trump the values of administrative justice. Perhaps it is better to call it a *right to just administration*, which would require the demands of both sets of values to be respected in any particular case.

Mashaw's administrative justice models are not exhaustive, nor are they uncontested, but they illustrate the variable goals and models of decision-making characteristic of different types of public body in particular contexts. That administrative justice might conflict with legal justice is not an argument against judicial review of administrative decisions, only a call to show appropriate respect for the specialist administrative context. The phrase

¹⁰⁴ *id.*

¹⁰⁵ South African Constitution 1996, s 33; 'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair' and 'Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons'.

‘principles of good administration’ is common in judicial review litigation and used inter-changeably with labels such as grounds or principles of review. In effect principles of good administration can include both values more often associated with legal justice and those more specifically aligned with administrative justice.

It has recently been argued that the search for overarching principles characteristic of the reformationist or constitutionalisation account of administrative law and judicial review displays a ‘rationalistic propensity’,¹⁰⁶ that is particularly ill fitting in the context of ensuring good administrative behaviour. Graham Gee and Grégoire Webber define this propensity as, ‘an unshakable faith in the power of reason to identify exact, complete, and orderly solutions to the practical problems that arise in the real world’.¹⁰⁷

Drawing on the work of Michael Oakeshott they distinguish between technical knowledge and practical knowledge, arguing that public lawyers are apt to prioritise the former over the latter. Technical knowledge, ‘can be formulated into a set of more or less precise rules, principles, and maxims that are capable of being learned by rote’;¹⁰⁸ this kind of knowledge privileges, order, certainty, and completeness. Practical knowledge on the other hand, ‘comprises sensibilities, dispositions, understandings, intuitions and

¹⁰⁶ Graham Gee and Grégoire Webber, ‘Rationalism in Public Law’ (2013) 76(4) MLR 708.

¹⁰⁷ *ibid* 713. They argue that practical tried and tested solutions are rejected (and reformed) if they do not fit with a universal set of abstract principles.

¹⁰⁸ *id.*

judgments...skills, talents, knacks – that typically find expression in the customary way of doing things’.¹⁰⁹

Gee and Webber argue that ‘ideology’ runs the risk of becoming detached from social facts. In particular they suggest that:

...having initially articulated an account of principles based on his understanding of traditions, the Rationalist ultimately divorces his principles from the underlying traditions, and in time forgets how to make sense of the traditions themselves. All the Rationalist is left with is a shorthand summary that, in his hands, is converted into an ideology.¹¹⁰

There is a sense in which the reformation, righting, or constitutionalisation of administrative law and judicial review is just such an ideology that has become untethered from social practice. Nevertheless, unlike Gee and Webber my response is not to abandon the idealistic search for consistency in moral principle as an ultimate aim of legal rationality. Instead I argue, primarily in Chapters Two and Eight, for an alternative, constructivist account of judicial rationality including an alternative account of how we can measure the correctness of our rational judgments.

1.7 Public interest and common good

¹⁰⁹ id.

¹¹⁰ *ibid* 720.

Under the culture of justification, public power must be exercised in a manner that is consistent with some coherent conception of the common good. This is a broad and abstract notion that could be supported even by those who are largely sceptical about judicial review. For present purposes I shall draw on Ronald Dworkin's account of consistency in principle. On this understanding individuals have rights flowing from 'past political decisions' (which include legislation, precedent, and other legal materials) that can be justified in accordance with the values discussed so far in this thesis. An exercise of public power will be consistent in principle if it duly respects these legal rights.

In addition to this relationship between the culture of justification and the broader common good, it is argued that the AJR procedure performs a specific public interest role by providing an alternate forum for examining competing conceptions of what the public interest requires in particular contexts. This can be linked to the notion of common law democracy in which deep-rooted social values find expression in common law principles. Both this conception of democracy and the notion of public interest judicial review are in a sense indirect or parasitic. The claimant still has to be able to point to some 'wrong' that fits with past precedent, they cannot simply argue that the defendant acted undemocratically or against the public interest.

Despite the Lord Chancellor's rhetoric about left-wing campaign groups, only a tiny proportion of claims issued (and substantive decisions) involve public interest groups, charities and the like, and the flexibly applied

standing test works to filter out most attempts to use the AJR as part of a ‘campaigning style of politics’.¹¹¹

It is right to be concerned that any growth in attempts to directly utilise judicial review as part of a political campaign may blur orthodox distinctions between law and politics and risk damaging rule of law values such as certainty, finality, and judicial independence. However, certainty and finality have to be interpreted in the context of doing justice in the case at hand. First, as regards accessing legal justice, representative groups can take on claims where the individual(s) affected face insurmountable practical hurdles. Second, substantive justice may be more likely to be done as representative organisations and third parties have considerable expertise and resources, allowing the court process to function in an efficient and informed manner.

In terms of judicial independence from politics, one is thrown back to examining the broader role of judicial review and, despite criticisms, I think there is value to Ronald Dworkin’s distinction between principle and policy; for Dworkin a matter of principle concerns the identification and protection of individual rights, and a matter of policy addresses whether a decision or course of action could lead to an enhanced state of community (a good) to which no individual can be said to have a right.¹¹²

Consider for example, *R (Plantagenet Alliance Ltd) v Secretary of State for Justice*,¹¹³ concerning whether there was a common law duty to consult as to how and where the remains of Richard III should be buried. It is established

¹¹¹ Carol Harlow, ‘Public Law and Popular Justice’ (2002) 65(1) MLR 1.

¹¹² Ronald Dworkin, *A Matter of Principle* (n 43) 72-103.

¹¹³ [2013] EWHC 3164 (Admin).

precedent that public bodies have certain duties to consult interested parties as part of the ordinary common law principles of procedural fairness. In light of such precedent a claimant may have a legal right to be consulted (a matter of principle) though such was ultimately not made out in this case. However, as Haddon-Cave J noted:

there is an important public interest in ensuring that the decision as to the final resting place of the remains of a former Monarch is arrived at in a proper manner...The more important the decision, the more important the public interest is in adherence to the proper lawful process.¹¹⁴

In effect there will always be some sense of public interest or common good in ensuring that the law is observed.

Matters (of public interest or common good) that would be inappropriate for judicial cognisance are questions such as whether the remains would be viewed by more people in Leicester than in York, or whether one city would be better able to capitalise on the economic benefits of the dead King's presence in terms of tourist revenues. These are matters of policy that could legitimately factor into the political and administrative process, but not into the decision of the reviewing court.

I am not suggesting that the policy-principle distinction is one that is always capable of clear demarcation; only that the notions of rights, interests,

¹¹⁴ *ibid* [35].

goods, and wrongs are also manipulable. There is a legal right to consultation (based on past precedent), a legal wrong is committed if this right is breached, and damage is also done to the public interest or common good if the law is not upheld. It is better then to see judicial review as serving a pluralistic range of purposes and values.

So far I have treated the public interest and common good as synonymous, but they may be separable, each causing different problems for judicial review.¹¹⁵ The notion of common good can be linked back to the ancient philosophical concern to identify and expound the good life as the highest fulfillment of humanity within a political community. Ancient theorists adopted an objective sense of what is good or right, not the modern individualistic parlance of what is subjectively good for me and what I therefore demand a right to.¹¹⁶

The public interest can be aligned with this latter sense of what is in my own subjective interests; the public interest is then a collection of liberal, individualist, perhaps also largely capitalist interests. Whilst ‘public interest judicial review’ may have secured benefits for some of the most marginalised in society there is a danger that it can portray a set of individualistic interests aligned to those issues which have popular (numerical) support among citizens enabling litigation to be financed.¹¹⁷

¹¹⁵ Bruce Douglass, ‘The Common Good and the Public Interest’ (1980) 8(1) Political Theory 103.

¹¹⁶ Brian Tierney, ‘The Idea of Natural Rights – Origins and Persistence’ (2004) (2) Journal of International Human Rights 2.

¹¹⁷ Douglass (n 115) 106-111.

There may have been a perceptible shift in recent years to re-aligning the public interest with the classical notion of the common good as being the objectively correct moral course of action,¹¹⁸ and I think this is to be welcomed.

For present purposes the common good is understood as a contested concept, it can be based on a monistic account of maximising pleasure (and minimising pain) or on a more pluralistic set of goods that are ‘forms of human flourishing’,¹¹⁹ it may be based on aggregation of numerous individual beliefs about what is good, or it may be synonymous with doing the right thing based on an assessment of all the moral considerations at stake. Judges must be clear about the conception of the good to which they are referring, and most importantly they must give open and genuine consideration to the parties’ competing conceptions.

Given the growing diversity of topics of claim now featuring in AJRs, the Administrative Court is required, either explicitly or implicitly, to examine some sense of common good and/or public interest in a wide range of social circumstances. Judges explicitly examine the broader public interest under the proportionality test and in claims raising a possible substantive legitimate expectation. The public interest also features when determining permission in *Cart*-style claims,¹²⁰ and whether to grant a Protective Costs Order.¹²¹ However, this does not mean that Administrative Court judges make policy or

¹¹⁸ See eg, Dworkin, *Hedgehogs* (n 58) 23-39 and generally, Michael Sandel, *Justice: What’s the Right Thing to Do* (Penguin 2010).

¹¹⁹ John Finnis, *Natural Law and Natural Rights* (2nd edn, Clarendon 2011).

¹²⁰ Judicial review of the Upper Tribunal attracting the second-tier appeals criteria see Chapter Four 182-198.

¹²¹ *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 1 WLR 2600, [74].

craft legislation through the AJR procedure. Of course they can influence the development and interpretation of both but there are major institutional limits to the Court's creative capacity. As Carol Harlow notes, 'Courts are not surrogate legislatures'.¹²²

1.8 The Administrative Court and a core of judicial justice

In the confines of this Chapter I have focused only on some key values that mark out the terrain of debates about the purposes of judicial review.

My conclusion is that the AJR in the Administrative Court provides an authoritative judicial forum for examining the meaning of values relevant to assessing the legitimacy of public power; in particular which interpretations of which values we wish to concretise in legal doctrine at any point in time, and how we want to enshrine them. Administrative Court judges have the capacity to deliver some core of judicial justice based on treating citizens with equal concern and respect, informed both by institutional legal rights (those which stem largely from past precedent), and by broader (natural) rights stemming from interpretations of the common good; this may extend to protecting a *right to just administration*. It is in this sense that judicial review may indeed be primarily about rights (purpose 9, the elaboration and vindication of rights), but this is contrary to the popular, but factually incorrect view that most applications involve human rights arguments be these of the ECHR or common law constitutional variety.

¹²² Harlow, 'Popular Justice' (n 111) 11.

The AJR in the Administrative Court gains its constitutional legitimacy, its authority, and its flexibility, from the bedrock of common law democracy; but it is also (rightly) tethered by institutional limitations, by the need to pay due regard to the parties' conceptions of justice, and by the need to show respect for the rational capacities of other branches of state.

Chapter Two: Constructive Interpretation

Law has a ‘dual nature’; it has a dimension of value and a dimension of fact; understanding the complex relationship between these dimensions is a central aim of contemporary jurisprudence.¹ In this Chapter I defend a methodology under which social facts and moral values are constructively connected by laying principle (values) over practice (social facts).² My aim is to contribute to debates about methodology in jurisprudence and socio-legal studies whilst developing the specific method adopted in this thesis. I also explain why over-emphasis on conceptual analysis can hinder attempts to understand judicial review in the Administrative Court and why a non-formal interpretation of rationality may be necessary.

Legal theory is concerned with identifying, developing, and refining concepts³ that are implicit in the social practice of law; it also involves the moral evaluation of those concepts. The data of legal theory is made up of the beliefs, attitudes, and opinions towards the law of those who are its subjects; it is made up of their interpretations.⁴

¹ Robert Alexy, ‘The Dual Nature of Law’ (2010) 23(2) *Ratio Juris* 167.

² Ronald Dworkin, *Law’s Empire* (new edn, Hart 1998) 413.

³ Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 19; ‘Concepts...lie between words and their meanings, in which they are expressed, on the one side, and the nature of things to which they apply, on the other’. Stephen Perry, ‘Hart’s Methodological Positivism’ in Jules Coleman (ed), *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (OUP 2001) 311, 333; ‘...concepts make ‘explicit what the theorist claims is in some sense already implicit in our common understanding’.

⁴ Julie Dickson, *Evaluation and Legal Theory* (Hart 2001) 41. Finnis similarly concludes that this extends to; ‘...asking what would be considered important and significant in that field by those whose concerns, decisions and activities create or constitute the subject matter’. John Finnis, *Natural Law and Natural Rights* (Clarendon 1979) 18.

Relevant empirical studies are those that gather and interpret data pertaining to judicial review and bureaucratic impact;⁵ such data includes the infrastructure of relevant courts and tribunals, the number and type of cases issued and their instrumental effects on administration, and the beliefs, attitudes, and opinions of those engaged in the practice (including judges, lawyers, litigants, and administrators). This is the same data on which legal theorists base their intuitive conceptual analysis; the difference is that the empirically gathered data can be both more extensive and more reliable than the intuitions of the theorist.

I propose a three-stage methodology for this thesis. First, outlining certain *manifest* interpretations of judicial review, those interpretations based on intuition and which form part of the social practice if anything does⁶ (a number of these *manifest* interpretations, such as *ultra vires* and common law constitutionalism, were encountered in Chapter One). Second, developing an *operative* interpretation of judicial review in the Administrative Court based on the methods of empirical (socio-legal) studies, including assessing which (if any) *manifest* theory fits best with this *operative* account. Finally, developing a *target* interpretation that fits with the *operative* interpretation and provides the best moral justification of it (based primarily on the values encountered in Chapter One).

It is inevitable that these different projects will inter-act and over-lap in the same way that the three central arguments of this thesis are not addressed in

⁵ See eg, Marc Hertogh and Simon Halliday, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (CUP 2004).

⁶ What Dworkin refers to as 'paradigms', *Law's Empire* (n 2) 72-73, 88-93.

an entirely linear fashion. To re-cap, these central arguments are; to expose misconceptions or lack of attention to social facts in existing interpretations of judicial review, to challenge over-emphasis on conceptual tests at the expense of moral values as unnecessarily complex, and to develop an interpretation that provides a better fit with social practice and with the contested nature of relevant values.

2.1 Legal theory and empirical analysis: the argument for separation

There are two basic ways in which legal theory and the empirical data gained by social research might be connected. The first is to develop some theoretical hypothesis about law and to test this by analysing empirical data, generally described as a deductive process. The second is to begin with some, admittedly broad and conventional understanding of law, and to collect data from which to divine a theoretical account, generally described as an inductive process.⁷

Both induction and deduction are limited because they work on the assumption that empirical data constitutes all that is objectively true about a particular topic. Contrarily there may be truths about law that cannot be discovered by collecting and analysing empirical data, and such may continue to be true even in the face of overwhelming empirical evidence to the contrary.⁸

⁷ DJ Galligan 'Legal Theory and Empirical Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2012) 976, 981, and more generally Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) Ch 1.

⁸ Bix concludes that; 'Conceptual theories define terms by necessary and sufficient conditions. Such definitions cannot be directly verified or rebutted by empirical observation'. Brian Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell 2009) 15.

It is argued that legal theories are general (they purport to apply to law wherever and whenever it is found), aiming to articulate only necessary features of law.⁹ Further it is assumed that legal theorists are concerned with certain core considerations about law, namely, its structure, identity, existence, authority, and content. The general theorist's aim is to investigate the existence conditions of law, which are separable from questions about its interpretation and application.¹⁰ In my view this account is based on a specific theory of law, legal positivism (under which legal validity is separable from moral value), therefore failing to appreciate other theories that are concerned to articulate law's purposes, functions and values (and certain values as necessary to law's existence).¹¹ These purposive theories fit better with empirical studies that do not limit themselves to just what is necessary about law, but which also examine what is interesting or perceived as important by the participants (or by society generally).

⁹ Galligan (n 7) 978; Raz notes that the necessary features of law may be infinite and that each will only, 'come to light as we find reasons to highlight them, in response to some puzzle, to some bad theory, or some intellectual preoccupation of the time', *Authority and Interpretation* (n 3) 97-99. The argument that legal theories only purport to uncover what is 'necessary' about law has been challenged. Julie Dickson, *Evaluation* (n 4); Frederick Schauer, 'The Social Construction of the Concept of Law: A Reply to Julie Dickson' (2005) 25(2) OJLS 493; Dan Priel, 'The Boundaries of Law and the Purpose of Legal Philosophy' (2007) 27 *Law and Philosophy* 643; Brian Bix, 'Ideals, Practices, and Concepts in Legal Theory' in Jordi Beltrán, José Moreso, and Diego Papayannis (eds), *Neutrality and Theory of Law* (Springer 2012) 33; Sarah Nason, 'Practical-Political Jurisprudence and the Dual Nature of Law' (2013) 26 (3) *Ratio Juris* 430.

¹⁰ Galligan, 'Legal Theory and Empirical Research' (n 7) 976-980, and see especially the works of positivist scholars such as Raz (n 3) and HLA Hart, *The Concept of Law* (2nd edn, Clarendon 1997).

¹¹ Dworkin, *Law's Empire* (n 2) and Lon Fuller, *The Morality of Law* (rev edn, Yale University Press 1969).

Both empirical studies and these more value-laden legal theories have been criticised as too ‘parochial’ (contingent on context).¹² However, there are examples of specific empirical studies that have been indirectly relevant to testing general legal theories, in particular examining the extent to which law is a matter purely of rules, or of rules and other materials such as principles and discretion, and the extent to which official action conforms to purported laws.¹³

Empirical scholars have been mainly content to rely on wide social theories about the nature of law that are not as intricate, narrow, and elemental, as those proposed by legal theorists, and legal theorists are content to rely on intuitions or stipulations about empirical realities without looking for evidence.¹⁴ My concern is that this can lead to the production of legal theories that are based on misconceptions about people’s day-to-day experiences of law. For the empirical scholars my concern is that the broad social theories or special jurisprudential (context specific) theories which they adopt are ultimately underpinned by commitments to general legal theories that are not made clear. If these underlying commitments (usually in the form of a

¹² See eg, Raz, *Authority and Interpretation* (n 3) 91-99.

¹³ Galligan argues that; ‘Empirical studies certainly support the idea that, while rules guide and structure the legal environment, their application involves other social factors, elsewhere described as contextual contingencies, entering into and forming part of that environment’. DJ Galigan, *Law in Modern Society* (OUP 2007) 47.

¹⁴ Galligan, ‘Legal Theory and Empirical Research’ (n 7) 979, ‘...in acquiring knowledge of law, legal theorists tend to rely on what they know from common sense and perhaps their own experience of law. Empirical research is not considered relevant and is rarely cited’ and at 980; ‘Empirical researchers display a range of attitudes towards legal theory. Some are unfamiliar with it, while those who have some knowledge appear united in holding it marginal to their research’. Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate 2006) 45: ‘A modern myth about sociological study of law survived until recently, encouraged from within legal philosophy and by some legal sociologists...According to this myth...Lawyers and jurists analysed law as doctrine – norms, rules, principles, concepts and the modes of their interpretation and validation. Sociologists, however, were concerned with a fundamentally different study: that of behaviour, its causes and consequences’.

commitment to either positivism or idealism) are not explained then their contestability cannot be addressed.

There have been calls for the community of legal theorists to anchor their accounts in social practice by expanding the empirical basis for their theories beyond ‘folk knowledge’ or common sense.¹⁵ The majority of those theorists who have connected empirical analyses with general legal theory have focused on specific practices within specific communities and assessed these against the yardsticks of predominantly legal positivist concepts of law. These studies have cast doubt on the primacy of rules and the equation of law with the settled attitudes of officials. Despite being local and limited these studies question the universal applicability of particular legal theories and as these studies multiply a bigger picture may be revealed. This may be a picture in which interaction with the social environment is necessarily a feature of all legal systems and the only universally true theory of law will be one that can properly make sense of that interaction whenever and wherever it occurs. Law is a parochial concept because its data (social practice) is parochial; the insights of this thesis may provide a small segment of a socially constructed account of the nature of law.

2.2 Rationality and empiricism

¹⁵ William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (CUP 2009); Brian Tamanaha, *A General Jurisprudence of Law and Society* (OUP 2001); Roger Cotterrell, *Law, Culture and Society* (n 14) and *Law's Community: Legal Theory in Sociological Perspective* (Clarendon 1995) and many works in two recent collections, Beltran, Moreso, Papayannis, *Neutrality and Theory of Law* (n 9) and Wil Waluchow and Steffan Sciaraffa (eds), *The Philosophical Foundations of the Nature of Law* (OUP 2013).

To evaluate the relationship between legal theory and empirical legal research it is useful to go back to first principles addressing what is really ‘out there’ to be discovered, what is really true, what does it mean to know about that thing and how does one come by such knowledge.¹⁶

A common method of coming to knowledge about law is conceptual analysis. Concepts function as mediating devices between the ‘real’ world and our understanding of it, they constitute the theorist’s attempt to render explicit what is already implicit in our shared understanding of a social practice. However, something can still be a concept of a practice if it does not track all the features that are somehow necessary to it (i.e., if it would still be that practice without them).¹⁷

Conceptual analysis as applied in legal theory can be considered a rationalist method in that it generally deploys reasoning (most often the tools of formal and informal logic)¹⁸ independently of sensory experience, to hone our intuitions about some feature or features of the social practice under consideration.

A particular concern with some doctrines of judicial review is that they prioritise descriptive (formal) conceptual analysis over normative or more ‘holistic’ methods of reasoning and understanding. Conceptual analysis may

¹⁶ P Van Inwagen, ‘Metaphysics’ The Stanford Encyclopedia of Philosophy (Winter 2012 edn) Edward Zalta (ed), <<http://plato.stanford.edu/archives/win2012/entries/metaphysics/>> (accessed 6 October 2014).

¹⁷ See eg, Natalie Stoljar, ‘What Do We Want Law To Be? Philosophical Analysis and the Concept of Law’ in Waluchow and Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (n 15) 230; Ronald Dworkin, *Justice in Robes* (Belknap Press Harvard University Press 2006) Ch. 8 ‘The Concepts of Law’.

¹⁸ Barry Hoffmaster, ‘The Rationality of Judging and Judges’, *Nature of Law Conference* (McMaster University May 2011) available online: <<http://works.bepress.com/barryhoffmaster/40/>> (accessed 6 October 2014).

also be a target of Gee and Webber's recent critique of legal rationalism in public law and its privileging of the global and general over the local and particular.¹⁹

Empirical legal studies fall on the other side of the rationalist/empiricist divide being founded on data that is drawn specifically from sensory experiences of the social practice.

2.3 Positivism

Conceptual analysis is often associated with contemporary legal positivism, a theory that can lead to scepticism about the value of judicial review. The legal positivist understanding of social order can be linked to the methodology of the logical positivists, who argued that only logic and empirical methods coterminous with those of the natural sciences, could deliver objective truths about the world.

Logical positivist methodology is unlikely to take us very far in either legal theory or empirical legal studies. Much of what goes on under the rubric of conceptual analysis of law does not comply with the rules of basic formal logic, and it is questionable whether empirical legal studies can be conducted consonantly with natural scientific experimentation. Nevertheless, this form of positivist methodology once appealed to both legal theorists and social researchers because the twin methods of logic and natural scientific empiricism, were said to reveal truths about the world that have a real, objectively verifiable

¹⁹ Chapter One 92-93.

(or falsifiable),²⁰ existence. Positivism is often associated with a realist or objectivist ontology, i.e., what is actually out there, its content and meaning, has an existence independent of our sensory experience of it and logic and scientific empiricism are methods for accessing that meaning, they do not somehow constitute or contribute to it.

However, neither logic, nor empiricism, nor positivism itself, need be associated with realism. It might also be argued that the process of scientific investigation inevitably alters the subject matter under analysis, it is altered by our sensory experience of it, hence either what is real has no independent existence, or science is not the way to discover it. The same might also be said of logic, if the process of logic is based on intuitions of the human mind, how can reality itself have any existence separate from human intuitions about it? This is anti-realism, that what is ‘out there’ has no existence independent from human perceptions be they intuitions or sense experience.

My point here is to note that those who champion the value of conceptual doctrinal tests in judicial review litigation do not have a greater claim to supply accurate knowledge about law than those who adopt a more holistic account of reasoning with values.

There is much debate in judicial review as to whether judicial reasoning is capable of producing real (objectively true) judgments, or if all such reasoning is ultimately anti-real, clouded by the judge’s personal characteristics

²⁰ The term ‘falsifiable’ does not mean something is false; rather, that if it is false, then this can be shown by observation or experiment. Karl Popper, *Conjectures and Refutations* (Harper and Row 1963). See generally R Creath, ‘Logical Empiricism’ *The Stanford Encyclopedia of Philosophy* (Spring 2013 edn), Edward Zalta (ed) available online: <<http://plato.stanford.edu/archives/spr2013/entries/logical-empiricism/>> (accessed 6 October 2014).

and lived experience. Again, not surprisingly those who are sceptics about judicial review tend to think that judicial reasoning is ‘anti-real’ or that the matter is irrelevant²¹ whereas those who support the culture of justification are more persuaded by the possibility of objectively correct judicial decisions.²²

2.4 Constructive interpretation

Many of the problems that have traditionally occupied philosophy have been expressed in terms of conflicting pairs, examples are *a priori* (things that are true independent from our experience of them) and *a posteriori* (things that are true only after our experience of them), necessary truths (which hold true in virtue of logic or other forms of conceptual intuition, in any possible world regardless of sense experience) and contingent truths (which are true in virtue only of some empirical fact of the matter).

Duelling pairs are also characteristic of legal theory, and of judicial review. I believe that many of the dualisms affecting judicial review, such as fact/law, merits/legality, and jurisdictional/non-jurisdictional errors, have parallels with the basic philosophical dualisms in that to get past the gridlock they cause we have to adopt a methodology that goes beyond purely descriptive conceptual analysis and natural scientific empiricism.

²¹ Jeremy Waldron, ‘Judges as Moral Reasoners’ (2009) 7(1) *ICON* 2 and *Law and Disagreement* (OUP 1999) Ch 8. ‘The Irrelevance of Moral Objectivity’.

²² Ronald Dworkin, ‘Objectivity and Truth: You’d Better Believe It’ (1996) 25(2) *Philosophy & Public Affairs* 87.

The tools historically applied in judicial review claims to distinguish concepts such as fact from law, and jurisdictional from non-jurisdictional matters, were largely those of descriptive conceptual analysis.²³ However, these attempts were criticised because the distinctions produced were easily capable of manipulation,²⁴ and they were manipulated precisely because the conceptual boundaries did not reflect changing interpretations of relevant values noted in Chapter One. These values included e.g., democracy, equality, liberty, legality, administrative justice, specialisation, authority and the common good.

Nevertheless, the desire to draw tight conceptual boundaries was itself born out of value considerations. If neat distinctions could not be made and articulated by way of clearly expressed rules, then judges might be free to decide in an arbitrary and unpredictable manner, based on their own personal moral and political views, this, it is argued, is undemocratic. This argument reflects a broader concern about law and legal reasoning, if laws cannot be expressed as clear and absolute rules, the alternative is that judicial decision-making is uncontrolled, unpredictable, and arbitrary.²⁵ Idealists have argued on the contrary that law is an affair of rights, and that these rights (and the values which define them) are the central elements of the legal order; there may be some presumptive rules, but on closer examination many purported rules are so

²³ Beatson describes these methods as creating, ‘an intricate mosaic of conceptual formulae’; Jack Beatson, ‘The Scope of Judicial Review for Error of Law’ (1984) 4(1) OJLS 22, 31.

²⁴ Allan Hutchinson, ‘The Rise and Ruse of Administrative Law and Scholarship’ (1985) 48 MLR 293.

²⁵ See Hoffmaster, ‘The Rationality of Judges’ (n 18) and HLA Hart, ‘American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream’ (1977) 11 Georgia L Rev 972, see also John Valauri, ‘Dialectical Jurisprudence: Aristotle and the Concept of Law’ (2010) available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1659924> (accessed 6 October 2014).

uncertain they cannot properly be called rules at all. The charge is then to explain why reasoning with values and rights is not arbitrary or based only on the judge's personal moral views.

This apparent dichotomy between the absolute and the arbitrary has haunted some quarters of contemporary philosophy, legal theory, and social research,²⁶ and it may underlie debates about judicial review. Attempts have been made to dismantle some of the philosophical dualisms and this has implications for both legal theory and empirical legal research methods.

It had been philosophical orthodoxy to propose a distinction between analytic truths, true in virtue of their meaning alone (conceptual analysis would likely fall within this category), and synthetic truths, true in virtue of sense experience (empirical proof in accordance with natural scientific methods). On this basis both conceptual analysis and empirical legal studies are capable of providing truths about law. However, more recently the distinction between the analytic and synthetic has been questioned raising doubts over what if anything is real about the world? Willard Van Orman Quine's rejection of the analytic/synthetic dualism has inspired legal theorists.²⁷

For Quine, analytic truths are true in virtue of their meaning independently of matters of empirical fact. Synthetic truths are true in virtue of empirical facts that ground them. Quine argued that aside from very basic statements of logic, such as, 'a man who is unmarried is an unmarried man';

²⁶ Most notably as argued by HLA Hart, 'Nightmare and Noble Dream' (n 25), but this is also seen as a problem affecting broader Western philosophy. Catherine Elgin, *Between the Absolute and the Arbitrary* (Cornell University Press 1997).

²⁷ WVO Quine, 'Two Dogmas of Empiricism' (1951) 60 *The Philosophical Review* 20.

further statements that depend on synonyms such as, ‘a bachelor is an unmarried man’ cannot be analytically true. He considered, for example, that the true meaning of the second statement (using the synonym) would have to depend on the definition of the synonym (which is likely to be a matter of fact, i.e., who posited it, and where, and how regularly is it applied), or some rules of language (semantic rules), or by prior appeal to the truth of analyticity itself.

To take an example relevant to judicial review; we can say that a decision which is *ultra vires* is an *ultra vires* decision. However, basic logic alone cannot tell us that a jurisdictional error is *ultra vires*; whilst jurisdictional error (or the jurisdictional principle) is often taken as synonymous with *ultra vires*; this equation depends on some prior definition of the synonym jurisdictional error.

Quine argued that the only truths are empirical (synthetic) truths. However, such truths cannot be arrived at by ‘reductionism’, reducing purported truths down to singular statements that can be empirically verified. In Quine’s view, ‘science has its double dependence upon language and experience; but this duality is not significantly traceable into the statements of science taken one by one...The unit of empirical significance is the whole of science’.²⁸ He continues:

...total science is like *a field of force whose boundary conditions are experience*. A conflict with experience at the periphery occasions readjustments in the interior of the field. Truth-values have to be

²⁸ *ibid* 39.

redistributed over some of our statements. Re-evaluation of some statements entails re-evaluation of others, because of their logical interconnections – the logical laws being in turn simply further statements of the system, certain further elements of the field. Having re-evaluated one statement we must re-evaluate some others...But the total field is so under-determined by its boundary conditions, experience, that there is much latitude of choice as to what statement to re-evaluate in the light of any single contrary experience... *Any statement can be held true come what may, if we make drastic enough adjustments elsewhere in the system.*²⁹

For Quine everything is up for grabs in light of experience, even the rules of logic themselves, what is true can only be determined in light of the whole of science. Quine's account fits well with the inter-relation between the values noted in Chapter One as central to judicial review litigation. The values make up a total field (what Ronald Dworkin has labelled a 'geodesic dome'),³⁰ how we interpret one value inevitably impacts upon how we interpret the others.

In relation to legal theory, Brian Leiter has argued that we should follow Quine's understanding of naturalism and recognise, 'that it is within science and not in some prior philosophy, that reality is to be identified and

²⁹ Quine, 'Two Dogmas' (n 27) 39-40 (Emphasis own), this is particularly true of the boundaries between jurisdictional and non-jurisdictional errors, between law and fact, and between proportionate and disproportionate decision-making in the context of judicial review.

³⁰ Dworkin, *Justice in Robes* (n 17) 160.

described'.³¹ Leiter's commitment is not to an, 'austere physicalism' but rather is a 'relaxed naturalism' that is sceptical about neutral conceptual analysis. Scientific investigations about law are not tightly circumscribed; we should choose the concept of law, 'that figures in the most fruitful a posteriori research programs (i.e., the ones that give us the best on-going account of how the world works)'.³² Leiter's project is ambiguous³³ and he does not seem to appreciate that even basic experiments have to begin with some prior (even if unstated) account of the purposes of law. Whilst I share his view that there may be multiple concepts of law (not one universal concept), Leiter accepts that science *cannot* tell us which one to prefer and yet he provides no detailed analysis of any alternative criteria or methods of evaluation.³⁴ I think Leiter is silent or ambiguous on this point because the criteria for choosing or evaluating competing concepts of law are ultimately moral criteria, and this is precisely the conclusion he was trying to avoid by way of his naturalistic turn.

Accepting the demise of the analytic/synthetic distinction can lead to the conclusion that there are no truths out there to be had.³⁵ However, it can also be argued that whilst the demise of the dualisms suggests that there may be no first things independent of other modes of theorising, we can instead contrive or construct categories depending on our interests and ingenuity and what we find

³¹ Brian Leiter, 'The Demarcation Problem in Jurisprudence: A New case for Skepticism' in Beltran, Moreso, Papayannis, *Neutrality and Theory of Law* (n 9) 161.

³² Brian Leiter, *Naturalizing Jurisprudence* (OUP 2007) 134.

³³ Julie Dickson, 'On Naturalizing Jurisprudence: Some Comments on Brian Leiter's View of What Jurisprudence Should Become' (2011) 30(4) *Law and Philosophy* 477.

³⁴ In particular he says we should choose those concepts which provide us with the best ongoing account of how the world works. Leiter is anti-Dworkinian yet this can be understood as a resort to Dworkin's 'best light' interpretation.

³⁵ Rorty's work is often taken as reaching this conclusion, Richard Rorty, *Philosophy in the Mirror of Nature* (Princeton University Press 1979).

useful in a particular context. It is within these constructed categories that judgments as to what is objectively true, useful, fruitful, or best, can be made.

Constructivist philosophers broadly propose that systems of classification are, ‘human contrivances, designed to further diverse ends. They need not, indeed cannot – reflect the antecedent order of nature, for there is no such order to reflect. Rather their rightness is determined by the effectiveness for the purpose for which they are used’.³⁶ On this account:

The world does not privilege any particular likenesses over the rest. What similarities and differences we recognise are determined by the classificatory schemes we devise, schemes which are keyed to our purposes – to the questions we want to answer, the problems we seek to solve, the constraints we want to respect, and the ones we are willing to relax.³⁷

Under the constructivist approach we construct categories, such as distinctions between fact and value,³⁸ between science and non-science,³⁹ and between law and non-law, based on what purposes we want the categories to serve. The same can be said in relation to the key bi-polarities in the context of judicial

³⁶ Elgin (n 26) 12.

³⁷ *ibid* 13.

³⁸ *ibid* 176, ‘the demarcation of facts rests squarely on considerations of value; and evaluations are infused with considerations of fact. So factual judgments are not objective unless value judgments are; and value judgments are not relative unless factual judgments are...tenable judgments of both kinds are at once relative and objective’. 176.

³⁹ David Resnik, ‘A Pragmatic Approach to the Demarcation Problem’ (2009) 31 *Studies in the History and Philosophy of Science* 249.

review; fact/law, jurisdictional/non-jurisdictional error, legality/merits, proportionate/disproportionate, relevant/irrelevant considerations and so on.

The difficulty with constructivism is that it brings its own terminology, of concepts or categories that are ‘useful’, ‘fruitful’, ‘effective’ or suit our ‘purposes’, without additional vocabulary to assess what useful, fruitful, effective, or fit for purpose in the current context might mean. Doubtless the constructivist will respond that we must also construct the categories or concepts designed to test fruitfulness, usefulness, and so on. But it seems to me that the final conclusion will always be one of value; in judicial review this means we are ultimately directed back to the values in Chapter One (among others). However, an insight of constructivism is that we can create our own standards by which the relevance and importance of particular interpretations of value are to be assessed. This may help us avoid the rationalist propensity to be overly abstract, general, and global whilst side-lining the local and particular.

Although Quine was not *per se* a constructivist, he ultimately argued that only scientific (synthetic) truths really exist, his work in relation to the ‘total field’ that is under a constant process of re-evaluation inspired moral and legal constructivists like John Rawls and Ronald Dworkin. Rawls’ notion of ‘reflective equilibrium’ under which we work back and forth between our considered judgments in a particular context and the broader principles that govern them, has echoes of Quine’s tinkering based on sensory experience. The reflective approach will be adopted in this thesis, and in the following Chapter I begin to argue that this approach is characteristic of the development of particular grounds of judicial review and the broader institutions and

procedures of social practice. When a judge crafts or articulates grounds of review from rule of law (or other liberal-democratic) values he is engaging in a constructive reflexive process.

The obvious approach to legal theory with constructivist leanings is that espoused by Ronald Dworkin.⁴⁰ Dworkin develops his account by analogy with an invented community whose members follow what they call the ‘rules of courtesy’. He argues that:

Everyone develops a complex “interpretive” attitude towards the rules of courtesy, an attitude that has two components. The first is the assumption that the practice of courtesy does not simply exist but has value, that it serves some interest or purpose or enforces some principle – in short, that it has some point – that can be stated independently of just describing the rules that make up the practice. The second is the further assumption that the requirements of courtesy – the behaviour it calls for or judgments it warrants – are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point. Once this interpretive attitude takes hold, the institution of courtesy ceases to be mechanical...People now try to impose *meaning* on the institution – to

⁴⁰ It is not appropriate to pigeonhole Dworkin into any particular philosophical categories (such as realist/anti-realist/constructivist) or legal philosophical schools (positivism versus natural law). His work is unique and many of its elements are themselves constructs in part of theorising the objectivity of value.

see it in its best light – and then to restructure it in light of that meaning.⁴¹

It is this form of process that I undertake in the current thesis. Chapter One was concerned with articulating the possible purposes of judicial review in the Administrative Court, in later Chapters I identify and examine relevant social facts, aiming to restructure them in light of the moral *meanings* of judicial review.

Dworkin concludes that; ‘Law’s attitude is constructive: it aims, in the interpretive spirit to lay principle over practice to show the best route to a better future, keeping the right faith with the past’.⁴² His vision is constructivist in the sense that it purports to ‘lay principle over practice’ and to engage with the socially constructed data of legal practice. However, it might be wrong to conclude that Dworkin’s ontology (his view of what really is out there about law and ultimately morality) is constructivist.⁴³ For Dworkin (and for myself) there may be at least some sphere of objective truth ‘out there’ that isn’t constructed by the inter-action of our intuitions and sensory experiences. For me the insight of constructivism is that we can accept the judge’s decision as

⁴¹ Dworkin, *Law’s Empire* (n 2) 47.

⁴² *ibid* 413.

⁴³ Katrien Schaubroeck, *Review - Justice for Hedgehogs*, Meta psychology Online Reviews (2011) 15(35); ‘Though Dworkin urges readers to forget about ‘the pigeonholes’, this reader could not help but wonder whether Dworkin defends a form of...normative constructivism. His dismissal of metaphysics and the existence of real facts to which true moral judgments correspond suggests an affinity with constructivism. But on the other hand, his theory implies that coherence and convergence is wanted *because* value is objective, not the other way around’. Available online: http://metapsychology.mentalhelp.net/poc/view_doc.php?type=book&id=6210 (accessed 6 October 2014).

‘real’ and ‘correct’ even if it is only a best approximation of what is truly out there, law is in this sense an ‘aspirational’ or ‘target’ concept.

Trevor Allan has long adopted a interpretivist methodology for understanding judicial review, most recently noting that; ‘Matters of empirical fact or official opinion obtain their relevance from a theory informed by moral and political values – a theory whose construction is foundational to any useful account of the practice of judicial review’.⁴⁴ Paul Craig also accepts that his method is interpretive, though he questions the serviceability of making one’s account of political values explicit in every context.⁴⁵ Though the work of other scholar’s such as Elliott and Forsyth can be criticised for failing to appreciate the pervasiveness of moral values to understanding judicial review,⁴⁶ their theories can also be understood as constructive interpretations, it is just that they are less apt to openly acknowledge their commitments of political morality (in particular their commitment to the political value of *ultra vires*).⁴⁷

2.5 Socio-legal research: Social scientific positivism, interpretivism, and constructivism

⁴⁴ TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP 2013) 211 and Appendix.

⁴⁵ ‘I have stated...on numerous occasions...that I subscribe to a Dworkinian interpretivist legal theory’. Paul Craig, ‘Theory “Pure Theory” and Values in Public Law’ [2005] PL 440, 440-441.

⁴⁶ See eg, Allan, *Sovereignty* (n 44) 217-233.

⁴⁷ Stuart Lakin, ‘Review: TRS Allan’s *The Sovereignty of Law* (OUP, 2013)’ UK Const Blog (4 February 2014) <<http://ukconstitutionallaw.org/>> (accessed 6 October 2014): ‘While we can agree with Allan that no account of the constitution can be descriptively correct, the various positivist-inspired doctrines...that he attacks in *Sovereignty* need not be understood in this way. They can instead be understood, in line with the method Allan recommends, as *interpretations* of British legal and constitutional practice...a lawyer or judge *arguing from the internal point of view* may have entirely plausible *moral reasons* to...understand judicial review as a discrete set of rules’. (emphasis original).

Just like in legal theory, social researchers have found, ‘almost as many concepts of law as there were theorists, with no apparent means to determine which concept, if any, was the correct one’.⁴⁸

Social scientific positivism proposes that social practices should be approached through the application of objective methods associated with natural science such as measurement, observation, and data gathering. The specific methods adopted are usually forms of behaviourism where the theorist observes and measures the behaviours of participants in the practice.⁴⁹

In its most extreme form a behaviourist approach would exclude as inherently unscientific, any consideration of what participants report as their state of mind when engaging in this behaviour. On this basis it is argued that we can only scientifically understand social phenomena by analysing relations between observed patterns of behaviour. Other less extreme forms of social scientific positivism focus on behaviour as a means to determine what functions are attributable to law and how these are performed, or what structures in society appear to have legal character.⁵⁰

The social scientific concepts of law that have been produced can be divided into two categories, the ‘social group model’, and ‘the state law model’.⁵¹ The central insight of the social group model is that, ‘law consists of and can be found in the regularised conduct or actual patterns of behaviour in a

⁴⁸ Brian Tamanaha, ‘An Analytical Map of Social Scientific Approaches to the Concept of Law’ (1995) 15(4) OJLS 501.

⁴⁹ Tamanaha, *General Jurisprudence* (n 15) 162-166.

⁵⁰ Brian Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Clarendon 1999) Ch 3. ‘Behaviourism and Interpretivism in Complement’.

⁵¹ Tamanaha, ‘Analytical Map’ (n 48) 503-511.

community, association or society',⁵² this requires us to reject the view that law must be necessarily connected to state control. For social group theorists law constitutes the rules that are actually followed by members of a particular social group, usually because of reciprocity felt towards the other members, and not necessarily because sanctions might follow from breach.

The alternative state law paradigm characterises law as a publicly administered system of sanctions and it is likely that many theorists who take this view are influenced by legal positivism.⁵³

Both the community of rules and state law paradigm approaches were based on observation of social behaviour, whilst the former focused on the behaviour of ordinary people within the community, the latter focused on the behaviour of legal officials and legal institutions. The approaches were also united in resting on the intuition that law is ultimately about the maintenance of social order.

Neither approach was successful in providing one universal social scientific concept of law, however, each has important insights. The social group model highlights the gaps between state legal rules and the rules that people in the community actually follow during the course of their social life. The state law paradigm, identified through the behaviour of legal officials, highlights gaps between the law posited in sources such as legislation and precedent, and what legal officials and institutions actually do.

⁵² *ibid* 503.

⁵³ Tamanaha, 'Analytical Map' (n 48) 507 and *General Jurisprudence* (n 15) 137-142, he argues that key state law model theorists (notably Max Weber) must have been influenced by Hart's positivism.

The social scientific approach to law has largely been overtaken by the advent of interpretive social research methods. However, the gaps that can be highlighted by drawing distinctions between scientifically observed behaviour and the conclusions drawn from other methods of analysis (such as conceptual analysis) continue to perform a useful role that will be applied in this thesis. For example, it is a common misconception that all species of judicial review litigation are growing exponentially and that this is well captured, at least in part, by legal theories providing an expansive account of the legitimate province of judicial review and the boundaries of legal rationality. However, even a cursory look at scientifically verifiable facts about the number and type of cases issued relative to the reach of state decision-making, the legal grounds most commonly argued, and the extent to which claimants are actually winning their cases, demonstrates a large gap between the popular expansive account of judicial review (which can include the popular legal theoretical views of constitutionalisation, righting, and the culture of justification) and what can be proven empirically.

Alongside social-scientific empiricism, interpretivist methodology gained prominence in social research as an alternative to the external attitude of social scientific positivism. Its rise is linked to Max Weber's concept of *Verstehen* (understanding); he described sociology as a, 'science which attempts the interpretive understanding of social action in order to arrive at a

causal explanation of its course and effects'.⁵⁴ Hence Verstehen includes both scientific positivist and interpretivist methods. The causal explanation may utilise something akin to natural scientific methods to verify causation, but the causal *explanation* cannot be undertaken without first identifying the interpretive understandings (or attitudes) of the participants in the social practice.

The interpretive notion that we must strive to make sense of the meaning attributed to a certain social practice by the participants in that practice themselves is complemented by the work of phenomenological philosophers who sought to understand how individuals make sense of the world around them and whether (and how) this sense might be separable from the theorist's own preconceptions about the world. This is exemplified by the work of Alfred Schutz:

...the observational field of the social scientist – social reality – has a specific meaning and relevance structure for the beings living, acting, and thinking within it. By a series of common-sense constructs they have pre-selected and pre-interpreted this world which they experience as the reality of their daily lives. It is these thought objects of theirs which determine their behaviour by motivating it. The thought objects constructed by the social scientist, in order to grasp this social reality, have to be founded upon the thought objects constructed by the

⁵⁴ Max Weber, 'The Fundamental Concepts of Sociology' in AM Henderson and Talcott Parsons (trns), *The Theory of Social and Economic Organisation* (The Free Press of Glencoe 1947) 87.

common-sense thinking of men, living their daily life within the social world.⁵⁵

In legal theory the notion that a theorist must at least be able to appreciate the attitude of participants in the practice is referred to as aiming to make sense of ‘internal attitudes’, or adopting the internal point of view.⁵⁶ It is said to be one great advance HLA Hart made over his predecessors, most obviously John Austin, who treated law as a science of observable behaviour (threats followed by sanctions) without reference to participant’s attitudes. Through this recognition of interpretivism and the related internal attitude the concerns of social research about law and the projects of legal theory have been drawn closer together.

Hart characterised his work as ‘descriptive sociology’⁵⁷ and his account of the internal point of view has been directly equated with interpretive methods in social research.⁵⁸ In my view it can no longer be appropriate to make a distinction between the apparently external methods of the social researcher and the internal methods of the legal theorist.

⁵⁵ Alfred Schutz, *Collected Papers I: The Problem of Social Reality* (Martinus Nijhof 1962) 59; see also Tamanaha, *Understanding Law in Micronesia: An Interpretive Approach to Transplanted Law* (Brill Publishers 1993) 76-103.

⁵⁶ This is an attempt to appreciate the normative significance of law from the perspective of those engaged in the practice. For Hart this can be a descriptive activity, even if one is describing an evaluation, Hart, *Concept* (n 10) 244. In Dworkin’s view, which I share, one cannot adopt an attitude that is internal but still somehow dis-engaged; one inevitably joins the practice and proffers an interpretation of its normative (moral) significance along with other members of the practice. *Law’s Empire* (n 2) 64 and *Justice in Robes* (n 17) 155.

⁵⁷ Hart, *Concept* (n 10) preface. Though Stephen Perry has argued that there are tensions between Hart’s broader claim to be engaged in descriptive sociology and his conceptual analysis; Perry, ‘Methodological Positivism’ (n 3).

⁵⁸ Tamanaha, *General Jurisprudence* (n 15) 135-155, it may be that Hart’s project included both intuitive conceptual analysis, descriptive sociology, and normative (moral) argument. See eg, Nicola Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (OUP 2004) 351.

Constructivist social research projects aim to move on from the impasse between the social grouping and state paradigm concepts of law. Two key accounts are those of Foucault and Habermas whose work is based on perceived long-term changes in the nature of the social world.⁵⁹ What these theories have in common is their, ‘claim to construct socio-legal realities that cannot be adequately expressed by ordinary language’;⁶⁰ each challenges epistemological realism (that true knowledge is ‘out there’ and we can come to it independently of sense experience) and methodological individualism (that individual participants are the primary units of social and legal life). Each theory expresses a ‘constructivist social epistemology’ under which, ‘law as an autonomous epistemic subject...constructs a social reality of its own’.⁶¹

Foucault constructs a picture of a ‘disciplinary society’ in which new kinds of knowledge and power have grown up to displace the traditional pre-eminence of legal rationality. Roger Cotterrell explains it thus:⁶²

The prison, the asylum, the school, the medical clinic and other particular institutional sites have been primary foci for the gradual emergence of constellations of knowledge/power in which technical norms, expertise, training and surveillance combine to regulate populations and define the place of individuals as autonomous, responsible subjects.

⁵⁹ Gunter Teubner, ‘How the Law Thinks: Toward a Constructivist Epistemology of Law’ (1989) 23(5) *Law and Society Review* 727.

⁶⁰ *ibid* 728.

⁶¹ *ibid* 730.

⁶² Cotterrell, *Law, Culture and Society* (n 14) 21.

This as a picture of legal pluralism in which the primacy of the state law paradigm no longer holds. Such pluralism is of particular interest to public law where the different characteristics of administrative and legal decision-making regularly rub against each other. Foucault's social theory may provide a better explanation of administrative law and judicial review than traditional accounts such as *ultra vires* and common law constitutionalism, which may ultimately be based on versions of either the state law or social group paradigms respectively.

Habermas argues that we should not seek to separate sociological and legal analyses, what is required is, 'an analysis equally tailored to the normative reconstruction and the empirical disenchantment of the legal system',⁶³ what Cotterell paraphrases as 'law as ideal and reality',⁶⁴ and what I have referred to as the 'dual nature' of law.

Habermas has criticised legal philosophers for failing to properly address the social world, in particular for their neglect of the empirical nature of that world. Ultimately Habermas' substantive theory aims to make sense of the discursive nature of law, locating authentic consensus in a community of discourse rather than individual consciousness.

What Foucault and Habermas's approaches have in common is their shift away from the state law paradigm and their attempt to engage with the idea that there may be a plurality of legal systems, each generating their own norms, inter-acting with each other but nevertheless distinct.

⁶³ Jurgen Habermas, *Inclusion of the Other: Studies in Political Theory* Ciaran Cronin and Pablo De Greif (eds) (MIT Press 1998).

⁶⁴ Cotterrell, *Law, Culture and Society* (n 14) 32.

A significant related challenge facing judicial review in the Administrative Court is the dual importance of globalism (the infiltration of international law and of doctrines from foreign legal systems) and localism (as epitomised by the recent opening of Administrative Court Centres in Birmingham, Cardiff, Leeds, and Manchester). The constructivist social theories may have some call to make better sense of these developments than popular theories of judicial review in England and Wales that are largely based on legal rationality, legal justice, and conceptual analysis.

Harry Arthurs work on administrative justice and legal pluralism in 19th Century England uncovered a struggle between particular jurisdictions, such as between national and local courts, and between courts, other arbitration systems, and commercial communities.⁶⁵ Much the same jurisdictional contestation afflicts contemporary public law and will continue to do so especially given the de-centralisation of judicial review and its diffusion among a number of different bodies (most notably the Upper Tribunal (UT)). Under such an account law is not a unified hierarchical system, but is comprised of a plurality of different communicative networks, discursive groupings, or knowledge bases, in much the same way as the theories discussed above suggest. This might provide a better fit with recent focus on the anti-hierarchical relationship between the Administrative Court and the UT.

Despite their appeal the implications of legal pluralist social theories for judicial review are still relatively ambiguous. Martin Loughlin has tried to

⁶⁵ HW Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press 1985).

adapt these ‘systems’ or ‘network’ accounts to public law. He argues that those who analyse the functions of public law (such as Harlow and Rawling) have no concern for its value and that those who take a normative approach (and are concerned with the ideal of legality) have but one function in mind (namely limiting or subordinating government to law).⁶⁶ In my view this initial diagnosis is wide of the mark and he attributes positions (or disinterest) to scholars that are misguided. Nevertheless, Loughlin’s aim to provide a theory that is interpretive (related to human purposes), empirically grounded, critical (by which he means subject to rational scrutiny) and historically sensitive, aligns with the aims and methodology of this thesis.

Loughlin concludes that:

...public law is a set of practices concerned with the establishment, maintenance and regulation of the activity of governing the state, and the nature of these practices can be grasped only once that activity is conceptualised as constituting an autonomous sphere: the political realm.⁶⁷

I think this image of public law as an autonomous sphere discloses the shortcomings of systems theory. Loughlin’s account must be based on some minimal prior analysis (even if un-stated) that helps us identify the relevant grouping or knowledge base (does it include just courts, or also administrators

⁶⁶ See eg, Martin Loughlin, *The Idea of Public Law* (OUP 2003) 153-164 and *The Foundations of Public Law* (OUP 2010) 460-465.

⁶⁷ Martin Loughlin, ‘Theory and Values in Public Law: An Interpretation’ [2005] PL 48, 58.

and politicians, then what is a court what is an administrator, why should we be concerned with what they are doing, and so on)?

Loughlin supposes that we must set some objectives by which to interpret the value of our theories, he considers this to be their serviceability as maps for navigating the terrain of the subject. This brings me back to my knot analogy, if we can't know what a knot is until we know its purpose, I suspect the professor of outdoor education who made this comment would say the same is especially true of a map. Both the contours of Loughlin's map and its precise purpose may be too abstract to be of much assistance.⁶⁸ Similarly the map analogy assumes there is a precise terrain out there to be mapped, whereas I take the alternate view that public law rests on an ocean of shifting tides that are constantly turning. On this understanding we need coastal navigators to constantly adjust our course based on shifting values triple-fixed to the basic static concepts of democratic legitimacy (including authority), expertise, and institutional constraints.

Conceiving of different elements of public law such as courts, tribunals, and administrators, as particular institutions with defining characteristics is important, but it cannot be the endgame, there will still be questions of value at stake in determining whether and how these characteristics should guide or decision-making in specific contexts.

2.6 The methodology of this thesis

⁶⁸ This point is made well by Tony Prosser in, 'Journey Without Maps? Review of Martin Loughlin: Public Law and Political Theory' [1993] PL 346.

In this thesis I follow a three-stage process of constructive interpretation drawing upon an account developed in relation to law by Natalie Stoljar,⁶⁹ relying on the broader philosophical work of Sally Haslanger.⁷⁰

Under this approach the theorist uses intuition and general knowledge of the subject to articulate *manifest* concepts, these render more explicit what she intuitively believes to be implicit in the practice. Numerous *manifest* concepts may fall out of different intuitions about the purposes and functions of judicial review; these concepts, though they may later turn out to be false, provide a starting point for further interpretation.

I use the looser terminology of *manifest* theories and/or *manifest* interpretations to describe those accounts of judicial review that are intuitively most prominent, as Dworkin might put it, these are examples of what constitutes judicial review if anything does. The most common *manifest* theories in relation to judicial review are various forms of *ultra vires*, common law constitutionalism, and more recently legal and political constitutionalism, and the culture of justification (including the reformationist or righting accounts); one might also include here an interpretation under which judicial review is said to be about public wrongs and not about individual rights or public goods.

⁶⁹ Natalie Stoljar, 'What Do We Want Law To Be?' (n 17).

⁷⁰ Sally Haslanger, 'Gender and Race (What) Are they?; (What) Do We Want Them to Be?' (2005) 34 *Nous* 31.

The second step is to disambiguate the *manifest* concepts rendering them more accurate by examining social practice in order to investigate the phenomena we use them to track.

Under Haslanger's tripartite approach this 'descriptive' stage aims to, 'develop potentially more accurate concepts through careful consideration of the phenomena, usually relying on empirical or quasi-empirical methods'.⁷¹ The descriptive strategy aims to uncover an *operative* concept, which is a more accurate account of how the paradigms identified by the *manifest* theories/interpretations function in the 'real' world of social practice. I am wary of referring to this as a descriptive project, because the interpretive approach to doing social research that I will be using throughout this thesis not only involves observing and describing behaviour, but also aiming to make sense of the internal point of view of the participants in the practice. Hence I shall refer to this as an empirical strategy, designed to uncover an *operative* theory of judicial review in the Administrative Court. I will rely on primary data collection and analysis as well as on an assessment of some existing empirical data. It is admitted that the data collection will have its limitations, however, the crucial concern is that the data selected, and any generalisations made about the practice of Administrative Court judicial review and its participants, are consistent in the context of this study and across other studies to which comparisons will be made.

Where *manifest* interpretations conflict or where different *operative* interpretations are proposed that are each equally illuminating, an additional

⁷¹ *ibid* 12.

project is to identify a *target* or aspirational concept (in my terminology a *target* theory or interpretation), this is the interpretation that provides the best value-laden justification for judicial review in light of social practice. This *target* interpretation aims to make better moral sense of the practice, including the sense in adopting this particular interpretation of it rather than other competing interpretations. The following is a non-legal example of my tripartite methodology in operation.

A school may have a set of rules about what constitutes lateness, in most schools this is expressed in the rule that a child is late if they arrive after the morning bell has sounded, let us say that morning bell is at 8:30am. When questioned, the teachers and other school staff responsible for implementing the lateness policy will say that the definition of lateness is to arrive after the 8:30am bell has sounded. This is their *manifest* interpretation.

Despite generally adhering to this definition, the actual behaviour the term lateness is taken to track is variable from school to school in the local authority area, and from class to class, and teacher to teacher. In some schools the children may line up outside after the bell but before proceeding to their classrooms so as to enter the school building in an orderly manner. Some children may arrive after the bell, but still in time for the start of the class and they would not be marked as late.

This disambiguation based on practice is part of the *operative* social interpretation, but it also invites the further question why are these children not marked as late even though they have arrived after the bell has sounded? It invites us to consider, what does it really mean to be late, and why does it

matter? We can ask the teachers these questions as part of the empirical inquiry aiming at an *operative* interpretation, but this still only tells us what the teachers mean or what they think they mean in the context of lateness. It does not tell us what it means to be late. In this case we might say that it matters because children arriving at different times are disruptive to the learning environment, especially if they arrive well after the class has started. Then lateness is really a function of how disruptive the child's joining in with the class at a particular moment is going to be. However, this is not the only way to understand lateness, it might be argued that children must be in school once the bell sounds because they ought to be off the streets during the whole school day otherwise they could be disruptive to others in the community. This seems to correspond more to the *manifest* interpretation of being in school when the bell sounds, not the teacher's *operative* interpretation of arriving for class at a time that is not disruptive. One might also argue that children should not be late because they would miss valuable learning time (when instructions are given at the beginning of lessons) and that this would be detrimental to their development and future prospects.

The simple idea of being late for school opens up a range of different normative arguments (at least some of them being moral arguments). Once we consider these arguments, about order (in school and out), disruption, and the best interests of the children (individually and as a class) we might want to revisit our definition of lateness and corresponding policy. Perhaps to something like, lateness occurs when pupils arrive after class has started

(without genuine excuse of course – and we could have an additional discussion of what constitutes a genuine excuse).

This final stage is an ameliorative or reforming inquiry directed towards producing a *target* interpretation. The aim, just as with the empirical stage, is to develop more accurate concepts, but this time, ‘the theorist evaluates the phenomena using a normative and justificatory strategy to characterise its purpose’.⁷²

Here again we come up against the problem, what should guide the choice, more specifically (including in the case of judicial review) does that choice necessarily require moral argument? My best answer at present is; what else would guide the choice if not moral argument?⁷³ In the context of judicial review, the matter is perhaps simpler because the different *target* interpretations that have been propounded are either proposed openly on the basis of moral value (the values of political morality outlined in Chapter One) or they can be interpreted as having moral value.

Elsewhere I have argued, following Liam Murphy, that the choice of a *target* interpretation should be based on the ‘practical-political’ or ‘beneficial moral’ consequences that might flow from adopting a particular theory of law in a certain context.⁷⁴ Murphy suggested that the, ‘way to resolve the conceptual disagreement between Hart and Dworkin [i.e. between positivism and idealism] must therefore be to evaluate the practical-political reasons that they offer for their respective positions. We must approach the traditional

⁷² Stoljar ‘What Do We Want Law To Be?’ (n 17) 244.

⁷³ Nason, ‘Practical-Political Jurisprudence’ (n 9) 440-449.

⁷⁴ *ibid.*

question about the concept of law as a practical aspect of political philosophy'.⁷⁵ Dworkin's position has always been that jurisprudence is inseparable from political philosophy. He argues that the old debate, between legal positivism and natural law, 'makes sense only if it is understood as a contest between different political theories... The argument is not conceptual in our sense at all, but part of the interpretive debate among rival conceptions of law'.⁷⁶

For interpretivist methodology generally the moral reasons for favouring a particular account of law are always the central concern in establishing the merits of that account. I was initially drawn to Murphy's instrumentalist approach because it suggests that we ought to empirically assess the social consequences of adopting a particular theory of law. However, Murphy was never especially clear about the instrumental criteria or tests to be applied and later abandoned the whole project arguing that convergence on a particular theory based on its predicted beneficial consequences was too much to hope for. One response to Murphy is that we need not look for a universal theory of law, but we can look to convergence in specific contexts, such as judicial review in the Administrative Court in the present thesis.

A constructive interpretivist approach is ultimately about solving practical problems; in my case it is about developing an analysis of the social practice of judicial review that provides a better fit with empirical facts and

⁷⁵ Liam Murphy, 'The Political Question of the Concept of Law' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (OUP 2001) 371, 373.

⁷⁶ Dworkin, *Law's Empire* (n 2) 98.

with the contested nature of the values at stake; I think my account also assists in the ‘struggle for simplicity’⁷⁷ in administrative law.

2.6.1 Specific methodology

2.6.1.1 Administrative Court data analysis

The Administrative Court IT system (the Crown Office Information Network – COINS) records key data about all cases issued in the Administrative Court. This information includes the date of issue, the location of issue,⁷⁸ the Type⁷⁹ and Topic⁸⁰ of claim, the name and address of the first claimant and their legal representatives (solicitor and/or barrister) where instructed, and the name and address of the defendant (and their legal representatives where instructed). The caseload analysis presented in this thesis draws on COINS data from and including 1 May 2007 to and including 30 April 2014.⁸¹ The Administrative Court officials refer to this information as ‘Receipts’ data, i.e. claims received by the Administrative Court, and I shall adopt this terminology.

Alongside this newly collected data, I refer to previous empirical studies in order to draw longer-term comparisons. Wherever there are specific

⁷⁷ Sir Robin Cooke, ‘The Struggle for Simplicity in Administrative Law’ in Michael Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (OUP 1986) 1.

⁷⁸ London or one of the four local Centres.

⁷⁹ A classification given by Administrative Court officials categorising the application as either a judicial review claim or one of a number of species of statutory appeals and applications.

⁸⁰ A classification used by Administrative Court officials, this time referring to the subject matter of the claim such as asylum, immigration, planning, education, prisons and so on.

⁸¹ This period coincided with the time spent developing the thesis proposal and the research period of my studies. It also coincides with important changes to the procedures and institutions of judicial review.

limitations to the data (for example where the fields or time periods of previous data analysis do not match up to the current research, or where there are gaps in the data that could be collected) these will be noted and accounted for.

2.6.1.2 Surveys

The surveys were significantly directed towards inviting practitioner views about the impact of opening new Administrative Court Centres outside London (a substantial recent reform to the judicial review procedure). However, the surveys also collected basic data about the activities of practitioners, the subject areas of law in which they specialised (e.g., asylum and immigration, prisons, planning, education), and the proportion of their time spent advising clients prior to the issue of claims (as well as preparing for court, and presenting and defending claims in court). In this regard the data is not limited to an assessment of views on regionalisation specifically, it also provides a useful snapshot of the core activities of a sample of specialist practitioners.

An electronic survey of solicitors and barristers was conducted during mid-2009. In relation to solicitors, a sample was drawn from a Law Society database of those professing some degree of specialisation in public law. The sample consisted of 300 solicitors based outside London and the South East of England⁸² and 180 solicitors based in London and the South East of England.

⁸² The geographical boundaries of each region are defined in CPR PD 54D Administrative Court (Venue), para 2.2: ‘Any claim started in Birmingham will normally be determined at a court in the Midland Region (geographically covering the area of the Midland Circuit); in Cardiff in Wales; in Leeds in the North-Eastern Region (geographically covering the area of the

The sample was initially representative in that it included solicitors firms of a range of sizes (from sole trader to 80 partners or more) from Wales, the English regions, and from London. However, a number of solicitors were either no longer practicing, or no longer handled public law claims. On this basis the number of individual solicitors ultimately invited to complete the electronic survey was 225 outside London and the South East of England, and 150 based in London and the South East of England. Forty-five solicitors from outside London and the South East responded (a response rate of 20%) and 25 solicitors based specifically in London (not in the South East) responded (a response rate of 17%).

A different e-survey was constructed to invite the views of specialist barristers. The sample of barristers was developed by Internet research aimed at identifying public law (particularly judicial review) specialists based both inside and outside London. In some cases the email addresses of individual barristers were available, in others individuals were contacted via the chamber's head clerk (on this basis the final number of recipients cannot be precisely stated). It was anticipated that the survey reached approximately 280 barristers (80 of whom were based outside London); including barristers from the most prominent sets of chambers both inside and outside London. Responses were received from 32 barristers based outside London (a response rate of 40%) and from 48 barristers based in London (a response rate of 24%). The barristers

North Eastern Circuit); in London at the Royal Courts of Justice; and in Manchester, in the North-Western Region (geographically covering the Northern Circuit)'. Her Majesty's Courts and Tribunals Service provided detailed maps of relevant boundaries.

who responded had a range of experience from between two and over 20 years call; the average years call of respondents was 14.

2.6.1.3 Interviews and workshop

In order to explore some of the recent challenges facing judicial review in more depth, semi-structured interviews were conducted with practitioners specialising in AJRs and other public law claims. Interviews were conducted with 25 solicitors and 25 barristers from variously sized firms and sets of chambers both inside and outside London. In addition, a number of less formal discussions have taken place with particular specialist solicitors and barristers over the course of the research.

A workshop was also held at Bangor University's London Centre in March 2013; this brought together Administrative Court officials, lawyers, judges, practitioners, and academics.

Chapter Three: Historical Context

In Chapter One I analysed the purposes and values that characterise judicial review in the Administrative Court concluding that a key purpose is to expose and develop a *core of judicial justice* based on equal concern and respect which may include a *right to just administration*. In Chapter Two I proposed that the values and purposes of judicial review could be linked to social practice by way of a constructive interpretive method designed to lay values over practice. Appreciating the history of social practice is an important part of this process and in this Chapter I chart the development of relevant institutions, procedures, and some key legal doctrines.

The history of judicial review and the broader jurisdiction of the Administrative Court have been marked by tensions as to the constitutional allocation of power between different branches of state, the need for specialist institutions of law and administration, and the need to promote swift and efficient access to justice whilst discouraging vexatious claims.¹ Given the complexity of resolving these tensions it has been argued that public law procedures and remedies in the Administrative Court owe their development to judicial policy and concrete problems in the administration of justice, not to some coherent framework of values.²

¹ Rawlings similarly refers to the, ‘tension between a judicial desire to open access to the machinery more widely, so facilitating the vital normative function, and a managerial instinct to protect the efficient functioning of the process by keeping litigants out’. Richard Rawlings, ‘Modelling Judicial Review’ (2008) 61(1) CLP 95, 97.

² See eg, Ivan Hare, ‘The Law Commission and Judicial Review: Principle Versus Pragmatism’ (1995) 54(2) CLJ 268. Laws LJ has proposed that there is an ‘un-principled’ distinction between the lawful extent of the High Court’s jurisdiction, and circumstances to which the

I argue alternatively that the judicial review procedure and the broader jurisdiction of the Administrative Court have developed in a principled manner based on the influence of competing interpretations of particular values. A contentious or deficient interpretation of relevant principles (and values) is still an interpretation of principle rather than a policy choice.

Institutional and procedural reforms, and case law precedents, should not be described as unprincipled because they happen to respond to practical problems, if that were true much of our justice system would be unprincipled.

For present purposes I rely again on Ronald Dworkin's distinction between principle and policy.³ A matter of principle concerns the identification and protection of individual rights, and a matter of policy addresses whether a decision or course of action could lead to an enhanced state of community to which no individual can be said to have a right. For example, where an immigrant argues that appeal routes are insufficient to protect him from administrative impropriety, a matter of principle arises because his right of access to justice is engaged, as are the access rights of others competing with him for scarce judicial resources. On the other hand, whether the UK should

jurisdiction could lawfully extend but where judges will refuse to exercise it as a matter of discretion, *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin); [2010] 2 WLR 1012, [94] and [98]. Sedley LJ also drew a distinction between legal principle and judicial policy, arguing that the role of the courts is to 'arrive at a proper judicial policy' as to the appropriate balance between accessing judicial review and the autonomy of other courts and tribunals. *R (Cart) v Upper Tribunal* [2010] EWCA Civ 859; [2011] 2 WLR 36 [35]. However, Guest notes that such references to 'judicial policy' or the 'policy of the common law' need not be seen as controversial and are generally based on the notion that judges have found (from experience) that it makes good sense to take a certain line, as a matter of expediency. All the court is really doing here is bowing to precedent. Stephen Guest, 'The Role of the Courts in the Making of Policy' (2006) 26(6) *Univ Queensland L J* 307, 319.

³ See Chapter One 142.

allow immigration at all, and if so whether the number of immigrants should be capped, is a matter of policy.⁴

3.1 The King's Bench as predecessor to the Administrative Court

The Administrative Court forms part of the Queen's Bench Division of the High Court whose origins can be traced back to the late 12th and early 13th Centuries when the *Curia Regis* (a King's Court/King's Council in which law and administration were largely fused) separated into the Court of Common Pleas and Court of King's Bench. The Court of Common Pleas was the first permanent centralised court to spin off from the *Curia Regis*. The King's Bench began its life as an itinerant court following the King as he exercised his prerogative of dispensing justice around the realm. As it became less convenient for the King to preside in person (not least due to the growing number of suits) the role became exclusively that of his judges.

The Court of Common Pleas largely dealt with cases between individuals, whereas the King's Bench heard a mix of claims; such as where the Crown was directly implicated (Royal Charters, feudal interests, and trespass against the King's peace), where one of the parties was a prominent public person such as a baron, bishop, or royal official, and cases which had been removed from other courts due to some possible miscarriage of justice, or some

⁴ This example is adapted from *R (Cart) v The Upper Tribunal* and *R (MR (Pakistan)) (FC) v The Upper Tribunal (Immigration & Asylum Chamber) and Secretary of State for the Home Department* [2011] UKSC 28; [2012] 1 AC 663.

new or complex question of law (the King's Bench was not technically an appellate court).

There was tension between the Common Pleas (as an increasingly professional body) and the King's Bench, the latter being influenced by Royal resistance to the authority of professionals and specialists (in law and governance) that might ultimately damage the King's ability to impose his will.⁵

The King's Bench is nowadays seen as synonymous with the inherent supervisory jurisdiction to assess the lawfulness, or legality, of decisions and actions taken by inferior courts and other types of public bodies. However this jurisdiction can likely be traced back prior to the establishment of the King's Bench and the function was never specifically reserved to it. The Common Pleas and the Court of Chancery, determined some of the most important cases that would later come to be seen as part of our administrative and constitutional law, and Sir Edward Coke, a prominent advocate of the judicial control of public power, was once removed as Chief Justice from the Common Pleas to the King's Bench on the basis that he could do less damage there.⁶

The supervisory work of the King's Bench came to be dominated by the writs of *certiorari*, *mandamus*, and *prohibition* (now known as quashing, mandatory, and prohibiting orders). The history of these writs has been described as, 'a complex and tortuous tale, embodying not so much a

⁵ SA De Smith, 'The Prerogative Writs (1951-1953) CLJ 11, 40; Ralph Turner, 'The Origins of the Common Pleas and King's Bench' (1977) 21(2) Am J of Legal History 238, 239; and see generally AH Manchester, *A Modern Legal History of England and Wales, 1750-1950* (Butterworths 1980).

⁶ *Brownlow's Case* – (1615) 3 Bulst 32.

continuous narrative as a collection of dicta and incidents'.⁷ De Smith argues that 'most modern writers'⁸ classify the writs as prerogative on the basis that they were originally issued only at the suit of the King. However, it may be more likely that the term prerogative referred to their close connection with the King's prerogative of justice and early judicial uses of the writs had been broadly aimed at rectifying individual wrongs done to subjects.⁹

The writs were not always exercisable as of course by any applicant; more often they were considered to be writs of grace that required permission to proceed (either given by a judge or the King). The notion of a leave or permission stage in modern judicial review proceedings is not novel, nor is the conflict between widening access to justice, court resources, specialisation, and constitutional authority. As De Smith has noted of Lord Chancellor Bacon's reforms in 1618:

The primary object of this reform was to check abuses of legal process by dishonest and vexatious persons whose machinations were bringing the administration of justice into disrepute. Parliament had indeed already made several attempts to erect safeguards but it seems clear that Bacon's reform had another object: that of maintaining the principle that

⁷ De Smith, 'Prerogative Writs' (n 5) 55.

⁸ *ibid* 40.

⁹ *ibid* 41.

writs closely associated with the rights of the Crown should not issue...to the subject as of course.¹⁰

Procedural hurdles introduced by parliament and a judicial desire to ensure that cases closely connected to powerful state actors are primarily determined by a small cadre of expert judges is replicated in contemporary debates.¹¹

De Smith's account of Bacon's reforms alludes to the problem of increasing caseloads and the proportionate use of court resources (concerns at the heart of the contemporary debates over the purposes and value of judicial review). This is important evidence because it is otherwise difficult to determine the circumstances of social practice, such as how many prerogative writs (and other types of claim against public bodies) were issued and what kind of impact such litigation might have had on individual claimants and defendants.¹²

The expansion of *certiorari* made the greatest contribution to the developing jurisdiction of the King's Bench. Under the leadership of Holt CJ the Bench was inundated with applications to quash the decisions of justices and other bodies exercising administrative functions. In De Smith's view the Bench became:

¹⁰ *ibid* 43. This has parallels with Lord Diplock's principle of 'procedural exclusivity', *O'Reilly v Mackman* [1983] 2 AC 237, that remedies against public bodies should only be sought via the judicial review procedure in the High Court.

¹¹ Chapter Four 197-235 and Chapter Five 253-264 and 273-274.

¹² The National Archives hold files of writs issued in the King's Bench from the 13th Century onwards. The number of court files of writs and returns of service survive in large numbers until 1660, the number of file series' grew slowly at first but after 1549 it expanded rapidly, reaching a peak around 1630. The majority of files for the 18th and 19th Centuries have been destroyed. National Archives online: <<http://www.nationalarchives.gov.uk/records/research-guides/kings-bench-1200-1600.htm>> (accessed 6 October 2014).

a supreme court of administration, supervising much of the business of local government by keeping subordinate bodies within their legal limitations by writs of *certiorari* and prohibition, and ordering them to perform their duties by writs of *mandamus*. The modern High Court has succeeded to much of this jurisdiction, and there can be no doubt that the absence in the common-law systems of a distinct body of public law, whereby proceedings against public authorities are instituted only before special administrative courts and are governed by a special body of rules, is *directly traceable to the extensive use of prerogative writs by the Court of King's Bench*.¹³

The King's Bench worked to fill a practical gap in the administration of justice, but it is less clear whether there was any consistency in principle¹⁴ to its exploits, in particular whether its decisions reflected any higher order of values giving rise to specific legal rights. The reach of the King's Bench jurisdiction was determined by a select group of judges and Monarchs influenced by their own interpretations of justice and authority (sometimes self-interestedly so), and by the need to guard court resources.

Whilst De Smith concludes that there is no satisfactory answer to what constitutes a prerogative writ, Dawn Oliver has argued that the writs issued

¹³ De Smith, 'Prerogative Writs' (n 5) 48 (emphasis own).

¹⁴ I take here Dworkin's account under which individuals have rights that flow from 'past political decisions' (which include legislation, precedents and other legal materials) that can be morally justified by some coherent interpretation of values. An account will be consistent in principle if it properly respects this framework of rights. Dworkin, *Law's Empire* (new edn, Hart 1998) 219-224.

through the King's Bench were primarily concerned with doing justice in the public interest where no other remedies were available or appropriate in relation to both public and private powers.¹⁵ She cites *R v Baker* (1762) where Lord Mansfield noted in relation to *Mandamus* that; '...it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one...Within the last century, it has been liberally interposed *for the benefit of the subject* and the *advancement of justice*...If there be a right, and no other remedy, this should not be denied'.¹⁶ A.T. Carter defines the early King's Bench jurisdiction as being; 'to correct all crimes and misdemeanours that amounted to a breach of the peace, the King being then plaintiff, for such were in derogation of the Jura regalia; and to take cognisance of everything not parceled out to the other courts'.¹⁷

Despite the hotchpotch caseload, rather than being unprincipled, the Court's jurisdiction can be characterised by competing interpretations of principles. Three particular principles stand out because these are also relevant to contemporary debates; these are authority, justice (proportionate justice especially), and expertise.

First, the Monarchs (and members of the judiciary) may have seen moral value in maintaining *authority* over cases touching the interests of the Crown and broader public justice within one institution (the Monarch or the Bench in his name) because in turbulent times they viewed having an

¹⁵ Dawn Oliver, *Common Law Values and the Public – Private Divide* (CUP 1999) 43-47.

¹⁶ 3 Burr 1265, 1267, see also *Bagg's Case* (1615) 11 Co Rep 9, 98a (Coke CJ) (emphasis own).

¹⁷ AT Carter, *History of English Legal Institutions* (Butterworths 1906) 85.

authoritative final answer to questions of justice as essential to social order, many of these historical claims involved breaches of the peace.

Second, consideration of court resources is not unprincipled; it is in the interests of *justice* that resources are directed to the most deserving cases. The question is not whether the right of access to justice can be limited by resource considerations, it is rather, what does the right of access to justice really mean taking into account all relevant considerations (which include social facts about resources).

Third, concern for *expert* decision-making is not unprincipled, whilst it may mean more power and more coins in the coffers for particular judges and lawyers, it can lead to the efficient resolution of particular cases, and coherent development of legal principles, enhancing justice and legal certainty.

The history of administrative law and the jurisdiction of the King's Bench might appear unprincipled to those who believe that law itself was an unprincipled enterprise in the medieval and early modern periods. Commentators have described this as a time in which the judiciary, the King, and the nascent legislature were united by a common goal of keeping the political show on the road.¹⁸ The courts were accommodating of the King's justice and accepted their own political limitations. Under this account the common law may have been rooted in artificial reason, but this was not based on intuitive rational principles, rather on practical knowledge acquired by

¹⁸ Martin Loughlin, *Sword and Scales: An Examination of the relationship Between Law and Politics* (Hart 2000) 218-220; Sean Coyle, 'Positivism, Idealism and the Rule of Law' (2006) 26(2) OJLS 257, 258; 'Legalism and Modernity' (2010) 35 AJLP 55, 66-70 (emphasising the importance of habit and tradition alongside idealistic moral rationality).

education in traditional behaviour.¹⁹ The judge was a craftsman not a philosopher and rules were cribs not fonts of knowledge.

3.2 Modern constitutions

In the early the modern period the notion of individuality gained further prominence as a defining feature of humanity, though the primary concern of law was still to assist in keeping the social and political show on the road,²⁰ rather than to police the boundaries of individual freedoms or rights. In hindsight one can trace the development of positivism and idealism as legal and political theories designed to maintain social harmony in different ways.

From the 16th Century onwards we see the growth of what we now term positivism, most prominently Hobbes' understanding of law as an instrument of social rule justified by authority.²¹ Some judges had expressed the idealistic view that common law reason could control parliamentary power and that statutes could be struck down if contrary to the moral reason of the common law.²² However, it is debatable whether such judicial pronouncements were merely meant as rules of construction (that judges should construe statutes in

¹⁹ Coyle 'Positivism and Idealism' *ibid* 258, this is: '...a form of scholarship for which precedent and custom, rather than rules or rights supplies the ground of authority and justification'.

²⁰ Coyle, 'Legalism and Modernity' (n 18) 57-62.

²¹ Though Hobbes' status as a positivist is disputed given that he believed the Monarch was under an obligation to rule in accordance with certain natural laws, see eg, John Finnis, 'Natural Law: The Classical Tradition' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP 2002) 1.

²² *Dr. Bonham's Case* (1610) 8 Co Rep 107a, 118a (Coke).

accordance with common law reason so far as possible) much like current modified *ultra vires*.

After the Restoration, Parliament became a more representative and more powerful institution. It was during this time (the later 17th and early 18th Centuries) that the writings of commentators such as Locke and Montesquieu were taken as the *imprimatur* for developing modern constitutions. These writings were in the idealist tradition in that authority was not determined by the social fact of power, but by the legitimate moral conditions under which power could be established and wielded.

It is questionable how much impact these constitutional changes had on the development of what is now recognised as administrative law. It may be that notions of a more balanced constitution influenced judges to expand the inherent supervisory jurisdiction to newly developed public bodies.²³ However, when this jurisdiction is understood as doing justice for the individual in the name of the common good where no other legal remedy is available or appropriate, it can be seen as pre-dating modern constitutional discourse with its focus on individual rights. On this basis the new constitutional changes may have set in train a shift of emphasis from judicial supervision based on public justice for the broader good, to supervision based on the part of justice that is most concerned with individual rights.

²³ HWR Wade and CF Forsyth, *Administrative Law* (11th edn, OUP 2014) 10-11. Forsyth traces the development of modern administrative law to the latter half of the 17th Century in particular because two of the most significant principles of contemporary administrative law, that public bodies must act within the boundaries of their delegated powers and adhere to the tenets of natural justice, were crystallised in case law around this time. However, he does not tie this account to the influences of new constitutional theory.

On the modern constitutional account, judicial review also includes constitutional review whereby judges may strike down primary legislation as incompatible with constitutional principles and rights. There is no consensus as to whether the common law inherent supervisory jurisdiction extends to constitutional judicial review.²⁴ Despite the symbolic constitutional importance of this issue some senior judges would rather it remain ‘academic’.²⁵

3.3 The ‘dark ages’ of administrative law?

It is difficult to assess the practical impact of the inherent supervisory jurisdiction in the 18th and 19th Centuries, largely because records of the number of writs issued in the King’s and Queen’s Benches during the larger part of this period have been destroyed. Wade and Forsyth describe the 18th Century in particular as a, ‘period par excellence of the rule of law’²⁶ when the role of the justice of the peace in controlling local government led to the development of a rich jurisprudence that forms the bedrock to many more modern incantations of principle.²⁷

A key case from the 19th Century was *Cooper v Wandsworth Board of Works*²⁸ where Byles J held that in the absence of statutory wording supplying a right to a fair hearing; ‘...the justice of the common law will supply the

²⁴ See Chapter One 75-77.

²⁵ *Cart and MR* (Supreme Court) [73] (Lord Phillips); ‘The proposition that parliamentary sovereignty requires Parliament to respect the power of the High Court to subject the decisions of public authorities, including courts of limited jurisdiction, to judicial review is controversial. Hopefully the issue will remain academic’.

²⁶ Wade and Forsyth, *Administrative Law* (n 23) 10.

²⁷ *ibid* 90-91.

²⁸ (1863) 14 Common Bench Reports (New Series) 180.

omission of the legislature'²⁹ (it is worth noting that this case originated in the Common Pleas, not the Queen's Bench). Also in the 19th Century we do see reference to the existence of an administrative law, having expanded alongside various extensions of state power.³⁰

Judicial development of relevant legal principles in the mid-19th Century has been attributed to the need to control newly established bodies such as boards and commissions overseeing the operation of railways, docks, and canals. Sir Stephen Sedley has argued that these, 'bodies were perceived by the propertied classes as dangerous invasions of individual liberty'³¹ and that the judiciary utilised *certiorari* and *mandamus* to control their regulatory decisions. A continuing theme of this period (and later in the dark ages) was the use of a judicial review type power to protect private law rights. For Sedley many of the key principles of public law are attributable to Victorian judges inspired by liberal individualist political theories prioritising respect for property rights.

The early 20th Century is widely described as a dark period in the history of administrative law,³² yet it is during this time, 1929 to be precise, that the first specific administrative law text was published.³³ The darkness seems to relate to the nature and extent of specifically judicial control of the

²⁹ *ibid* 194.

³⁰ FW Maitland, *The Constitutional History of England* (Lawbook Exchange 1908) – from lectures first compiled in 1888.

³¹ Sir Stephen Sedley, 'The Common Law and the Constitution' (1997) 19(9) *London Review of Books* 8, 9.

³² Robert Stevens, *The English Judges: Their Role in the Changing Constitution* (Hart 2002) 19, Wade and Forsyth, *Administrative Law* (n 23) 11-14.

³³ FJ Port, *Administrative Law* (Longmans, Green & Co 1929).

administrative state, perhaps losing sight that administrative law itself has a much broader compass than just the inherent supervisory jurisdiction.³⁴

Whilst some European countries had developed specialist administrative courts, applying unique legal principles to the exercise of public power, in England and Wales the idea of a separate administrative court developing principles of public administrative law appeared contrary to Dicey's account of the rule of law and separation of powers. Dicey was wary that so-called *droit administratif*, special legal rules and procedures applying only to the administrative branch of the state, would offend the rule of law postulate that state officials and individual citizens should be equally subjected to the ordinary common law. He was also wary of the limited distance between administrative policy-making, policy-application, and adjudication, in some continental legal systems.³⁵ Dicey's dislike of *droit administratif* counselled against the development of a specialist administrative law, but worse his account of parliamentary sovereignty seemed also to limit the exercise of the inherent supervisory jurisdiction.

In the 1930s Lord Shaw declared that even to impose standards of procedural fairness on administrators would be inconsistent, '...with efficiency, with practice, and with the true theory of complete parliamentary responsibility for departmental action...that the judiciary should presume to impose its own

³⁴ See 160 below.

³⁵ This was also characteristic of the tribunal system in England and Wales and it was only with the advent of the Tribunals Courts and Enforcement Act 2007 that the final connections between some tribunals and their sponsoring departments were severed; s 1 'Independence of tribunal judiciary'.

methods on administrators or executive officers is a usurpation'.³⁶ On the other hand Lord Hewart was acutely aware of the developing administrative state, the limitations of parliamentary supervision, and corresponding threat to the rule of law.³⁷

A common criticism of Dicey is that his principle of absolute parliamentary sovereignty appears inconsistent with his account of the rule of the ordinary common law. Paul Craig asserts that Dicey's dislike of administrative law stemmed from his unitary interpretation of democracy.³⁸ He concludes that Dicey believed in parliamentary monopoly under which all government power would be subject to oversight by the Commons. On the other hand Trevor Allan has argued that Dicey's interpretation of the rule of law was not as weak or formalistic as has been suggested and that it included substantive protections that could not be transgressed, possibly not even by parliament.³⁹

Dicey's account of parliamentary sovereignty (at least on Craig's interpretation) coheres with 18th and 19th Century legal positivist theories, notably Bentham's and Austin's accounts of a legally unlimited sovereign habitually obeyed. These seem not to fit when the historic supervisory function is understood as comprising a common law capacity to control power in the interests of justice. On this latter basis an inferior body stepped outside its jurisdiction when it breached principles of justice impacting on the King's

³⁶ *R v Local Government Board ex parte Arlidge* [1915] AC 120, 138

³⁷ Gordon Hewart, *The New Despotism* (JJ Little and Ives 1929) 159.

³⁸ Paul Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 4; 'It is important to understand that Dicey based his view of administrative law on a certain vision of democracy, which can be termed unitary', and see *Public Law and Democracy* (OUP 1990) 12-51.

³⁹ TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003) 2-12.

peace. However, in the mid-19th Century the concept of within jurisdiction was equated to the Latin tag *ultra vires* first used to denote excess of authority by independent statutory bodies and the powerful Railway Companies. *Ultra vires* extended to municipal corporations and new types of local government authority, and ultimately came to denote any action or decision beyond the limits of powers specifically delegated by the sovereign Parliament. This strict *ultra vires* account is a *manifest* interpretation of judicial review, one that is part of the basic foundations of the subject, even if it no longer fits the whole practice, or provides a full justification for it. Strict *ultra vires* can be seen as a formal, descriptive concept, if a particular power is not specifically delegated by an enabling provision, then a public body purporting to exercise such a power steps outside its jurisdiction.

Strict *ultra vires* may have contributed to a sense of judicial abdication from the broader common law supervisory function. The judiciary of the day have been described as incompetent guardians responsible for delivering a series of judgments in flagrant breach of historical precedent;⁴⁰ however, this era can be viewed differently.

The King's and Queen's Benches of the time may have disappointed because they rarely applied historical judge-made principles of what we now recognise as public law (such as the tenets of natural justice or the principle that discretion cannot be absolute). Yet, success rates in those claims against public bodies actually reaching the courtroom may have been approximately the same

⁴⁰ See citations at (n 32) above.

as they are today.⁴¹ Whilst the legal principles applied during this era were less expansive, claimants may have been just as likely to be successful.

Back in the dark ages (as is the case today) the prerogative writs (now prerogative orders) were not the only procedures by which oversight of administrative action was sought. Various statutory provisions in particular subject areas provided for appeals on a point of law, and for other forms of application under which similar principles were applied to those raised under prerogative writs. Courts were also not the only venues for challenging or controlling administrative decision-making.

In the 1940s to at least the late 1960s, land use and taxes were among the most prominent topics of statutory appeals and applications. During the current period of research (1 May 2007 to 30 April 2014) a significant proportion of Administrative Court AJRs, and statutory appeals and applications, continue to relate to planning law.⁴² Today, as was the case back in the 1940s, the incidence of litigation is driven significantly by the availability of affordable expert legal advice. The legal profession is well developed when it comes to cases that involve private property and a liberal judiciary may be especially sympathetic.

That comparatively few claims were issued during the dark days was not just because the judiciary lacked interest, but also due to the activities (or inactivity) of the legal profession and the limited issue of parliamentary statutes

⁴¹ Susan Sterett, *Creating Constitutionalism? The Politics of Legal Expertise and Administrative Law in England and Wales* (The University of Michigan Press 2000) 61-67.

⁴² From 1 May 2013 to 30 April 2014 there were 259 town and country planning AJRs constituting 12.3% of all non-asylum and immigration civil AJRs, and an additional 189 statutory planning appeals and applications.

to which the judiciary could affix their interpretations. It may be that in case-level decisions⁴³ (incidents of street-level bureaucratic decision-making)⁴⁴ that reached the courts, the judiciary interpreted statutory provisions in favour of claimants as often as they do today. Their abdication was from scrutinising decisions of central government, of Ministers in particular,⁴⁵ where the decisions complained of had a whiff of policy about them.⁴⁶ It was not just Dicey's account of parliamentary sovereignty, but also the importance attached to ministerial responsibility and perhaps also the strong presence of lawyers in the House of Commons, that lagged the development of broader principles of judicial review especially.⁴⁷ It was this abdication from entertaining review in more politically sensitive cases not clearly connected to identifiable private rights that went against the developing views entertained by some quarters of the judiciary and legal profession that common law principles could be revitalised to control the administrative state.

This account exposes another *manifest* interpretation still relevant to contemporary judicial review. Under this account judicial review applications should only be entertained if the claimant can point to some *private right* that

⁴³ Sterett, *Creating Constitutionalism* (n 41) 45-67.

⁴⁴ Peter Cane, 'Understanding Judicial Review and its Impact' in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (CUP 2004) 15.

⁴⁵ Sir Stephen Sedley argues that the decision in *M v Home Office* [1994] AC 377 recognising the official contempt liability of the Crown, 'forms a landmark on the path to the common law's eventual acknowledgment of the state as an entity known to and governed by law'; 'Early Days' in David Dyzenhaus, Murry Hunt, and Grant Hushcroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart 2009) 281, 291.

⁴⁶ See KC Davies, 'The Future of Judge Made Public Law in England: A Problem of Practical Jurisprudence' (1961) 61 *Columbia Law Review* 201, noting judicial failure to take on policy issues.

⁴⁷ Carol Harlow and Richard Rawlings, 'Administrative law in context: restoring a lost connection' [2014] *PL* 28, 31.

has been damaged by the public body's wrongdoing. The damage need not constitute an actual breach of that private right to the extent actionable in contract or tort for example; if that was the case then this cause of action should be pursued rather than a prerogative writ claim (now an AJR). On this interpretation a claim cannot be established if the public body's wrong has caused no specific individual damage.

Harlow and Rawlings have modelled this period as the 'drainpipe' era in which procedures, substantive law, and remedies were each confined to tight separate compartments and there was little room for any judicial discretion.⁴⁸ According to Rawlings, modelling judicial review involves, 'a use of ideal types to illuminate basic contours and so the path of historical development and possible futures'.⁴⁹ Models help to explain the relationship between court organisation, procedure, substantive law, and remedies. In addition to being characterised by strict *ultra vires*, private rights, and limited scope for judicial discretion, the drainpipe era is also synonymous with restrained substantive review (traditional *Wednesbury*⁵⁰ as a total failure of logic), and little judicial concern for factual exploration (limited disclosure of documents, no review for error of fact, no exploring the sufficiency of reasons given for the challenged decision, scant regard to whether reasons were given at all). But nevertheless, individuals were still successful in core topics of claim such as planning and taxation.

⁴⁸ Harlow and Rawlings, *Law and Administration* (3rd edn, CUP 2009) 673.

⁴⁹ Rawlings, 'Modelling' (n 1) 97.

⁵⁰ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

3.4 The rise of administrative law

It should be remembered of course that the province of administrative law is much broader than just judicial review claims, or indeed just those claims issued in the Administrative Court. At its widest the province of administrative law covers any legal standards applicable to the exercise of powers of a public character. Administrative law extends beyond common law precedent to all the legislation (primary and secondary) and various rules, policies, and guidance that pertain to particular areas of administration such as town and country planning, healthcare, education, prisons, and asylum and immigration. Administrative law also encompasses the procedures and rulings of tribunals, ombudsmen, and other regulators. The decisions of the ordinary courts are only part of administrative law and the judgments of the Administrative Court in AJRs are only part of that.⁵¹ Even the doctrines that we generally regard as judge-made take on a unique character in specific administrative contexts. As Etienne Mureinik explains:

When the principles of natural justice are pleaded in an employer's disciplinary inquiry, they are relied upon, not on an analogy with judicial practice, but as principles of fair employment practice. When the rules against abuse of power are pleaded before a trade union

⁵¹ Significant administrative law cases from the 1960s-70s began by using an application for declaratory relief, or making an application for originating summons in the Chancery Division. Lord Woolf of Barnes and Jeremy Woolf, *Zamir & Woolf: The Declaratory Judgment* (4th edn, Sweet & Maxwell 1993) [2.40].

committee, they are relied upon not because what appeals to the judges should be acceptable to union executives, but as rules of good government, from which union government is not exempt.⁵²

This broader and more functionalist nature of administrative law has been recognised by the works of various scholars from the London School of Economics, in particular John Griffith and Harry Street in their text *Principles of Administrative Law*, first published in 1952.⁵³ In this regard there may be various administrative laws, each applying to specialist areas such as planning, healthcare, education or immigration and asylum. This reinforces the need to consider specialisation or expertise as an important value in understanding judicial review, as I have noted in Chapter One.⁵⁴

Legal principles developed and applied by the courts can lead to improved administrative decision-making that helps administrators better achieve their stated policy goals. This is part of the normative exposition (structuring good administration) function identified by Harlow and Rawlings. It is also part of a broader ‘green light’ account of administrative law and judicial review, emphasising that legal influences need not be seen as specifically blocking administrative decision-making and reducing the administrator’s area of discretion, but also as facilitating and guiding good decision-making. Indeed another *manifest* theory of judicial review is that it is a legal process (or just a threatened legal process) that contributes to improving

⁵² Etienne Mureinik, ‘Administrative Law in South Africa’ (1986) 103 S Afr L J 615.

⁵³ JAG Griffith and H Street, *Principles of Administrative Law* (Pitman & Sons 1952).

⁵⁴ At p79-86.

administrative decision-making. The phrase principles (or grounds) of judicial review, is used inter-changeably with the phrase grounds or principles ‘of good administration’.

However, this conflation is problematic as interpretations of good administration (administrative justice) and interpretations of legal justice can conflict, as noted in Chapter One.⁵⁵ That conflict may be resolved by interpreting both sets of values simultaneously and constructively in the relevant context, but if principles of legal justice and principles of good administration are conflated at the outset the required interpretation cannot take place.

Courts do not have a monopoly over questions of legal principle and legal justice. Legal principles need to be interpreted, as does the scope and content of any particular legal right and sometimes specialist administrators (and specialist administrative tribunals) are well placed to at least assist the Administrative Court (and higher appellate court) judiciary in determining matters of principle in specific cases. The concept of judicial deference is not only about judicial yielding to the assessment of policy supplied by those who have been democratically elected; it is also about respect for an administrator’s subject-specific expertise in matters of legal principle. The boundary between judicial and administrative competence may be demarcated by different accounts of rational decision-making in the legal and administrative spheres, but this boundary has fuzzy borderlines.

⁵⁵ 86-93.

From the dark ages to the rise of administrative law the prevailing interpretation of what it means to be rational was Max Weber's account as succinctly expressed, 'one can, in principle, master all things by calculation'.⁵⁶ Weber's rationality encouraged formalism in law, which I take to mean the codification of norms into rules to be interpreted textually by the judiciary; the professional management of bureaucratic administration also had its own standards of rationality.

It is significantly with the work of William Wade⁵⁷ that we start to see attempts to expose formal (rational) legal rules, otherwise known as general principles of review, capable of distancing the legal profession from claims of undue interference with administration for political reasons and designed specifically as controls on administrative power. This account of administrative law is stressed to be developed from the historical resources of the ordinary common law, made up of general rules that touch all aspects of administration, and clearly demarcated as law and not politics carried out by un-elected lawyers and judges.⁵⁸ In that regard it is different to the more functional style of the earlier work of Griffiths and Street, who accepted that administrative law could not be separated from the rough and tumble of politics, and from the specific policies of particular subject matters such as education, planning or health.

By the 1960s there were calls to review how lawyers and the courts should respond to the post Second World War growth of professional

⁵⁶ Max Weber, 'The Profession and Vocation of Politics' 1919/1946 Peter Lassman (ed) and Ronald Spiers (trns), *Max Weber: Political Writings* (CUP 1994) 139.

⁵⁷ HWR Wade, *Administrative Law* (Clarendon 1961).

⁵⁸ DJ Galligan, 'Judicial Review and the Textbook Writers' (1982) 2 OJLS 257, and see Sterett, *Creating Constitutionalism* (n 41) 91-112.

bureaucracies and the nascent administrative law.⁵⁹ The newly established Law Commission (itself a hallmark of the increasing professionalisation and rationalisation of law and administration) investigated the case for reform. The Commission looked at procedures and remedies, court organisation, and whether the developing administrative law principles could be rationalised into a ‘systematic and comprehensive’ legislative framework.⁶⁰ The focus on procedure showed sensitivity to the ordinary common law development of substantive legal principles; however, reference to codification is redolent of Weber’s rationalism and positivist accounts of law that prioritise formal legal rules. This kind of rationalism could have reduced the scope for judicial discretion and moral (idealistic) reasoning associated with the common law style. If judicial review in the Administrative Court represents a *core of judicial justice* untrammelled by statutory intervention (as I have proposed in Chapter One) then any attempt to codify the grounds of review by legislative instrument could do great damage.

It is during this era that HLA Hart’s account of legal positivism gained influence. Hart proposed that his predecessors had failed to fully appreciate the make-up of legal rules, including their internal aspects,⁶¹ helping us to understand why officials consider themselves to be bound by such rules and

⁵⁹ Law Commission, *Exploratory Working Paper on Administrative Law* 1967 [1967] EWLC C13.

⁶⁰ Law Commission, *Report on Remedies in Administrative Law* 1976 [1976] EWLC 73 [2].

⁶¹ HLA Hart, *The Concept of Law* (2nd edn, Clarendon 1997) 56-57: ‘...if a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole... What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified...’

why they consider the rules to be justified rather than obeyed out of habit. Hart explained that officials, including judges and administrators, consider themselves bound by legal rules because the rules flow from an authoritative source. However, ostensibly for Hart whether such an authoritative source existed, and whether there were any limitations on its authority, was ultimately a question of social fact. Hart's theory fits well with JAG Griffith's account that the constitution is what happens and what happens is constitutional.⁶² Griffith had no regard for a superior order of values and rights limiting the exercise of political power.⁶³ On this view political power is a matter of social fact and judges should merely ensure that administrators are keeping within their statutorily delegated limits; strict *ultra vires* fits well here. But strict *ultra vires* is not just a formal test; it represents the conclusions of a normative political theory that calls for limited judicial supervision of administration⁶⁴ on the basis that judges lack the necessary authority (and perhaps also the necessary specialist expertise).

However, strict *ultra vires* began to sit less comfortably with the social facts, especially in cases where judges refused to comply with a clear statutory intention to exclude or limit access to the courts.⁶⁵ The trio of *Anisminic* (error

⁶² JAG Griffith, 'The Political Constitution' (1979) 42(1) MLR 16.

⁶³ Following Bentham in the view that rights are only political claims carved out of politics and governance. See eg, JAG Griffith, 'The Brave New World of Sir John Laws,' (2000) 63(2) MLR 159 and Jeremy Bentham, 'Nonsense Upon Stilts' in Philip Schofield, Catherine Pease-Watkin, and Cyprian Blamires (eds), *Rights, Representation and Reform: Nonsense Upon Stilts and Other Writings on the French Revolution* (OUP 2002) 364, 375: 'Right...is a child of the law: from real laws come real rights; but from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters'.

⁶⁴ See my discussion of 'political constitutionalism' in Chapter One 58-79.

⁶⁵ *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

of law and circumventing an ouster clause), *Ridge v Baldwin*⁶⁶ (natural justice) and *Padfield v Minister for Agriculture Fisheries and Food*⁶⁷ (Ministerial improper purpose and abuse of power) are seen as defining elements of a renaissance of common law supervision in the interests of justice.

The outcome in *Anisminic* did not appear to fit with strict *ultra vires*, since the judicial conclusion went against Parliament's clearly expressed intention. However, the influence of rationalism and Hart's descriptive conceptual analysis were evident in other respects. A seam of case law spread in which lawyers and judges drew fine conceptual distinctions between certain types of questions and certain types of powers.⁶⁸ The most obvious case in point is *Anisminic* itself where the majority of the House of Lords held that the Foreign Compensation Commission (FCC) had committed a error of law that went to determining the limits of its jurisdiction (rather than an error of law within its jurisdiction) by taking into account the nationality of a successor in title when the applicable statutory order in council did not require it to do so. On this basis the error destroyed the FCC's jurisdiction to decide therefore rendering its 'purported' decision a nullity,⁶⁹ and since there was in effect no decision a relevant ouster clause (attempting to exclude judicial review) could not operate to insulate the legal error.

⁶⁶ [1964] AC 40.

⁶⁷ [1968] AC 997.

⁶⁸ For example, between administrative, judicial, quasi-administrative and quasi-judicial powers; between errors of law, fact, policy, and degree; and between jurisdictional and non-jurisdictional errors of law.

⁶⁹ In order to get around this reliance on technical language more recently drafted (but ultimately rejected) ouster clauses have referred not only to decisions as being incapable of legal challenge, but also 'purported' decisions. See eg, proposed clause 11 of the Asylum and Immigration (Treatment of Claims, etc.) Bill 2003.

Anisminic was later taken by some judges to have collapsed the distinction (between jurisdictional and non-jurisdictional errors) which the majority in that case had purported to uphold.⁷⁰ This was because it would take a simple linguistic manipulation to convert any error into an instance of the body asking itself the wrong legal question and thereby making an error that it was not lawfully entitled to make. For some time judges and academics debated whether the apparently defunct jurisdiction test could be replaced by a broader principle of ‘error of law’.⁷¹ This broad principle is more in tune with idealistic thinking about law as a matter of values that translate into concrete rights (in this case a right to be treated in accordance with legally correct public decision-making). As much as this broad principle seemed constitutionally appropriate, based on the rule of law, it was vague (when un-interpreted). The error of law principle could have been rendered more explicit by reference to the values at stake in particular cases and there were some academic voices counselling this approach.⁷² For example, there might be different values at stake depending upon whether the relevant error pertains to statutory interpretation (either ordinary language or purposive) or whether it extends to a broader common law error and so on), it could also depend on the institutional characteristics of the body that made the supposed error.

⁷⁰ Lord Diplock, *O’Reilly* (n 10) 278 and *R v Lord President of the Privy Council ex parte Page* [1993] AC 682.

⁷¹ Jack Beatson, ‘The Scope of Judicial Review for Error of Law’ (1984) 4(1) OJLS 22.

⁷² TRS Allan, ‘Pragmatism and Theory in Public Law’ (1988) 104 LQR 422, 423: ‘the principles governing review assume a theory (or theories) of individual rights, and the essence of the test of legality consists in their being accorded sufficient respect in the exercise of public power. Constitutional theory...cannot escape from an explicit choice of political values, and in the definition and protection of those values lies the only path to rational and legitimate review’.

The lack of clarity in the principle ‘error of law’ was instead purportedly addressed by another supposedly formal, conceptual distinction, this time between ordinary courts and tribunals (reviewable) and peculiar jurisdictions (not reviewable).⁷³ Once all questions of law (outside the remit of peculiar jurisdictions) became reviewable, the demarcation between matters of law and matters of fact also took on increased significance and attempts have been made (by legal positivists) at producing formal rule-based conceptual distinctions between facts and law.⁷⁴ By staying within the restraints of technical language (conceptual analysis and apparently formal legal rules)⁷⁵ lawyers and judges were able to define problems in ways that made their expertise relevant and persuasive but not overtly political (not overtly based on some of the values of political morality outlined in Chapter One); such was the rationalist and positivist influence on legal development. There was still an undercurrent of thought that behind the technical language administrative law was merely a ruse for judges and lawyers who wished to play politics.⁷⁶

Many of these conceptual refinement cases were not brought by way of the prerogative order procedure nor were they heard in the Queen’s Bench Division (though they were decided by judges who also sat regularly in that Division).

⁷³ *Ex parte Page* (n 70). Beatson however argued that this distinction could not be drawn by general rational legal principles and must therefore be based on some disguised pragmatic or functional account. ‘Error of law’ (n 70).

⁷⁴ Timothy Endicott, ‘Questions of Law’ (1998) 114 LQR 292.

⁷⁵ What Beatson described as, ‘an intricate mosaic of conceptual formulae’, Beatson, ‘Error of Law’ (n 71) 31.

⁷⁶ Allan Hutchinson, ‘The Rise and Ruse of Administrative Law and Scholarship’ (1985) 48 MLR 293.

Back in the Queen's Bench the number of applications for prerogative orders increased significantly from the late 1960s until 1977. The increase in claims may have been partially due to judicial findings against the administration especially in the 1960s. However, it was more substantially driven by the rise in immigration litigation attributable to restrictions introduced by the Immigration Act 1971 and the growth of relevant legal services. This practical problem needed addressing and this led to the implementation of one of the 1976 Law Commission proposals, the harmonisation of prerogative procedures, together with ordinary civil claims for declarations and injunctions, into one Application for Judicial Review (AJR). From the perspective of ordinary litigants the AJR was supposed to resolve the injustice caused by trying to navigate variable and antiquated procedures alongside more recently developed alternatives.⁷⁷ From the perspective of the administration it was hoped that the single procedure would reduce delays that had built up in the Queen's Bench due to the increasing number of claims relating to immigration and homelessness. Any academic interest in a rationally systematised rule-based administrative law was by the by, and the majority of the other 1976 Law Commission proposals were dropped.

3.5 The AJR and procedural exclusivity

The AJR was not designed to replace other avenues for challenging the legality of administration; such purported unlawfulness could still be raised collaterally

⁷⁷ The Law Commission, *Report on Remedies* (n 60).

where relevant in other civil and criminal proceedings. The procedural reform was meant to give effect to the values of specialist expertise, and professionalisation that would increase efficiency and speed up the resolution of disputes.

Under the influence of the one judge who had perhaps done the most to develop the nascent administrative law (both from within and outside the Queen's Bench Division), a rule of procedural exclusivity was instituted such that remedies against the unlawful acts and omissions of public bodies should generally be sought only via the AJR procedure in the High Court in London. Lord Diplock's judgment in *O'Reilly* meant that claimants could no longer access the inherent supervisory jurisdiction by using an action for declaratory relief or by making an application for an originating summons in the Chancery Division, nor could claims against the administration be made in the county courts. This vision of procedural exclusivity went against the traditional plurality of the common law with its emphasis on flexible procedures and remedies to ensure that no legal wrongs go unchallenged. It largely went against the ancient King's Bench function to do justice wherever necessary for the benefit of citizens. However, it did reinforce the supposed discretionary nature of judicial review, namely that access to the court is subject to permission and remedies may be circumscribed or withheld. In my view it is better to say that access to the court is based on principle rather than discretion; competing interpretations of relevant values will give rise to different interpretations of what degree of access is appropriate (hence the appearance of discretion).

Part of the case for exclusivity was that the AJR procedure incorporates safeguards to protect the administration from vexatious claims and to ensure swift progress of litigation (most notably short time limits, a leave stage (now permission) and limited rules on disclosure of evidence). The case for maintaining special procedures that must be exclusively pursued was contentious at the time and remains subject to debate.⁷⁸ On the one hand protecting the administration from vexatious litigation also safeguards the public purse in the interests of the common good and protecting broader individual rights to scarce court resources, on the other hand there is always a danger that the procedural hurdles will deter legitimate claims (thereby potentially damaging the broader good).⁷⁹

The modern Civil Procedure Rules provide for strike out and summary judgment, and contextually interpreted these provisions could be just as effective as the permission stage in deterring vexatious claims. It is also questionable how many of the claims actually reaching the Administrative Court are of such a complex and specialist character that they could not be handled adequately by non-expert courts such as the county courts. My findings in later Chapters suggest that many AJRs are not as complex, specialist, and wide-ranging in their potential impacts as might be supposed.⁸⁰

Lord Diplock's procedural exclusivity rule helped pave the way for a previously little recognised distinction between the doctrines of public and

⁷⁸ Maurice Sunkin, 'Judicial Review: Rights and Discretion in Public Law' (1983) 46 MLR 645; HWR Wade, 'Procedure and Prerogative in Public Law' (1985) 101 LQR 180; Dawn Oliver, *Common Law Values* (n 15) 72–78.

⁷⁹ Dawn Oliver, 'Public Law Procedures and Remedies: Do we Need Them?' [2001] PL 91.

⁸⁰ See Chapter Five especially.

private law. Judges who sat both in the Queen's Bench and Chancery Divisions decided many of the early administrative law cases and as Dawn Oliver has documented, many of the legal tests applied to administrative action were developed by analogy with private law doctrines.⁸¹ I wouldn't necessarily go as far as Oliver and maintain that claims involving the state and claims involving powerful private actors are ultimately based on the same set of values. Nevertheless, whether the power is public or private it must be exercised in accordance with reason, with the tenets of natural justice, and in compliance with any statutory or other limitations. Procedural exclusivity endorsed the view that the ordinary common (private) law was insufficiently sensitive to the circumstances of public bodies. The unique procedures, growing body of specialist doctrinal law, and discretionary remedies, all provide inbuilt protection for public bodies making it appear at least as though public law remedies are available as a matter of discretion rather than as a matter of legal right.

3.6 Public and private law, rights and wrongs, and more reforms

The early 1980s establishment of a list system of judges⁸² cohered with Lord Diplock's vision of a specialised system of public law administered by a small cadre of elite judges. Previously three judges had determined each AJR, under the new system claims would be heard by one of nine nominated specialist

⁸¹ Dawn Oliver, *Common Law Values* (n 15) 167-199.

⁸² Supreme Court Rules Committee [1981] 1 WLR 1296.

judges with various experience (notably as counsel for administrative departments, members of administrative tribunals, and presiders over major public policy inquiries).

Lord Diplock's rule of procedural exclusivity, the developing distinction between public and private law doctrines, and the particular characteristics of the nominated judges, were part of a trend towards legal supervision of fields that were, in more recent history at least, regarded as policy-centric and political, private and commercial, and therefore judicial no go areas. During this time there was an increased focus on the judicial role in structuring good administration and perhaps also a more pronounced divide between purely administrative matters on the one hand, and constitutional and human rights issues on the other.

There was growing judicial willingness to impose standards of legal rationality on public administrators beyond those that could be discerned directly from the statutory grant of power. The inherent supervisory jurisdiction was interpreted as extending to Ministers,⁸³ to royal prerogative powers, to third source powers, such as those contractually delegated to quangos and regulatory bodies like the Monopolies and Mergers Commission⁸⁴ and the Takeover Panel.⁸⁵ Around this time it was suggested that policing both public and private abuses of power could provide a central organising principle for judicial review.⁸⁶

⁸³ *M v Home Office* (n 45).

⁸⁴ *R v Monopolies and Mergers Commission ex parte Argyll Group* [1986] 1 WLR 763.

⁸⁵ *R v Panels on Takeovers and Mergers ex parte Datafin plc* [1987] QB 815.

⁸⁶ Dawn Oliver, 'Is the *Ultra Vires* Rule the Basis of Judicial Review [1987] PL 543.

The creeping of judicial review into the province of administrative policy-making and the commercial regulation realm marked an apparent evolution from the Victorian common law protection of private rights, to a vision of administrative law based on the rectification of wrongs of a public character.⁸⁷

The 1982 *IRC*⁸⁸ case dealt a significant further blow to the private rights account of judicial review. Lord Diplock concluded that it would, ‘be a grave lacuna in our system of public law if a pressure group...or even a single public spirited taxpayer were prevented...from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped’.⁸⁹

The *IRC* case paved the way for representative proceedings and signalled an increased role for judicial flexibility at the procedural stages of review. On this account the range of bodies and individuals that could acquire standing and the relevant range of rights and interests involved was widened; this development in itself brought pressure to expand substantive law principles beyond the basic doctrines of strict *ultra vires* and *Wednesbury* as a total failure of logic.⁹⁰ On some interpretations the *IRC* case also proposed a sense of ‘fusion’ under which the question of standing could not easily be separated

⁸⁷ *R v Somerset County Council, ex p Dixon* [1998] Env LR 111, 117-121 (Sedley LJ); ‘Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs that is to say misuses of public power’.

⁸⁸ *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617.

⁸⁹ *ibid* 644.

⁹⁰ Peter Cane, ‘Standing, Legality and the Limits of Public Law’ [1981] PL 322; David Feldman, ‘Public Interest Litigation and Constitutional Theory in Comparative Perspective’ (1992) 55(1) MLR 44; Carol Harlow, ‘Public Law and Popular Justice’ (2002) 65(1) MLR 1.

from the legal merits of the case.⁹¹ Standing is relative to both the strength of the applicant's interest, the interpretation of any relevant statutory power or duty, the subject matter of the claim, and the legal grounds alleged.

Prior to the establishment of the AJR, High Court judges had begun to use the declaration as a remedial flexible friend in cases of public body illegality commenced outside the prerogative procedure. The remedy allowed the judiciary greater control over the specific form of relief and enabled them to consider claims that might otherwise be considered unripe or hypothetical. Following the establishment of the AJR procedure, declarations could be sought in AJRs alongside prerogative orders.⁹²

Despite broadened standing, access to the prerogative remedies was still (ostensibly) limited by procedural exclusivity (and the related London-centricity and elitism of High Court litigation). The Court's fact-finding role was limited, as was access to proceedings for third party interveners. An elite cast of judges were incrementally developing and refining, formal, specialist, public law doctrines to control the incidence of arbitrary and extra-jurisdictional public decision-making, but largely without a detailed analysis of the relevant facts and consequences. Harlow and Rawlings depict this as a 'Funnel' model where standing is broadened but judicial review is still primarily a top-down (*imperium*) practice in which a centralised and elite judiciary impose standards demanded by formalistic interpretations of the rule

⁹¹ Craig, *Administrative Law* (n 38) 779-786.

⁹² See eg, Woolf, *Declaratory Judgment* (n 51).

of law on an equally centralised and elite administration.⁹³ However, the most fitting *manifest* theory is no longer one of private rights and strict *ultra vires*. Whilst no applications would be possible without claimants, the individual's problem is largely a 'trigger'⁹⁴ allowing elite judges to progress their vision of a coherent and formal administrative law. Under this account the potential of the AJR to determine the limits of public power is more important than its ability to provide redress to particular claimants, or the ability of claimants or communities to have easy access to the system.⁹⁵

This notion that judicial review is about tackling public wrongs (as opposed to protecting private rights) may cohere with a more communitarian conception of democracy.⁹⁶ In policing abuses of power the judiciary are protecting the broader public interest in good administration and facilitating discussion about community values. However, the extent to which judicial review acts as a venue for the expression of broader social values as part of the democratic process is largely dependent upon individual judicial philosophies and whether the cases coming before the courts properly reflect the range of issues faced by citizens.

⁹³ Roger Cotterrell, 'Judicial Review and Legal Theory' in Geneva Richardson and Hazel Genn (eds), *Administrative Law & Government Action* (Clarendon 1994) 18.

⁹⁴ Thomas Poole, 'The Reformation of English Administrative Law' (2009) 68(1) CLJ 142, 142-143.

⁹⁵ Sarah Nason and Maurice Sunkin, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law' (2013) 76 MLR 223, 231.

⁹⁶ See eg, Feldman, *Public Interest* (n 90) and see my discussion of common law democracy in Chapter One 75-79 (though note this seems contrary to modern accounts of political constitutionalism under which it is argued that neo-republican interpretations of democracy ought to support only very limited judicial review of administrative action and reject constitutional review).

The conception of the public good at work during Diplock's era may have been limited and based primarily on the notion of voiding obvious abuses of power, rather than ensuring that power is exercised in the name of achieving some broader set of public goods to be determined by attention to a larger range of common law moral values. This limited account was not sustainable as changing interpretations of common law values brought with them more substantive interpretations of the rule of law, these interpretations had the resources to expound thicker conceptions of the common good, and to justify increased judicial cognisance of the good when determining particular claims.

Neither procedural exclusivity, the Funnel model,⁹⁷ nor the primacy of formal conceptual tests fit well with these changing interpretations of value, and related idealist accounts of law.

The more directly value-laden *manifest* theories of judicial review can be variously referred to as common law constitutionalism or legal constitutionalism. Broadly under these *manifest* interpretations it is argued that the fundamental rules, principles, and rights that circumscribe government and other administrative activity, are a product of the common law. Common law constitutionalism is not a new theory; it represents a resurgence of respect for the wisdom and authority of the common law, stepping out from the shade of legal positivism.

⁹⁷ Rawlings, *Modelling* (n 1) 101: 'It was so obviously a compromise under which the courts has abandoned some of the strict procedural certainties associated with judicial restraint, but had not squarely embraced a pluralist logic, a situation in which the close mix of expansive and restrictive elements created much difficulty and further pressures for change'.

A common law constitutionalist need not reject formal conceptual tests (including *ultra vires*) if they are considered to be useful in particular contexts. The major claim of this *manifest* interpretation is that judicial review need not be premised on parliamentary intent (though it can often be linked back to such intent).⁹⁸ Common law constitutionalism can also (although not necessarily) extend to supporting constitutional review, whereby primary legislation may be struck down as inconsistent with values enshrined in the common law constitution.⁹⁹

Each of the defining cases determined by the appellate courts during the growth period for the 1960s onwards led to a short-lived flurry of litigation in the Queen's Bench examining how the broader principles (both of substantive law, amenability to review, and standing to claim) might be applied in particular circumstances. Nevertheless, AJRs continued to be dominated by a small set of topics of claim against a narrow range of defendants.¹⁰⁰ Whilst academic attention turned to conceptualising the growing distinction between public and private law (instigated in part by procedural exclusivity) and dividing up the legal and political realms,¹⁰¹ the courts were again beset by a backlog of applications that had to be addressed.

⁹⁸ See debates between Allan and Craig (both self-confessed common law constitutionalists) over the correct way to interpret legislation; TRS Allan, 'Legislative Supremacy and Legislative Intent: A Reply to Professor Craig' (2004) 24(4) OJLS 563; Paul Craig, 'Legislative Intent and Legislative Supremacy: A Reply to Professor Allan' (2004) 24(4) OJLS 585.

⁹⁹ CJS Knight, 'Striking Down Legislation Under Bi-polar Sovereignty' [2011] PL 90.

¹⁰⁰ Maurice Sunkin, 'What is Happening to Applications for Judicial Review?' (1987) 50(4) MLR 432.

¹⁰¹ Largely sparked by Martin Loughlin, *The Idea of Public Law* (OUP 2003), Nicholas Barber, 'Professor Loughlin's Idea of Public Law' (2005) 25 OJLS 157, Paul Craig, 'Theory "Pure Theory" and Values in Public Law' [2005] PL 440.

In the early days Donaldson LJ had encouraged applicants to use the new AJR procedure, even to the extent of reprimanding citizens for their lack of awareness of the supervisory jurisdiction.¹⁰² However, by the early 1990s he was asserting that; ‘...the judicial review jurisdiction is to be exercised very speedily and, given the constraints imposed by limited judicial resources, this necessarily involves limiting the number of cases in which leave should be given’.¹⁰³

Whereas Lord Diplock’s earlier leave criterion had focused on whether the case was truly ‘hopeless’, Lord Donaldson developed a test of ‘potential arguability’, a step towards reforming the leave criteria from its role of merely deterring vexatious litigation to an early assessment of the legal merits of the case. It has been argued that this restricted interpretation of the leave requirement was significantly responsible for the fall in leave success rates until at least the mid-1990s.¹⁰⁴

In the early 1990s the Law Commission considered proposals to improve the efficiency of the AJR procedure (and other statutory methods for challenging administrative action). It recommended new tests to be applied at the leave (now permission) stage, but in the tradition of allowing the judiciary to develop substantive principles these were not taken forward.¹⁰⁵ In practice

¹⁰² *Parr v Wyre BC* (1981-82) 2 HLR 71, 80.

¹⁰³ *R v Panel on Takeovers and Mergers ex parte Guinness Plc* [1990] 1 QB 146, 177-178.

¹⁰⁴ Varda Bondy and Maurice Sunkin, ‘Accessing Judicial Review’ [2008] PL 647.

¹⁰⁵ This proposed test was in two stages, claims involving private rights would immediately be granted permission; those involving public interest matters in which no private rights were specifically and directly affected would have to pass further hurdles. Law Commission, *Administrative Law: Judicial Review and Statutory Appeals* [1994] EWLC 226, [5.20]-[5.22]. Recent proposals to restrict standing in AJR claims included suggestions along these lines, Ministry of Justice, *Judicial Review: Proposals for further reform* (2013) Cm8703. However,

many of these recommendations were recycled and implemented following the Bowman Review of the list system of judges (the Crown Office List) in 2000.¹⁰⁶ The Bowman reforms were again directed to managing the expanding AJR caseload, particularly in light of the impending entry into force of the Human Rights Act (HRA) 1998. Under Bowman the automatic right to an oral hearing was lost, permission became predominantly a paper, *inter partes* process, requiring the defendant to file an acknowledgement of service setting out the reasons, if any, for contesting the claim. Despite initial concerns over this greater fusion of standing and merits,¹⁰⁷ research indicates that whilst the Bowman reforms led to a decline in permission success rates they have also encouraged earlier settlement primarily in favour of claimants.¹⁰⁸ The permission stage now resembles a form of early neutral evaluation of claims (a proportionate dispute resolution measure) rather than a deterrent to vexatious litigants.

Another area of development has been the increase in third party interventions in AJRs, which further suggests that judicial review has thrown off its Victorian fetters of protecting private rights and evolved into a form of public interest litigation. Interveners can provide crucial specialist evidence in an age where governance is ever more complex and multifaceted and their role

the proposals were broadly condemned as failing to appreciate how the purposes of judicial review had developed in line with contemporary interpretations of relevant values such as rule of law values, democracy, and the broader public good; see Stephen Sedley, 'Not in the Public Interest' (2014) 36(5) *London Review of Books* 29-30.

¹⁰⁶ Sir Jeffrey Bowman, *Review of the Crown Office List* (Lord Chancellor's Department 2000).

¹⁰⁷ Tom Cornford and Maurice Sunkin, 'The Bowman Report, Access and the Recent Reforms of the Judicial Review Procedure' [2001] PL 11.

¹⁰⁸ Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges Before Final Hearing* (Public Law Project 2009) 69.

has been likened to the ‘Brandeis brief’ in American constitutional litigation whereby third parties can present evidence of the potential social and economic impacts of the legal questions at stake. Interventions may speed up litigation and allow important interests (otherwise not before the court) to be aired and represented, but they also risk pushing the court further to the fluid borderline between principle and policy, and to what some would see as a usurpation of the legislative role.¹⁰⁹

The contemporary picture is one of relative flexibility;¹¹⁰ *O’Reilly* procedural exclusivity has been overtaken by Lord Woolf’s access to justice reforms, and the subsequent Civil Procedure Rules which have encouraged judges to adopt a more flexible approach to procedural matters. However, the distinction between public and private law retains its significance, despite its questionable serviceability, and it has become entrenched in legal texts and teaching.

The Administrative Court itself was established in October 2000, largely as a re-branding of the developing Crown Office List (expert judges being directed to decide AJRs and other identifiable public law claims). It was recognised that the principal function of the Crown Office was to deal with issues of ‘public administrative law’ by which was meant, ‘cases involving challenges to the exercise of powers (or in some cases, the failure to exercise

¹⁰⁹ Harlow, *Popular Justice* (n 90) 11.

¹¹⁰ Though this picture is threatened by recent reforms (see Chapters Four and Five).

powers) by bodies performing public functions'.¹¹¹ This is a very broad remit and not one based openly on any particularly specialised area of law

More recently further distinctions or bi-furcations, have been proposed between administrative review (constituted by principles of good administration), constitutional review (more closely aligned with vindicating rule of law and other liberal-democratic values), and human rights litigation (which is at least in some circumstances not review at all but rather an appeal based on section 6 of the HRA 1998).

There seems to be a further specialisation, the law of judicial review, which incorporates only those elements of constitutional, administrative, and human rights law, that are somehow specific to AJRs (rather than the broader realm of public decision-making and legal appeals).¹¹² The supposition being that public law arguments applied in tribunals and some county court claims are largely determined by the law and policy of the relevant legislative schemes, rather than the demands of some core of common law or judicial justice.

These possible 'fragmentations'¹¹³ of legal doctrine (administrative, constitutional, human rights, and judicial review itself) present new challenges to our understanding of judicial review in the Administrative Court. Related

¹¹¹ *Bowman Report*, (n 106) Ch 3. [24].

¹¹² See eg, Diarmuid Phelan, 'The Crystallisation of Judicial Review as a Distinct Legal Subject' (2013) 18(4) JR 432, noting that judicial review has largely become a distinct subject in Ireland based on case law developments and constitutional interpretation. Phelan notes with approval Michael Fordham's, *Judicial Review Handbook* (OUP 2012) as an example of a distinct legal work in the field. It is worth noting that Fordham's view (and with it much of his text) is centred on the idea that judicial review extends (and should extend) to a form of constitutional review.

¹¹³ Using the notion of 'fragmentation' to explain these issues is attributable to Maurice Sunkin; Professor John Alder has alternatively suggested the word 'diffusion' as it may have less negative connotations.

contemporary concerns include moves towards the global harmonisation of legal values and legal doctrines (the influences of international and comparative law)¹¹⁴ alongside increased localism (either in terms of devolution and regionalisation, or the influence of the Leggatt reforms to the tribunals system). The Administrative Court, especially through its exclusively common-law supervisory jurisdiction (now exercised under the AJR procedure), has the potential to lead judicial responses to these issues and to help retain consistency in principle. However, there is a risk that the Court may have already become so diverse in its competence, yet so limited in the number of claims heard annually, that its constitutional authority including its capacity to deliver a *core of judicial justice* or to protect a *right to just administration*, is weakened.

¹¹⁴ See eg, Cormac Mac Amhlaigh, Claudio Michelon, and Neil Walker (eds), *After Public Law* (OUP 2013).

Chapter Four: An *Operative* Interpretation of Administrative Court Judicial Review - Caseloads and Inter-institutional Competence

One argument of this Thesis is that popular *manifest* interpretations (intuitive accounts that form the backdrop to any analysis of judicial review in England and Wales) may be based on some misconceptions about, or at least lack of appreciation of, the facts of social practice.

In the following four Chapters I identify some of these misconceptions and construct an *operative* interpretation of judicial review that is a more accurate account of contemporary social practice. My focus in this Chapter will be on the general characteristics of the Administrative Court's caseload, and Applications for Judicial Review (AJRs) in particular, in light of the plurality of purposes performed by judicial review outlined in Chapter One and re-stated below:¹

1. Upholding the Constitution (constitutional symbolism and legal authority 'lions behind the throne')
2. Protection of the individual (individual grievances)
3. Ordinary common law statutory interpretation
4. Determining inter-institutional relationships (constitutional allocation of powers, intra-state litigation)
5. Establishing general legal principles (rationality, proportionality, no-fettering)
6. Structuring deliberative and administrative processes (good administrative procedure, reasons, consultation)

¹ This account is adapted from Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, CUP 2009) 669-670.

7. Core values of good governance (freedom from bias, keeping promises (legitimate expectations))
8. Public interest litigation (alternative forum for discussion of competing conceptions of the public interest)
9. Elaboration and vindication of fundamental rights

I am also specifically concerned with the issues noted at the close of the previous Chapter, the apparent tri-furcation of review into ordinary administrative review, constitutional review, and human rights litigation, and the impact of recent reforms to tribunalise and regionalise judicial review.²

In this thesis I focus on the Type³ and Topic⁴ of claims issued in the Administrative Court, some aspects of the broader social practice of judicial review litigation, and judicial reasons for deciding in a sample of substantive judgments. Another element in developing an *operative* interpretation is the impact of judicial review litigation on public bodies and in terms of litigant experiences, and I shall draw on the findings of some impact studies, noting how these bolster the conclusions of the current work. In particular whilst it appears to remain the case that judicial review has only a, ‘limited ability...to influence administrative decision-making’,⁵ if one focuses more specifically on

² Sarah Nason, ‘Regionalisation of the Administrative Court and the Tribunalisation of Judicial Review’ [2009] PL 440.

³ The Type of claim is a classification given by Administrative Court officials categorising the application as either a judicial review claim, or one of a number of species of statutory appeals and applications.

⁴ The Topic of claim is again a classification used by Administrative Court officials, this time referring to the subject matter of the claim such as asylum, immigration, planning, education, prisons and so on.

⁵ Genevra Richardson, ‘Impact Studies in the UK’ in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (CUP 2004) 112. Cf some positive correlations have been found, in particular Platt et al found that legal challenges have the potential to lead to improvements in local authority service provision as measured by official service quality standards; Lucinda Platt, Maurice Sunkin, and

its core function of providing individual justice, then the picture looks more positive.

4.1 ‘Spaghetti Junction’, the reformation, and fragmentation

The BBC’s history website describes the 15th Century religious ‘Reformation’⁶ as, ‘one of those things that everybody’s heard about but nobody really understands’.⁷ Perhaps the same could be said of the reformation of administrative law.⁸

The central tenets of the reformation appear to include, anti-formalism, a broadly idealist (or anti-positivist) interpretation of judicial review (and of law itself), and constitutionalisation. These elements fit well with the culture of justification under which public bodies are required to clearly and openly justify their decisions.

The ‘Spaghetti Junction’ model⁹ provides a good account of post-reformation judicial review. In this model, procedures and remedies are flexible, leaving some space for judicial creativity, and there is notable

Kerman Calvo, ‘Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales’ (2010) 20 (suppl 2) *J Public Adm Res Theory* 243. King has also suggested that the impact of judicial review on the quality of public administration may be more significant than the majority of studies have so far indicated, especially if one pays more regard to the views of practitioners, and emphasises the role for judicial review in resolving individual grievances, as opposed to instigating broader systemic changes. Jeff King, *Judging Social Rights* (CUP 2012) 70-76.

⁶ The 15th Century development of Protestantism as a reaction, in part, against some aspects of Catholicism.

⁷ <http://www.bbc.co.uk/history/british/tudors/reformation_overview_01.shtml> (accessed 6 October 2014).

⁸ Jason Varuhas, ‘The Reformation of English Administrative Law, “Rights” Rhetoric and Reality’ (2013) 77(2) *CLJ* 369, 370, Varuhas argues that there are various versions of the ‘righting’ or ‘reformationist’ account and that they are, ‘shot through with ambiguity’.

⁹ Harlow and Rawlings, *Law and Administration* (n 1) 677.

interplay between international, European and national legal principles. Standing and third party intervention are widened; as are the grounds of review (especially substantive review), and complementary doctrines of judicial deference emerge in light of the relative specialist expertise and comparative constitutional authority of the Court and initial decision-maker. The fact-finding power of the Administrative Court has increased, with judges able to take a more flexible approach to requiring disclosure where it is deemed necessary in the interest of justice,¹⁰ and the declaration may be used as a tool to express lack of compliance with constitutional values (a breach of the principle of ‘legality’). Alongside Spaghetti Junction are various ‘statutory relief roads’ or instances of ‘judicial review lite’¹¹ (statutory judicial review) especially in the tribunals and county courts. It is from these multiple or pluralistic interchanges, between different legal regimes, different procedures, and different institutions, that the model takes its name.

Alongside this sense of legal pluralism, the reformation is primarily associated with apparent constitutionalisation that is said to result from the evolution of the UK constitution from one marked by parliamentary sovereignty to a more balanced system based on the values of liberalism and democracy, and the ‘twin’ or ‘bi-polar’ sovereignties of Parliament and the courts.¹² The AJR is capable of forming part of this process by providing a

¹⁰ *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53; [2006] All ER 175.

¹¹ Richard Rawlings, ‘Modelling Judicial Review’ (2008) 61(1) CLP 95, 108.

¹² See eg, Vernon Bogdanor, *The New British Constitution* (Hart 2009); Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (OUP 2011). More pragmatically these developments include; the Human Rights Act 1998, Freedom of Information Act 2000, devolution settlements, Constitutional Reform Act 2005, Equality Act 2010, and increased legal supervision of Parliament such as that provided by the Joint Committee on Human Rights.

route to vindicating constitutional values and rights that may be prior to Parliament's sovereignty.¹³ The reformation as a *manifest* theory incorporating constitutionalisation may support a vision in which the Administrative Court is primarily concerned with inter-institutional allocations of power, public interest litigation, ensuring 'consistency in principle' across a range of legal regimes (both global and local), and the elaboration of fundamental rights. On my account (following Ronald Dworkin) consistency in principle is achieved by court jurisprudence that properly respects legal rights flowing from morally justified past political decisions (such decisions include legislation and precedent). The reformation could represent a body in transition away from an administrative court, largely dealing with individual grievances and the normative exposition of legal principles of good administration, to some kind of first instance constitutional court.

More pragmatically, on analysing constitutional courts in comparative perspective, Alec Stone-Sweet argues that the primary role of a constitutional court is to protect rights by way of constitutional review.¹⁴ In the Administrative Court this would be through claims engaging common law constitutional rights, or section 3 or 4 of the Human Rights Act 1998 (though it is questionable whether the latter can properly be called constitutional review). He notes that constitutional courts also conduct 'abstract review' of certain legislative provisions prior to enforcement (and even prior to enactment), this is generally not an exercise engaged in by the Administrative Court. Likewise the

¹³ See Chapter One discussing some key values.

¹⁴ Alec Stone-Sweet, 'Constitutional Courts' in Michel Rosenfeld and András Sajó (eds), *Comparative Constitutional Law* (OUP 2012) 822-823.

Court generally does not conduct what Stone-Sweet refers to as ‘concrete review’ where constitutional issues are referred by other courts and tribunals (in a similar to manner to references to the European Court of Justice on EU law issues or to the Supreme Court on Welsh devolution questions). The only function the Administrative Court clearly shares with other constitutional courts is its capacity to determine individual petitions (individual AJRs) turning on supposed constitutional rights, and the inter-institutional balance of power between particular branches of state.

Despite the increased constitutional flavour of the Spaghetti Junction model, it is still far removed from most constitutional court models, and it could also represent a jurisdiction so fragmented as to weaken what constitutionally symbolic authority the Administrative Court does possess. I examine these concerns further in light of empirical evidence, including responses to surveys and interviews, and the proceedings of a Workshop, as well as Administrative Court Receipts data; the precise methodological details were given in Chapter Two.

4.2 The (in)significance of the Administrative Court’s caseload?

It has not gone unnoticed that the Lord Chancellor, with responsibility for upholding the rule of law, is sceptical about judicial review.¹⁵ In his view the

¹⁵ See eg, responses to proposals to reform the judicial review procedure, available online: <<https://consult.justice.gov.uk/digital-communications/judicial-review>> (accessed 6 October 2014). In its response, law firm Leigh Day & Co argued that; ‘the changes to date, and these further proposals, are not driven by any objective problems with judicial review but by political

procedure has, ‘expanded massively’, is ‘open to abuse’,¹⁶ is used as a publicity tool for ‘left-wing campaigners’, and provides a ‘lucrative industry’ for some (often unscrupulous) lawyers.¹⁷

Any expansion in the number of AJRs issued does not in itself provide support for particular *manifest* interpretations of judicial review. Nevertheless, it is important to get these figures correct before deciding what they may mean.

The growth in asylum and immigration AJRs has been massive, but the number of ordinary (i.e., non-asylum and immigration civil AJRs) has remained at approximately 2,000 claims per-annum since at least 1996.

The Lord Chancellor’s argument seemed to be that since the number of AJRs on the whole is increasing, and since the vast majority do not make it past the permission stage, there must be a large-scale abuse of the system. This also assumes that the only (or at least the primary) value of the AJR lies in a substantive win for the claimant (and any interested parties), ignoring all the other purposes of judicial review, some (perhaps most) of which are *not* aligned with winning a particular case.

However, it is correct that the majority of claims do not proceed to a substantive hearing and therefore the fit of any *manifest* interpretation must be tested against the broader climate of relevant legal practice.

Legal advisers (primarily solicitors) deal with a much higher volume of general enquiries about possible public law issues and pre-permission

ideology and an agenda which is inimical to a modern liberal democracy and the rule of law’.
[7].

¹⁶ Ministry of Justice, *Judicial Review: Proposals for further reform* (2013) Cm8703, 3.

¹⁷ Chris Grayling, ‘The judicial review system is not a promotional tool for countless Left-wing campaigners’ *The Daily Mail* (London, 11 September 2013).

correspondence (such as letters before claim), than permission and substantive AJRs. Five respondents to the current research estimated that they dealt with over 50 enquiries annually that could be potentially addressed by an AJR, but had not sent a letter before claim let alone issued proceedings in the previous year. Many lawyers with reputations as judicial review specialists were involved in only one or two AJRs per annum over the course of the current research period (1 May 2007 to 30 April 2014).

In a previous research sample it was found that 60% of potential AJRs were resolved by dialogue between lawyers before proceedings were commenced, 34% of cases issued were withdrawn before reaching the permission stage, and 56% of claims that progressed beyond permission were settled before a final hearing could be held.¹⁸ The researchers also found that the majority of claims settling prior to a substantive hearing did so in terms favourable to the claimant.¹⁹

In response to the current research the primary reason cited for taking a claim no further than initial legal advice was the cost of litigation generally, followed specifically by the lack of any (or lack of sufficient) legal aid funding, the next most prevalent reason was that the matter had been satisfactorily resolved by another means such as settlement, mediation, a relevant tribunal claim, or complaint to an ombudsman. Lack of legal merit came next, followed by the claimant's general concern about the pressures of the legal process.

¹⁸ Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges Before Final Hearing* (Public Law Project 2009) 33.

¹⁹ *ibid* 39.

Applications resulting in a substantive hearing (in which a broader precedent may or may not be laid down) constitute only a tiny fraction of the whole compass of judicial review activity. Ministry of Justice (MoJ) statistics indicate that in 2012 only 1% of all AJRs issued resulted in a final hearing with judgment in favour of the claimant. Another MoJ estimate; that in 2013 only 154 claims resulted in judgment for the claimant, suggests a similar rate of somewhere between 1%-1.5% of all claims issued leading to a decision favourable to the claimant in 2013.²⁰ The MoJ data should be treated with caution, in part because it draws no distinction between asylum and immigration civil AJRs and other topics of civil AJR, but also because some elements of the data analysis have previously been found to be inaccurate.²¹

Based on this information about the progression of claims and potential claims one can argue that the Administrative Court is not the central locus of judicial review litigation. The resolution of most disputes takes place outside the court process and the threat of judicial review is just one tool in achieving this resolution. It seems to be the symbolic nature of issuing an AJR, rather than the practical impact of a judgment, that is most significant.

Whilst some of the claims that are resolved or withdrawn pre-permission (or negotiated pre-issue) might involve wider public interest matters, the normative exposition of principles and constitutional allocation of

²⁰ Quarterly Court Statistics, available online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358230/court-statistics-quarterly-april-to-june-2014.pdf> (accessed 6 October 2014).

²¹ As I pointed out to the MoJ in October 2013; the error was acknowledged and rectified. Email from Katherine Williams, Administrative Justice Statistician, 29 November 2013. This demonstrates the importance of the current research in highlighting misinterpretations of relevant social facts.

power functions on the other hand are limited if the claim does not proceed to a reported substantive judgment. There can of course be claims where the threat of litigation and resultant negotiation between the parties could lead to improved administrative procedures, but any precedent set can only be relatively informal and primarily limited to the specific organisation involved.

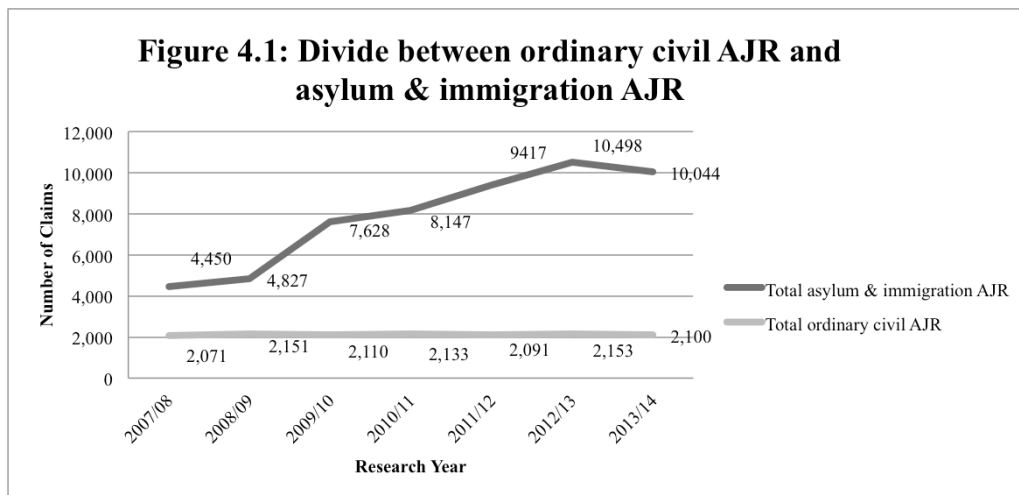
The publicity surrounding a potential AJR or an issued AJR can add legitimacy to particular claims, catalyse further support, and be a useful addition to other campaign strategies,²² but the specific impact of legal negotiations and ultimately of an issued claim can be empirically hard to estimate. Examining pre-judgment impact of judicial review litigation may become increasingly important in coming years as the number of AJRs reaching a final hearing has reduced dramatically, weakening what role the Administrative Court might have in more overtly and *publicly* exposing a *core of judicial justice*. The picture I am beginning to paint here is one wherein whatever the specific role of the Administrative Court, the broader social practice of judicial review is largely concerned with resolving individual claimant grievances outside court.

4.3 An ‘asylum and immigration court with knobs on?’²³

The Administrative Court’s AJR caseload has become dominated by asylum and immigration litigation as shown in Figure 4.1.

²² Tony Prosser, *Test Cases for the Poor* (Child Poverty Action Group 1983) 83-85.

²³ Rawlings, ‘Modelling’ (n 11) 111.



The stagnation in ordinary civil AJRs is striking. Considering factors such as population growth, the breadth of administrative decision-making (including central government decision-making), and contemporary legislative changes, one might have expected the total number of ordinary civil AJRs to have steadily (and justifiably) increased. In fact the number of AJRs is still infinitesimal in light of the scale of public decision-making. The data may indicate that claimants are having difficulty accessing justice and this in turn could damage some *manifest* interpretations of judicial review, including the reformation, culture of justification, and various common law constitutionalist accounts. In my view the AJR cannot properly be a vehicle for protecting individual legal rights (and constitutional values) if the majority of citizens are prevented from accessing the courts.

However, there could be other explanations; the trend of settlement pre-issue (especially settlement in favour of claimants) could be continuing and/or public decision-makers may have a better record than ever in terms of

compliance with public law standards. The relevant legal doctrines, administrative, constitutional, and specifically human rights-related, could have reached a certain level of maturity resulting in fewer complex legal questions requiring resolution in the Administrative Court. I am dubious with respect to these latter explanations and tend towards thinking that the stagnation of claims is significantly attributable to limited availability of legal aid funding and a decline in the provision of relevant legal services.

Figure 4.1 must be seen in light of recent reforms whereby the majority of asylum and immigration claims will now be issued in the Upper Tribunal Immigration and Asylum Chamber (UTIAC). During the latter period of this research, from and including 1 November 2013 to and including 30 April 2014 (after the main transfer provisions came into effect), ordinary civil AJRs made up 51% of the Administrative Court's civil AJR caseload; the first time since at least 1996 that asylum and immigration claims have been overtaken by ordinary civil claims. The Administrative Court is no longer 'an asylum and immigration court with knobs on'.

Despite the now decreasing number of asylum and immigration claims in the Administrative Court, the tortured history of this topic illuminates the constitutionally symbolic importance of judicial review.

Successive governments have sought to curb the expansion of asylum and immigration litigation by purporting to either exclude or limit access to the Administrative Court. In 2002 the Home Office proposed to designate the former Immigration and Asylum Tribunal (IAT) a 'superior court of record',

arguing that there should, 'be no scope for judicial review of its decisions'.²⁴ Parliament rejected this proposition and a High Court statutory review process was developed to replace judicial review of IAT refusals of permission to appeal. The Court of Appeal accepted that the statutory review procedure was a lawful alternative to the AJR²⁵ because it was compliant with rule of law values requiring a suitably independent, impartial, and specialist legal process for resolving disputes; rebutting any misconception that the AJR is an exclusive route for ensuring that public bodies comply with relevant law.

In 2004 the government proposed a new Bill containing a clause purporting to oust all forms of judicial review of the IAT (except the statutory legality procedure).²⁶ This proposition sparked a constitutional outcry; commentators argued that a proper interpretation of democracy requires the government to be subject to the ordinary common law (as well as any specific statutes Parliament might lay down). There was an outpouring of common law constitutionalist sentiment and the possibility of overt judicial recognition of a constitutional right to judicial review (a *right to just administration* in my terminology) was raised.²⁷

The increase in asylum and immigration litigation over the years is illustrated by Figure 4.2 (on page 198) depicting the main Types of claim received by the Administrative Court. In the earlier years of this research one

²⁴ Government White Paper, *Secure Borders, Safe Haven* (2002) [4.66].

²⁵ *R (G) v Immigration Appeal Tribunal* [2004] EWCA Civ 1731 [2005] 1 WLR 1445.

²⁶ Draft clause 11, Asylum and Immigration (Treatment of Claims, etc.) Bill 2003.

²⁷ Jeffrey Jowell opined that; 'the unwritten constitution contains nothing, in law or logic, to prevent the courts interpreting some rights, upon which democracy depends, as inviolable. The right to a democratic franchise may be one of these. The right to judicial review may be another'. Jeffrey Jowell, 'Immigration Wars' *The Guardian Newspaper* (London, 2 March 2004).

particular Type of claim was 'Reconsideration' under section 103A of the Nationality Immigration and Asylum Act 2002. This was another streamlined statutory legality review process under which an applicant whose appeal had been refused by the Asylum and Immigration Tribunal (established in April 2005) could apply to the Administrative Court for reconsideration by written submission only. This swifter process was supposed to alleviate the pressure on the Administrative Court; but in time both Reconsiderations and asylum and immigration related AJRs mushroomed.

Figure 4.2: Main Types of Receipts received by the Administrative Court

Type	2007/8		2008/09		2009/10		2010/11		2011/12		2012/13		2013/14	
	No.	%	No	%	No.	%	No.	%	No	%	No	%	No	%
Case Stated	98	0.8	97	0.8	94	0.6	85	0.7	85	0.6	79	0.5	55	0.4
Contempt	1		1		2		10	0.1	13	0.1	9	0.1	1	
Criminal Justice Act	1		1											
Extradition	4		5						6	0.1	121	0.8	599	4.1
Judicial Review Civil	6,521	54.7	6,978	57.3	9,738	58.3	10,280	86.2	11,508	87.4	12,651	86.9	12,144	83.9
Judicial Review Criminal	290	2.4	323	2.7	324	1.9	417	3.5	355	2.7	314	2.2	257	1.8
Sub-total Judicial Review	6,811	57.2	7,301	59.9	10,062	60.2	10,697	89.7	11,863	90.0	12,965	89.1	12,401	85.7
Reconsideration of s103a NIAA 2002	4,245	35.6	3,915	32.1	5,608	33.6	66	0.6	7	0.1				
Statutory Appeals and Applications	509	4.3	657	5.4	731	4.4	861	7.2	1,010	7.7	1,205	8.3	1,190	8.2
TCP s288/289	215	1.8	185	1.5	179	1.1	167	1.4	163	1.2	144	1.0	189	1.3
Other	29	0.2	25	0.2	32	0.2	36	0.3	34	0.3	28	0.2	35	0.2
Total	11,913		12,187		16,708		11,922		13,181		14,551		14,470	

4.4 Types of Administrative Court claim

Figure 4.2 illustrates the breadth of the Administrative Court’s jurisdiction. After AJRs the next highest proportion of Receipts are statutory appeals and applications. These are routes to a judicial determination on matters of law provided for under various statutes. The number of such claims has more than doubled over this research period; from 509 to approximately 1,200.

In 2007/08 statutory appeals and applications related to three main topics; claims under the Proceeds of Crime Act 2002 (29%), professional disciplinary bodies (28%), and extradition (19%). In 2013/14, 91% of claims

related to professional discipline (which includes the barristers appeal and solicitors disciplinary tribunals). In Chapter Three I noted that part of the ancient supervisory jurisdiction of the King's Bench was the determination of claims where one of the parties was a prominent public person such as a baron, bishop, or royal official. Perhaps it can be said that relevant professionals are the barons of the modern era; such professional disciplinary claims are a significant growth area and may add weight to the notion that litigation in the Administrative Court is an elitist or aristocratic activity, in this instance with elite judges and lawyers examining the activities of other elite professionals. The prominence of this Type of litigation also suggests that it may be a misconception to suppose that the Administrative Court is largely unconcerned with Mashaw's professional judgment model of administrative rationality in which the appropriate standard of review is likely to be that of a reasonable person possessing relevant professional expertise.²⁸

Another growth area is extradition work, with claims rising from just a handful in previous years, to 599 in 2013/14. This increase in claims is partially due to more accurate recording by the Administrative Court, but the number of appeals under the Extradition Act 2003 has been growing. The volume of appeals has started to distort the Administrative Court's general caseload and (with echoes of the furore over asylum and immigration litigation) it has been argued that many of these claims are without merit.²⁹ It has also been

²⁸ See Chapter One, 88-91.

²⁹ Such arguments are discussed and doubted in Merry Neal, 'Extradition: why the government is wrong to remove the automatic right to appeal' (November 2013) available online:

suggested that un-represented litigants are primarily to blame for these developments.³⁰ To stem the tide of cases Parliament enacted section 160 of the Anti-social Behaviour, Crime and Policing Act 2014 introducing a leave requirement into extradition appeals. The 2014 Act does not give detailed information about how the leave stage will operate and there is a danger that the requirement will increase already evident inequality between the state and the accused especially in cases involving European Arrest Warrants. The introduction of a leave stage into these proceedings can be seen as part of a general trend to introduce leave requirements across Administrative Court statutory appeals and applications.

Two specific forms of statutory appeal are provided for under sections 288 and 289 of the Town and Country Planning Act 1990 (TCP). The number of these statutory claims has generally declined over the course of this research, though there has been an increase in 2013/14. Practitioner responses to this research, and responses to the recent Consultation,³¹ were of the view that there is little difference between the legal principles applied under a TCP application and on an AJR, one interviewee described the different routes as, ‘an accident of history’ rather than a principled approach. Some harmonisation of the routes to challenging a planning related decision has led to the tightening up of both, with statutory appeals now attracting a permission test (previously the preserve

<http://www.halsburyslawexchange.co.uk/extradition-why-the-government-is-wrong-to-remove-the-automatic-right-to-appeal/> (accessed 6 October 2014).

³⁰ *ibid.*

³¹ *Judicial Review: Proposals for Further Reform* (2013) Cm8703.

of AJRs alone) and AJR time limits being reduced from three months to six weeks.

A new Planning Court (a fast-track procedure involving a sub-set of expert Administrative Court judges) has been set up to ensure that planning cases are dealt with expeditiously. Again it is the values of specialist expertise, authority, and access to proportionate justice (including the best use of court resources), that are guiding the development of the Administrative Court's jurisdiction whilst exposing it to the risks of over-fragmentation into separate courts within a court.

There is a perceptible increased desire by the government to enumerate (by statute) specific (and limited) grounds on which public power may be challenged and to provide additional procedural hurdles and circumscribed remedies, avoiding the breadth and flexibility of the inherent supervisory jurisdiction exercised on an AJR.³² As noted in Chapter Three, this inter-play between judicial activism in developing substantive law, and executive and parliamentary restriction, is characteristic of tensions between the courts and other branches of state throughout the history of judicial review.

The authority of the AJR could be weakened if its use is limited by the availability of other procedures that *may* address individual grievances, but which do not perform many of the other varied roles associated with judicial review. The less room there is for judicial creativity within our public law system as a whole, the more that system aligns with the vision of republican

³² Sarah Nason and Maurice Sunkin, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law' (2013) 76 MLR 223, 231-233.

democratic positivists or political constitutionalists who believe that the primary controls on public power should be parliamentary.

Each year approximately ½% to 1% of Receipts are appeals by way of case stated from the lower civil and criminal courts, the largest number coming from the magistrates courts. In such claims the justice (magistrates' court), judge (crown court), minister, government department, tribunal, or other relevant person³³ states their findings of fact and law for the Administrative Court,³⁴ 'to make a decision on the application of the law to those facts'.³⁵ The substance of these claims can overlap with an application for a quashing order under an AJR. In both types of case the core issue is whether the challenged party has made a legal error or acted outside their jurisdiction. The decision to state a case supposedly provides a filter for un-meritorious applications so there is no permission stage. This procedure also requires there to be a final determination (i.e. conviction, acquittal, or sentence). Such finality is not needed for an AJR which can generally be issued at any stage.

In circumstances where both avenues are available the case stated procedure should be used because it enables the Administrative Court to have specific cognisance of the facts as established by the lower court (or other decision-maker). In the criminal context it has been noted that, 'judicial review...should only be sought when the route prescribed by Parliament is for

³³ Magistrates' Courts Act 1980, ss 111-114 and Criminal Procedure Rules 2010, Pt 64; Senior Courts Act 1981, ss 28-31 and CPR Pt 54.

³⁴ Such claims must be determined by a Divisional Court.

³⁵ CPR PD 52E.

some reason inapposite or clearly inappropriate'.³⁶ An AJR is apposite in the context of allegations of unfairness or injustice in the conduct of the lower court (or other decision-maker) as opposed to some error of law that whilst material cannot be said to taint the entire proceedings with injustice. This is not always an easy distinction to draw and the Administrative Court takes a flexible approach to each case, after all the same pool of judges are available to decide each type of application. If a lower court or other decision-maker refuses to state a case a litigant may be able to pursue a mandatory order (in an AJR). Again the relevant distinction is that the AJR provides backstop for cases of potential injustice where all other appeal routes have run out.

These distinctions between case-stated and other statutory appeals and applications on the one hand, and the AJR procedure on the other, add weight to an interpretation of judicial review in the Administrative Court as concerned with individual miscarriages of justice that are damaging to any account of the rule of law as a key constitutional principle. The AJR claims are concerned with exposing and defending some *core of judicial justice*, potentially extending to a *right to just Administration*, whereas the statutory claims are more concerned with resolving specific errors of law, or errors of fact that have led to unfairness in routine decisions.

4.5 The tribunalisation of judicial review

³⁶ *R v Morpeth Ward JJ, ex parte Ward* (1992) 95 Cr App R 215.

The Tribunals Courts and Enforcement Act (TCEA) 2007 harmonised tribunal justice into one self-contained edifice with provision for internal appeal and review; at the apex is the Upper Tribunal (UT).

In 2009, asylum and immigration ‘Reconsiderations’ were transferred from the Administrative Court into this new tribunal structure. Yet there was a notable lacuna in the system; in some cases a UT refusal of permission to appeal (either to itself or to the Court of Appeal) could not be subject to legal challenge. The solution was to seek an Administrative Court AJR of the UT’s refusal. However, with the UT designated a ‘superior court of record’, prevailing opinion was that it would be immune from judicial review in the Administrative Court (specifically it would be immune from the inherent supervisory jurisdiction).³⁷

In the case of *Cart and MR*³⁸ this assumption was rejected, with the Supreme Court holding that AJRs to the Administrative Court could proceed, but only in cases that raise an important matter of legal principle or practice, or are otherwise compelling. These are the criteria that apply where an applicant requests a second appeal on a point of law.³⁹

The Administrative Court now classes these AJRs as either *Cart* (immigration) claims, or *Cart* (other) (anything that is not related to immigration or asylum). *Cart* (immigration) claims are successors to asylum and immigration Reconsiderations, the notable difference being the stringent

³⁷ Sir Andrew Leggatt, ‘Tribunals for Users: One System, One Service’ (Her Majesty’s Stationery Office 2001) [6.3].

³⁸ *R (Cart) v The Upper Tribunal and R (MR (Pakistan)) (FC) v The Upper Tribunal (Immigration & Asylum Chamber) and Secretary of State for the Home Department* [2011] UKSC 28; [2012] 1 AC 663.

³⁹ CPR 52.13.

permission test, another example of tightening up access to justice (but this time one that was judicially imposed and that leaves more room for flexibility in its application).

From 1 November 2013 to 30 April 2014 Cart (immigration) claims accounted for 39% of all asylum and immigration AJRs issued in the Administrative Court. Cart (immigration) and Cart (other) claims together amounted to 20% of the Court's total civil judicial review caseload during this period.

The Lord Chancellor can transfer certain classes of AJR from the jurisdiction of the Administrative Court to that of the UT; these AJRs must be conducted by a High Court judge on the same legal grounds as applied by the Administrative Court, in accordance with the same procedures and attracting the same remedies.⁴⁰ An Order has been made (with effect from 1 November 2013) transferring the major classes of asylum and immigration AJR to UTIAC.⁴¹ Figure 4.3 shows the make-up of the Administrative Court's asylum and immigration AJR caseload following the transfer.

⁴⁰ TCEA, ss15, 16, 17 and 18.

⁴¹ Direction given in accordance with Constitutional Reform Act 2005, Pt 1 Sch 2 and TCEA 2007, s 18 available online: <<http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Practice+Directions/Tribunals/lcj-direction-jr-iac-21-08-2013.pdf>> (accessed 6 October 2014).

Figure 4.3: Asylum and immigration AJR (1 Nov 2013 – 30 April 2014)

Topic	No.	%
Age Assessment	14	1.4
Asylum Fresh Claim	7	0.7
Asylum Support	18	1.9
Cart Immigration	376	38.7
Immigration (Asylum Only)	12	1.2
Immigration College Licensing	17	1.8
Immigration Declaration of Incompatibility	1	0.1
Immigration Detention	184	18.9
Immigration Human Trafficking	8	0.8
Immigration Legislation Validity	36	3.7
Immigration (Not Asylum)	207	21.3
Immigration Sponsor Licensing	5	0.5
Naturalisation and Citizenship	86	8.9
Total	971	

Many of these classifications (some of which are seen in the data for the first time in 2013) can be considered more constitutionally flavoured, or at least as attracting broader public interest, than the bulk of asylum and immigration AJRs (which primarily challenge decisions of border officials or highlight

individual grievances against the Secretary of State for the Home Department).⁴²

Applications seeking Declarations of Incompatibility and/or assessing the validity of legislation are each more akin to constitutional review than traditional administrative review of discretionary decision-making. Human trafficking and detention claims are likely to raise concerns over fundamental rights and also send outward signals to the international community about commitments to rights in the UK. The grant of nationality and citizenship is a key concern in identifying our *demos*; the sovereignty of a constitution ought to stem largely from the sovereignty of the peoples subject to it.

This theme of division between street-level claims on the one hand, and constitutional or higher-level matters of legal principle on the other, can also be seen in the broader relationship between the Administrative Court and the UT outside the asylum and immigration context.

In *Cart and MR* the Supreme Court concluded that the second-tier appeals criteria should apply to AJRs of the UT on the basis that these restrictions provide a proportionate balance between access to justice and the appropriate use of scarce judicial resources. A significant factor weighing in the balance was the specialist expertise of the UT within its fields of competence. Carnwath LJ, the first Senior President of tribunals, envisaged that the UT would have a distinctive role to play in the delivery of administrative justice

⁴² See eg, Robert Thomas, 'Immigration Judicial Reviews' UK Const L Blog (12 September 2013) <<http://ukconstitutionalaw.org>> (accessed 6 October 2014).

and that it could be assisted in that role by the higher courts taking a light-touch attitude towards external supervision.⁴³

A growing body of case law locates the distinctive benefit of tribunal justice in high degrees of specialisation.⁴⁴ This specialisation can be broken down into two elements; first that specialist tribunals may only deal with one or a handful of unique topics such as social security, asylum and immigration, education, or mental health. These bodies can be seen as having legitimate authority under Raz's 'normal justification thesis'.⁴⁵ Under this interpretation authority stems from the notion that I am better off complying with this body's balance of reasons than I am with my own assessment, in this case due to relative levels of expertise.

The second element of specialisation is the more relaxed manner in which tribunals supposedly approach their task when compared to the higher courts. The classically cited advantages of tribunals are their more flexible, inquisitorial, less costly, and less cumbersome procedures. This can be linked to the values of administrative justice, dealing with individual cases quickly, efficiently, informally, and sometimes-in private. However, this account does not fit well with the UT as the apex of a tribunals system that is more court like than ever.

In terms of providing an appropriate boundary between UT authority and higher court supervision a subject-specialist/generalist dichotomy may

⁴³ Robert Carnwath, 'Tribunal Justice: A New Start' [2009] PL 48.

⁴⁴ *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734; [2002] 3 All ER 279; *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579; [2008] INLR 307 [46]; *R (Wiles) v Social Security Commissioner* [2010] EWCA Civ 258.

⁴⁵ Chapter One, 79-86.

provide a useful starting point. For example, recent cases have stressed that the proper construction of statutory provisions is a generalist activity more suited to the higher appellate courts.⁴⁶ Others have noted that matters of procedural propriety, including the provision of adequate reasons are equally of generalist ilk.⁴⁷ However, this apparent dichotomy admits of no clear boundary lines, both statutory construction and procedural propriety can be understood as context-specific matters.⁴⁸

There are other more practical reasons why the apparent subject-specialist/generalist cleavage cannot form the appropriate test for accessing the Administrative Court in this context. The jurisdiction of the UT Administrative Appeals Chamber is particularly broad, encompassing appeals from various First-tier jurisdictions such as Health, Education and Social Care, and Armed Forces Compensation. There is a danger, particularly within this Chamber, that the amalgamation of a range of diverse fields of law could lead to watered down rather than concentrated legal expertise.

There are also concerns (as well as benefits) surrounding the diversity of tribunal membership, whilst many tribunal members are senior judges, variously styled commissioners and lay members from previously distinct tribunals have also been transferred into the new system. This mix of judicial and administrative perspectives on rationality could improve decision-making, but it might also lead to a lack of clarity and decisions that are too close to the policy objectives of administrators.

⁴⁶ *Cawsand v Stafford* [2007] EWCA Civ 231.

⁴⁷ *SM(Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 371.

⁴⁸ *R (S) v A Social Security Commissioner* [2008] EWHC 3097 (Admin).

Recently the Government proposed to transfer AJRs relating to ‘land’ issues and statutory appeals and applications under TCP sections 288 and 289, into the Lands Chamber of the UT. One concern is that this process would cause disruption and requires the duplication of resources (such as specialist HMCTS lawyers) already available in the Administrative Court. The judges determining applications in a Lands Chamber would largely be the same judges already determining claims in the Administrative Court, if more expert judges were needed then merely transferring work into a different location would not solve the problem,⁴⁹ it may even mean that those Administrative Court judges who already specialise in planning law could end up hearing fewer planning cases. The proposal was ultimately dropped but it is indicative of concerns about the appropriate resolution of specialist subject matter disputes.

Quite aside from these considerations the Government again grounded its case for reform on the basis that the new procedures would speed up the determination of claims that are delaying economic progress, but this is to frame the problem too narrowly.⁵⁰ Planning law relies heavily on policies about the acceptable use of land and a range of different interests are in play. Respect should be shown to both central and local government (conflicts between those two organs must be carefully mediated). The variable nature of judicial review is evident here; anecdotally specialist planning judges responding to this research were especially concerned about the growth of proportionality

⁴⁹ There are parallels here with the ‘regionalisation’ project discussed in Chapter Five.

⁵⁰ Liz Fisher, ‘The Proposal for a New Specialist Planning Chamber and the Framing of Administrative Law’ UK Const L Blog (1 November 2013) <<http://ukconstitutionallaw.org>> (accessed 6 October 2014).

reasoning in AJRs, they see their role as policing the boundaries of delegated power and watching out for decisions that are ‘bonkers’ (*Wednesbury* unreasonable).⁵¹ They largely wish to leave matters of justification and rights exposition to the initial decision-makers, these judges do not appear to be on board with the reformationist vision or common law constitutionalism and *manifest strict ultra vires* may be alive and well. I leave my discussion of the value of particular doctrines (such as proportionality) to later chapters; my point here is that if proportionality is valuable we should be wary of the isolationism of a specialist Lands Chamber. When institutionalised, particular cultures (including judicial cultures) have the potential to create distinct administrative laws that may damage the overall consistency in principle of the common law; too much fragmentation can damage consistency in principle.⁵²

Concerns about specialisation do not just relate to the substantive subject expertise of particular institutions within the tribunal structure, but also to their procedures. Some procedures of the new tribunal edifice, particularly those under which both the First-tier and UT can review their own decisions, are based on a curious amalgam⁵³ between a first instance merits decision,

⁵¹ In his Administrative Court for Wales Lecture (February 2014) Hickinbottom J (specialist planning judge, and at the time liaison judge for the Administrative Court in Wales, South Western England, and the Midlands) expressed concern about the infiltration of proportionality reasoning into planning cases, arguing that rights protection is primarily a matter for the institutions of government not the courts.

⁵² Administrative Court judge Rabinder Singh has argued that over-specialisation can stultify the development of the law. One must consider that many public law doctrines developed from ordinary common (private) law principles and Singh specifically includes the modern doctrine of legitimate expectations under this developmental umbrella. Sir Rabinder Singh, ‘The Unity of Law – or the Dangers of Over-specialisation’ *Society of Legal Scholars Centenary Lecture* University of Birmingham (2013) available online: <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/sir-rabinder-singh-speech-society-legal-scholars-centenary-lecture-28112013.pdf>> (accessed 6 October 2014).

⁵³ Peter Cane, ‘Judicial Review in the Age of Tribunals’ [2009] PL 479, 492.

factual appeal, and legality review. The reviewing body is the same tribunal possessed of the same power and authority, just with different members sitting. It can therefore substitute its own decisions, rather than remitting the case back to other tribunal members. There is evidence from Australian experiences to suggest that where the same body exercises first instance decision-making, appellate jurisdiction, and judicial review, it may be difficult to keep these functions distinct.⁵⁴ The danger is then that these functions could overlap in a manner than is inconsistent with rule of law values such as independence and impartiality. This notion, that I shall term ‘function creep’, can also damage the traditional distinction between review and appeal (legality and merits) on which the AJR is said to be based. My view is that this distinction between legality and merits neither fits nor justifies current practice in any event, but even if it doesn’t there is still good reason to distinguish different degrees of judicial intervention based on the values (and social facts) engaged by different types of claim.

Carnwath LJ has noted that one of the benefits of the tribunal edifice is its capacity to transcend traditional conceptual distinctions between fact and law, and between merits and legality in order to do justice in individual cases.⁵⁵ In my view this transcendence is to be welcomed, as the social practice of law (which is made up of the beliefs, attitudes, and opinions of participants) does not have ‘in it’ the capacity to draw these clear conceptual boundaries. Problems largely only arise when the UT is not subject to any oversight,

⁵⁴ *ibid* 487.

⁵⁵ Carnwath, ‘Tribunal Justice’ (n 43) 57.

especially in cases that are un-appealable. This worry stems from the relative isolation of the new body of tribunal administrative law that will be created. The UT has developed its own mechanisms by which to create ‘precedents’ that the First-tier considers binding.⁵⁶

In *Cart and MR* Lady Hale expressed concern about the insularity of this kind of ‘local law’.⁵⁷ Lord Neuberger, speaking extra-judicially, has also highlighted the tendency of specialists to regard the law in their area as ‘our law’ and that this may ‘lead to error’.⁵⁸ In the Court of Appeal in *Cart*, Sedley LJ referred to the UT’s, ‘potential to develop a legal culture which is not in all respects one of lawyers’ law – a system, in other words, of administrative law’.⁵⁹

Tribunals have the potential for greater specialisation in particular subject areas, but their closeness to administrative policy raises questions about the diverse values served by administrative justice and legal justice respectively. There is a view that in tribunal administrative justice the *administrative* should be stressed. This implies adjudication based on balancing swift redress of individual grievances against broader policy considerations such as government targets and the need for effective and efficient administration within budgetary constraints (essentially the concerns of PDR). On the contrary in the case of legal justice dispensed by the higher courts,

⁵⁶ Trevor Buck, ‘Precedent in Tribunals and the Development of Principles’ (2006) 25(4) CJO 458; Mark Elliott and Robert Thomas, ‘Tribunal Justice and Proportionate Dispute Resolution’ (2012) 71(2) CLJ 297, 319.

⁵⁷ *Cart and MR* (Supreme Court) [42].

⁵⁸ Lord Neuberger, ‘Talk to the Upper Tribunal on the Relationship Between the Tribunals and the Higher Courts’ 6 July 2009; and see SH Legomsky, *Specialized Justice: Courts, Administrative Tribunals, and a Cross-national Theory of Specialization* (Clarendon 1990) 15.

⁵⁹ (*Cart*) v *Upper Tribunal* [2010] EWCA Civ 859; [2011] 2 WLR 36 [42].

emphasis is placed on the *legal* element which implies decision-making that is open, independent, impartial, and compliant with a range of rule of law values.⁶⁰

Specifically in relation to asylum and immigration claims it is suggested that the majority of claimants are primarily concerned with having their personal grievances addressed in relation to issues that do not raise broader points of legal principle.⁶¹ This distinction between the individual grievance function of the AJR and its broader normative roles (public interest litigation, constitutional allocation of powers, exposition of legal principles) could provide an appropriate ground on which to demarcate the respective competencies of the UT and Administrative Court.⁶²

But just as with the specialist/general dichotomy, this cleavage also doesn't quite fit. Surely a specialist institution such as the UT ought to be able to bring its expertise to bear in protecting the public interest and exposing broader normative principles (especially where the structuring of good administrative procedures is concerned)? It has been argued that the UT's closeness to policy issues may make it better placed than the Administrative Court to determine whether particular decisions (especially those that might interfere with rights) can be justified.⁶³ The serviceability of this conclusion depends upon what is the best way to approach justification; if justification is

⁶⁰ Peter Cane, *Administrative Tribunals and Adjudication* (Hart 2009) 218; Michael Adler, 'Understanding and Analysing Administrative Justice' in Michael Adler (ed) *Administrative Justice in Context* (Hart 2010) 130; Emma Laurie, 'Assessing the Upper Tribunal's Potential to Deliver Administrative Justice' [2012] PL 288.

⁶¹ See Thomas, 'Immigration Reviews' (n 42).

⁶² Laurie, 'Administrative Justice' (n 60) 299-304.

⁶³ Carnwath, *Tribunal Justice* (n 43) 64-68; Laurie, 'Administrative Justice' (n 60) 304-309.

about more than administrative efficiency and proportionate dispute resolution then we should perhaps be wary of giving too much power to the UT without supervision.

In my view it is impossible to draw tight conceptual distinctions here; it is impossible to identify characteristics of institutions that are acceptable, that we wish to maintain and promote, without understanding the values and the practical effects (impacts) of any particular division.

In the Court of Appeal in *Cart's* claim, Sedley LJ noted that the judicial review power of the UT is endowed and circumscribed specifically by an Act of Parliament. The High Court's judicial review function on the other hand stems from its unique common law supervisory jurisdiction. Sedley LJ concluded that, 'far from standing in the High Court's shoes...the shoes the [Upper Tribunal] stands in are those of the tribunals it has replaced'.⁶⁴ The provisions of the TCEA conferring a limited legality review power on the UT were necessary precisely because the UT and High Court, 'are not meant to be, courts of co-ordinate jurisdiction'.⁶⁵

Expert public lawyers, Laws LJ in the Divisional Court and Sedley LJ in the Court of Appeal approached the issue via normative assessment of the inherent supervisory jurisdiction. Laws LJ was concerned to determine the extent to which the UT could be considered a suitably independent and

⁶⁴*Cart* (Court of Appeal) [19].

⁶⁵ *ibid* [20].

authoritative judicial source of statutory interpretation able to render Parliament's statutes 'effective'.⁶⁶

Both Laws and Sedley LJ accepted the continuing serviceability of the distinction between jurisdictional and non-jurisdictional errors of law, at least in the case of specialist courts and tribunals. However, jurisdictional error of law was the conclusion not the starting point. The starting point for Laws LJ was the normative basis of the High Court's jurisdiction, he cited *R v Cripps, ex parte Muldoon*,⁶⁷ in which Goff LJ concluded in relation to an election court:

The most that can be said is that it is necessary to look at all the relevant features of the tribunal in question including its constitution, jurisdiction and powers and its relationship with the High Court in order to decide whether the tribunal should be properly regarded as inferior to the High Court, so that its activities may appropriately be the subject of judicial review by the High Court.⁶⁸

Laws LJ approved this test concluding; 'It is clear to my mind that the approach being commended is to examine all the characteristics of the court in question in order, not to dignify it with a name or status, but to ascertain whether in substance it should be subject to the judicial review jurisdiction'.⁶⁹

Given the unique nature of the UT neither Laws nor Sedley LJ felt they had to fit the scope for judicial review of its decisions into any established

⁶⁶ Effective in this sense can have a very broad meaning, given Laws LJ's views expressed elsewhere, effective may mean in compliance with common law constitutional values. Sir John Laws, 'The Constitution: Morals and Rights' [1996] PL 622.

⁶⁷ [1984] QB 68.

⁶⁸ *ibid* [87].

⁶⁹ *Cart (Admin)* [70].

grounds, but reflecting on its qualities in relation to those of the Administrative Court, jurisdictional error of law and fundamental injustice were the grounds they came up with.⁷⁰ They applied the concept of jurisdictional error as a useful tool following interpretation of relevant values (including expertise and rule of law values such as efficiency) not as a proxy to avoid value-laden analysis. This fits with my argument is that it is misuse or over-emphasis on conceptual tests, rather than the very existence of conceptual tests that is problematic.

The Supreme Court, on the other hand, concluded that the concept of jurisdiction ‘has many meanings’ and a return to the ‘technicalities of the past’ should be avoided.⁷¹ Lady Hale considered the key issue to be one of proportionate access to justice:

the scope of judicial review is an artefact of the common law whose object is to maintain the rule of law...Both tribunals and the courts are there to do Parliament’s bidding. But we all make mistakes. No-one is infallible. The question is, what machinery is necessary and proportionate to keep such mistakes to a minimum?⁷²

The Supreme Court applied a holistic (as opposed to formally structured) proportionality test, examining matters such as scarce judicial resources, the number of bites of the judicial cherry that claimants seeking an AJR of the UT would have already had, and evidence of low permission success rates and

⁷⁰ An example of the former is where the UT proposes to grant a monetary remedy that it is not authorised to deliver, or if a disqualified member purports to hear a case, an example of the later would be severe procedural errors, such as failing to provide an individual with even the gist of the case against them.

⁷¹ *Cart and MR* (Supreme Court) [40] (Lady Hale) and [110] – [111] (Lord Dyson).

⁷² *ibid* [37].

unmeritorious claims in asylum and immigration litigation. Whilst Laws and Sedley LJ were concerned with the specific features and powers of the Administrative Court and UT respectively, the Supreme Court expanded its analysis to consider the consequences of its decision. Review that was unrestricted would lead to a continuing drain on court resources by what have been characterised as largely unmeritorious claims, but a test that was too restricted might lead to the ossification of legal errors within the tribunal system. This analysis has been seen as pragmatic largely I think because reliance on relevant facts (caseloads, bites of the cherry, the isolationism of the UT etc.) served (perhaps by sleight of hand) to transfer a debate over the value of supervision into one about social facts (the latter supposedly being easier to resolve). However, this is misleading because the relevancy of particular facts in the first instance can only be determined by conclusions drawn from an assessment of values; there can be no bright line between pragmatism and principle, or between pragmatism and values.

The Supreme Court in effect balanced a right of access to justice (drawn especially from rule of law values) against other competing matters such as the rights of others that would be affected by delays in the administration of justice, and the broader interest that legal errors must not be shielded within a self-contained system of administrative law.

Christopher Forsyth has argued that the Supreme Court ignored key precedents that could be taken to indicate that the concept of jurisdictional error of law is still alive and well in the context of certain courts and peculiar

jurisdictions.⁷³ In his view, the Supreme Court decision simply didn't fit with past precedent. I agree with Forsyth that the matter may have been dispensed with too quickly and the Supreme Court's case for distinguishing precedent, namely its 'excessive technicality', could have been more deeply explored.

However, I think there is another way to interpret the outcome. In its proportionality analysis the Supreme Court was not concerned with the right of access to justice in the broadest sense; it was concerned specifically with the right of access to judicial review of certain tribunal decisions. The Court therefore can be said to have started with *a right to just administration* (when this is understood as including all possible grounds of review) moving on to determine whether a limitation on this particular right was justified. It concluded that the second-tier appeals criteria provide a suitable limitation.

If we focus on these criteria (an important matter of legal principle or practice or an otherwise compelling case) the role for judicial review in the Administrative Court is distinguishable by the Court's competence in complex constitutional claims, public interest litigation, normative exposition of legal principles, and the inter-institutional balance of powers. But it could also be said that the Administrative Court is concerned with each individual's *right to just administration*, and that a 'compelling case' could be made out whenever this right has been breached.

That the Administrative Court is ultimately concerned to effect individual justice in compelling cases fits better with the views of Laws and

⁷³ Based on, *Re Racal Communications Ltd* [1981] AC 374, 382-383 (Lord Diplock) and *R v Lord President of the Privy Council, ex parte Page* [1993] AC 682, 700-704 (Lord Browne-Wilkinson).

Sedley LJJ. The ‘exceptional circumstances’ they noted constitute serious miscarriages of justice. Whilst the Supreme Court additionally located the Administrative Court’s special competence in the normative exposition of complex legal principles and cases of important public interest, at all levels the focus was also on doing justice in ‘compelling’ or ‘exceptional’ *individual* cases.⁷⁴

This conclusion ties in nicely with Andrew Le Sueur’s argument that recognition of what is in essence a *right to just administration* may help manage the tensions between legal constitutional values (such as openness, independence, impartiality, and dignity) and the values associated with administrative justice and PDR (such as speed, informality, and privacy).⁷⁵ In case of a conflict it is the legal constitutional values properly interpreted (the rule of law values, and perhaps also the other political values, outlined in Chapter One of this thesis) that should prevail.

4.6 Administrative Court AJRs and individual grievances: specific Topics

A more detailed look at social practice in ordinary civil AJRs also coheres with the view that the Administrative Court’s primary function is to do justice in individual cases.

⁷⁴ In any event it may be that compelling cases and exceptional circumstances are largely indistinguishable in practice. Sarah Nason, ‘The Administrative Court, the Upper Tribunal and Permission To Seek Judicial Review’ (2012) 21 Nottingham Law Journal 1, 19-23.

⁷⁵ Andrew Le Sueur, ‘Administrative Justice and the Resolution of Disputes’ in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (7th edn, OUP 2011) 260.

Figure 4.4 shows the main Topics of ordinary civil AJRs over the course of this research. It should be treated with some caution given that decisions to categorise are based on one core issue in claims that may traverse a range of subject matters.

Figure 4.4: Key Topics in ordinary civil AJR

Topic	2007/08		2013/14		Average	
	No.	%	No.	%	No.	%
Cart (other)			54	2.6	39	1.8
Community Care	150	7.2	84	4	97	4.6
Costs and Legal aid (Civil)	35	1.7	44	2.1	37	1.7
County Court	41	2	97	4.6	55	2.6
Disciplinary Bodies	84	4.1	110	5.2	108	5.1
Education	110	5.3	78	3.7	91	4.3
Family, Children and Young Persons	95	4.6	77	3.7	126	6.0
Homelessness	192	9.3	111	5.3	113	5.3
Housing	147	7.1	114	5.4	139	6.6
Local Government	45	2.2	53	2.5	47	2.2
Mental Health	54	2.6	21	1	30	1.4
Police (Civil)	73	3.5	95	4.5	99	4.7
Prisons	377	18.2	352	16.8	443	20.9
Social Security	70	3.4	21	1	37	1.7
Town and Country Planning	165	8.0	259	12.3	186	8.8
Other	433	20.9	530	25.2	469	22.2
Total	2,071		2,100		2,116	

In the late 1980s Maurice Sunkin concluded that whilst the AJR was being used across an increasingly diverse spectrum of activities, caseloads were still dominated by a few areas of litigation and a narrow band of respondents;⁷⁶ more than 25 years on and such is still the case. Although the make up of the main bulk of AJRs has not changed significantly, the variety of Topics under which claims are classified has expanded. In 2007/08 claims were categorised under 57 different Topics, in 2013/14 there were 89 different Topics. This demonstrates the increasing breadth of issues subject to oversight by the Administrative Court, and could also be a reflection of the broadened range of matters handled by public decision-makers.

Throughout the course of this research the most prevalent Topic of claim has been prisons, constituting 21% of all ordinary civil AJRs.

Claims against the police are another large Topic, having grown during this research, to a peak of 6.3% in 2011/12.

The next most prevalent Topic is town and country planning, which accounted for 8.8% of ordinary civil AJRs. Both the number of applications (259) and the percentage of applications as a proportion of the total ordinary civil AJR caseload (12.3%) are up significantly in 2013/14 which is perhaps surprising given that this was the year when Government proposals to restrict planning claims came into effect. It is possible that this increase could be a response to the recently shortened time limit (down from three months to six weeks); there is a concern that shortened time limits lead to the hasty issue of

⁷⁶ Maurice Sunkin, 'What is Happening to Applications for Judicial Review?' (1987) 50(4) MLR 432, 464-466.

litigation. Town and country planning claims may involve major infrastructure projects that affect the broader public (a particular target of the Government reforms). The Administrative Court now has a special category (town and country planning significant) for such claims and there were 18 in 2013/14.

The next five most prevalent Topics of claim come fairly close together as percentages of the Court's overall caseload; housing 6.6%, family, children and young persons 6%, homelessness 5.3%, disciplinary bodies 5.1% and education 4.3%. These are areas that have always been prevalent in judicial review litigation and where the market for legal services (including the charity sector) is relatively well developed. Cases of professional discipline, matters to do with one's housing situation (or lack of in homelessness cases), and concerns over the provision of education, care, and maintenance for a particular child, are generally areas where individual grievances are driving litigation.⁷⁷

Whilst it is true that one cannot draw a direct correlation between the Topic of the claim and whether it relates to an individual grievance, other evidence can bolster such speculation. In recent research conducted by Sunkin and Bondy, based on all AJRs proceeding to full hearing over a 20-month period from July 2010 to February 2012, it was found that 75% of judgments analysed (374 claims) turned on their own facts (what I have termed individual grievance cases). From my own sample of reported substantive judgments I found only 54% of claims (119 cases) to have turned on their own facts, over a 7-month period (1 January 2013 to 31st July 2013). There could be a number of

⁷⁷ These five categories together with prisons, police, and town and country planning accounted for 62% of the Administrative Court's caseload during this research.

explanations for our different findings, the most obvious of which is that we may have differing interpretations of what constitutes an ‘own fact’ case. For example, I may have a more expansive notion of how a judgment could establish or refine a legal principle having broader implications for other claimants. It may also be that Sunkin and Bondy’s analysis is more accurate as it extends over a longer period. Nevertheless, it is not beyond the bounds of possibility to speculate that something has changed in the time between our respective studies, particularly when there may be other evidence to suggest that the permission test is being interpreted in a manner that may disproportionately restrict access in own fact claims.

A specific Topic of AJRs to be watched with interest is Cart (other) claims. Mr. Cart’s application involved issues of social security and child maintenance, and non-asylum and immigration Cart style cases have more than doubled in the first two years that they have formed a specific Topic of AJR.

Another growth area is AJRs of county court decisions. Whilst judicial review runs in principle to judges of the county court, permission will not be granted where suitable alternative avenues of redress exist, whether or not such avenues have been exhausted. However, there are exceptions to this restriction, notably asylum cases because of the serious threat to life and liberty that their subject matter might disclose, but also two other categories; pre-*Anisminic* review for jurisdictional errors of law, and procedural irregularity so severe as to deny the right to a fair hearing.⁷⁸

⁷⁸ *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738; [2003] 1 WLR 475. These categories also found favour with Laws and Sedley LJ in *Cart*.

Taking these county court claims and *Cart* (other) claims together, the Receipts data suggests a growth in AJRs in which more restrictive interpretations of both access to review at the permission stage, and relevant legal principles, are evident.

4.7 The permission lottery

Given the variety of legal tests now applicable at the permission stage, and the restricted nature of review in particular Topics of claim, I think there is a perceptible risk of ‘function creep’. This is where restrictions on accessing justice (or on the breadth of applicable legal tests) legitimately present in one Type or Topic of claim leak into judicial handling of other Types of application where such restrictions could be damaging to the efficacy of the procedure, and to constitutional values.

In *Cart and MR* Lady Hale noted that there, ‘must be a limit to the resources the legal system can devote to the task of trying to get the decision right in any individual case’,⁷⁹ but in many instances the legal system has so far devoted no resources at all to the matter and an AJR is the only route to having the issue addressed. It may be true that resources spent on claims raising broader matters of public interest or legal principle have the potential to lead to greater tangible benefits, but something of value is lost if each individual’s right of access to justice is not taken seriously. Protecting individual dignity, or ensuring equal respect for individuals, may be the touchstone of judicial review

⁷⁹ *Cart and MR* (Supreme Court) [41].

across the board, as well as being self-evident in relation to human rights claims.

In my view variable rates of permission success may provide some evidence of function creep and inconsistency in principle across judicial decision-making. In Chapter Three I noted that judicial discretion at the permission stage (including the ability to alter the arguability standard over time) has been used as a judicial management tool to control caseloads. This is not necessarily unprincipled, but increased potential for judicial management (alongside other non-judicial reforms) has meant that the permission stage is now more akin to an early neutral evaluation of claims (a PDR process) than a filter for vexatious litigation.

There has been an evident fusion of permission and the substance of claims as a whole. Whilst this may have benefits in terms of speed and efficiency, it also has a negative side, not least because most permission decisions are not reported (this in itself goes against the culture of justification). Such claims largely cannot lay down broader legal principles and the attendant publicity of a permission decision (which is part of community justice) may not be as extensive as the Lord Chancellor has suggested.

It is perhaps this lack of reporting which led the government to the misapprehension that judges don't take into account whether any alleged defect in the decision-making procedure could have made no difference to the substance of the challenged decision. Judges *have* already been taking this

notion of no difference into account at the permission stage.⁸⁰ Nevertheless, clause 70 of the Criminal Justice and Courts Bill 2014 proposes that permission must be declined; ‘if 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’.

Among the many difficulties with this test is the introduction of new phrases such as ‘highly likely’ and ‘substantial difference’ which will require interpretation. Examining each of these concepts may bring judges closer to assessing the substance of the initial decision from the perspective of administrative policy, as opposed to from the perspective of legal principles and rights.

This biggest problem with formalising this test in statute is that it rests on neglect of one of the key functions (if not the central purpose) of judicial review; its symbolic protection of rule of law, and other constitutional, values, combining to form a *core of judicial justice* (and possibly a *right to just administration*). As Mark Elliott puts it, there are no ‘pyrrhic victories’ in judicial review litigation.⁸¹ There is intrinsic value to ensuring that public powers are lawfully exercised, and this value must at least be *capable* of outweighing an argument that the defect could have made no substantial difference in a particular case. The Administrative Court’s authority is

⁸⁰ Response of the Senior Judiciary to the Ministry of Justice Consultation on Judicial Review: Proposals for Further Reform: ‘Under the current law the court may already refuse an application at the permission stage on the basis that an alleged procedural flaw in making the decision can have made no difference to the outcome’. [20], available online: <<http://www.judiciary.gov.uk/publications/senior-judiciary-response-consultation-judicial-review-proposals-further-reform/>> (accessed 11 October 2014).

⁸¹ Mark Elliott, ‘Judicial review – why the Ministry of Justice doesn’t get it’ UK Const L Blog (16 December 2012) <<http://ukconstitutionallaw.org/>> (accessed 6 October 2014).

weakened (along perhaps with respect for its judgments) if it acts under Parliament's specific direction to ignore legal wrongs, even if in the Court's view the wrongs could have made no substantial difference.

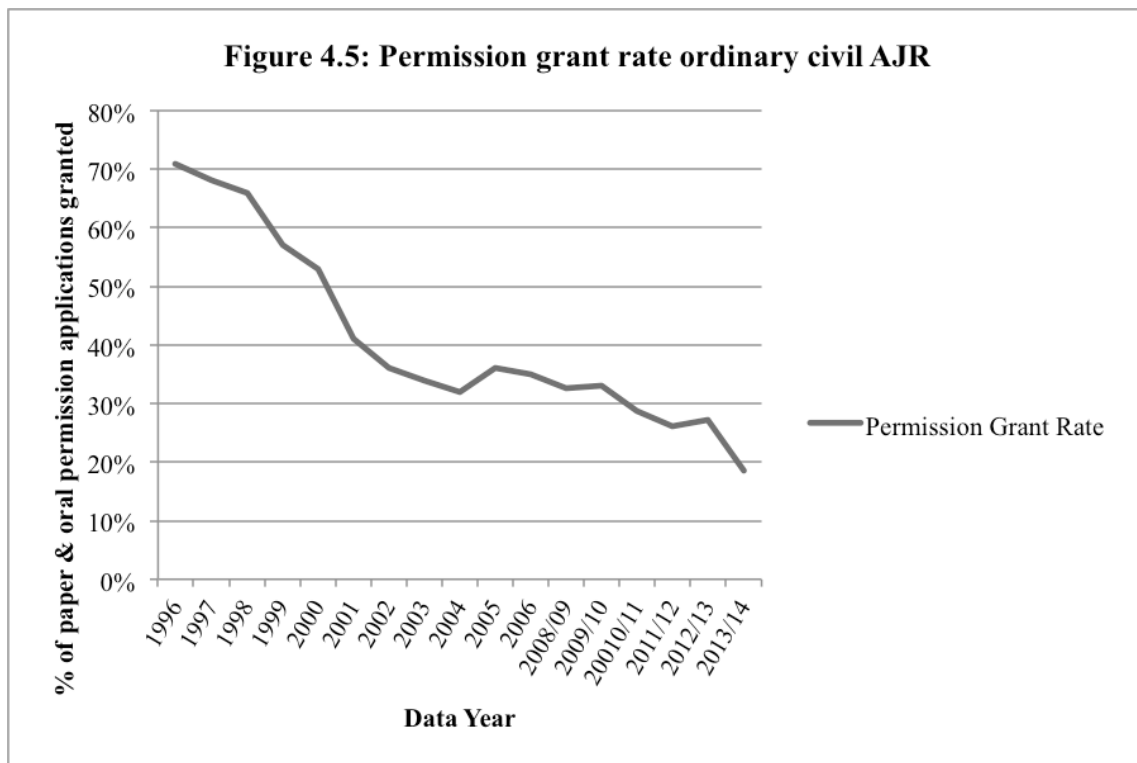
This new test will add another layer of complexity when studies have already shown that inconsistency in the way particular judges approach the arguability criterion of the permission test is causing significant concern to practitioners, litigants, and interested parties.⁸²

Judges have been criticised for manipulating the test to grant or refuse permission based on personal political proclivities, distrust of a certain class of claimant, or inherent bias against public body defendants. Even in the absence of such political and social class influences, nuanced distinctions such as those between 'clear arguability' and 'potential arguability' are confusing and invite errors from the most erudite judges.⁸³

Figure 4.5 indicates trends in permission success rates in ordinary civil AJRs over the years, it marries permission data collated for this research with historical figures and therefore the time periods do not match precisely, nevertheless the trend is clear.

⁸² Varda Bondy and Maurice Sunkin, 'Accessing Judicial Review' [2008] PL 647, 656-657.

⁸³ *ibid* 651-655 and 660-665.



In 1996 there were 1,856 ordinary civil AJRs issued in the Administrative Court and permission success rates stood at 71%; in 2013/14 there were 2,100 claims issued with a permission success rate of just 18.5%. Assuming that all successful permission applications reach a substantive hearing (actually it is only roughly 50%) there would have been close to three and a half times as many substantive hearings in 1996 as there were in 2013/14.

One of the most substantial reductions in success rates occurred between the penultimate and final years of this research, from 27.3% down to 18.5%. It is possible that this decline supports the Lord Chancellor’s view that a high number of AJRs are unmeritorious, but it may also show that the current permission stage is working to filter out such claims and further reforms are not necessary.

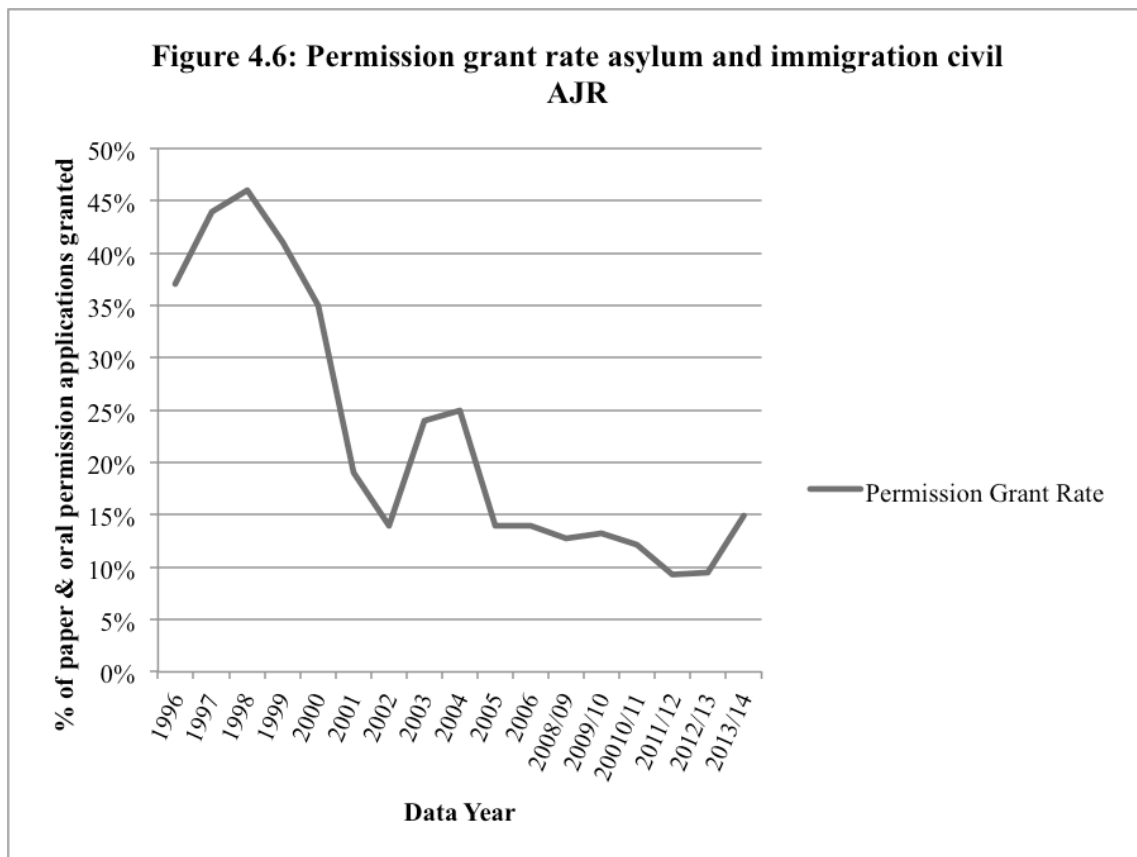
Nevertheless it seems surprising that permission success rates should be so low when (even accounting for the difficulties of self-reporting) practitioners responding to this research expressed clear regard for alternative dispute resolution and largely viewed the AJR procedure as one of last resort. One also has to question why there would be such a significant decline in the quality or merit of applications between 2012/13 and 2013/14 in particular.

It could be speculated that following the reduction in the number of asylum and immigration claims being issued in the Administrative Court, judges now have more time to devote to each permission application (some respondents to the research had perceived a judicial policy of ‘if in doubt, grant permission’ when judges were pushed for time in making decisions). It may also be that a smaller number of more experienced judges are now deciding applications, but especially given how difficult it is to quantify specialisation in Administrative Court AJRs this is not necessarily a positive development.⁸⁴

Figure 4.5 shows the overall permission grant rate, but this can be broken down to paper and oral applications. For example, in 2012/13 the paper grant rate was 23.3% whereas the oral grant rate was 68.1%; in 2013/14 the paper grant rate was 16.2% and oral grant rate 50.6%. Whilst a relatively small number of claims proceed to an oral hearing (144 in 2012/13 and 166 in 2013/14) it is still striking that grant rates are so much higher when the claimant is able to put their case in person. Since 1 July 2013 claims that are refused

⁸⁴ *ibid* 667, Bondy and Sunkin note that, ‘...the centralised system provides access to a relatively large pool of judges and, while inconsistency affects the relative chances of individual claimants obtaining permission, more systemic biases are likely to be ironed out by the number of judges involved’.

permission and considered ‘totally without merit’ cannot proceed to an oral renewal,⁸⁵ but it appears that this reform has not yet led to a reduction in the number of claims going forward to an oral hearing. This may provide some evidence that the reduction in permission success is due to more than some possible increase in hopeless applications.



The permission grant rate in asylum and immigration claims has also been decreasing as can be seen from Figure 4.6; bottoming out at around 9% between 2011/13, but rising again to almost 15% in 2013/14.⁸⁶ This is not surprising given that most asylum and immigration AJRs have been transferred

⁸⁵ CPR 52.3 (4A).

⁸⁶ Grant rates in oral claims are also higher than paper success rates in asylum and immigration claims, for example an oral success rate of 54.7% in 2012/13 and 44% in 2013/14.

into UTIAC, and those retained by the Administrative Court are largely claims involving complex legal principles or contentious constitutional issues. Most of the street-level bureaucratic claims, often labelled as largely un-meritorious, have been bequeathed to UTIAC; and its permission success rate in relation to such AJRs was only 5.2% in 2013/14.

Again the totally without merit classification does not appear to have led to a reduction in the number of permission claims being orally renewed (the number of oral permission applications increased from 86 in 2012/13 to 150 in 2013/14).

Whilst Maurice Sunkin and I previously found a correlation between decreasing permission success rates and the increasing proportion of claims issued by Litigants in Person (LIPs) (between 1 May 2009 and 30 April 2011),⁸⁷ the same trend is not so clearly evident in recent years. Anecdotally judges (practitioners and other interested parties) are still concerned about the capabilities of LIPs, but the reduction in permission success rates cannot be solely attributable to the growth of unrepresented litigation.

My particular concern is that the shadow of Cart claims, where the second-tier appeals criteria must be met at the permission stage, could be cast long over other species of claims where restrictions are not warranted. One can speculate that this function creep may be a partial cause of declining permission success rates and may also help to explain any possible decline in the number of own fact cases going forward to substantive judgment (the distinction

⁸⁷ Nason and Sunkin, 'Regionalisation' (n 32) 249-250.

between my case law findings on own fact claims and the earlier findings of Sunkin and Bondy).

4.8 An *operative* interpretation of (Administrative Court) judicial review part one - caseloads and institutional competence

In Chapter Two I explained my methodology by giving the example of lateness in schools.⁸⁸ A *manifest* interpretation of lateness (this is lateness if anything is) was taken to be when children arrive after the school bell has sounded; but when this concept was dis-ambiguated in light of the social practices of teachers across a range of schools different *operative* interpretations emerged. In some schools children would line up outside after the bell had sounded and then proceed to class in an orderly manner (one could arrive after the bell but still make it to class on time). In other schools a register of attendance was taken outside whilst in line, in other cases a register was not taken until the pupils were seated in class and so on.

In this Chapter I have tried to provide some data and analysis that helps to dis-ambiguate our *manifest* interpretations of judicial review; in particular the reformationist and common law constitutionalist accounts under which judicial review is seen as an increasingly constitutionalised procedure.

The findings of this Chapter suggest that the purposes of the AJR in the Administrative Court are wide, extending across the range of functions identified by Harlow and Rawlings. There is some evidence for the

⁸⁸ Chapter Two, 133-135.

reformationist account in both the broader Types of claim handled by the Administrative Court and in some key Topics of AJRs.

Cart claims (judicial review of the UT, both immigration and other) now make up 20% of the Administrative Court's civil judicial review jurisdiction (after 1 November 2013) and these cases attract the stricter second-tier appeals criteria at the permission stage. Certain classes of more constitutionally flavoured asylum and immigration applications (such as applications for a Declaration of Incompatibility and challenging the validity of legislation) make up a further 17% of the Administrative Court's total AJR caseload.

AJRs of county court decisions are also growing, and though attracting an ordinary permission requirement, these claims can generally only be substantively made out in 'exceptional circumstances'.⁸⁹ Further to this, AJRs of magistrates and crown court decisions lie only where the initial decision was irrational, perverse, outside jurisdiction (strictly interpreted) *and* tainted by some sense of injustice beyond a mere error of law.

Taking together all these claims (and some others)⁹⁰ it can be argued that some 43% of the Administrative Court's AJR caseload (from 1 November 2013 to 30 April 2014) concerned arguments over broader matters of principle or practice (including constitutional issues), important public interests, or otherwise compelling cases (such as exceptional circumstances and potential miscarriages of justice). This aligns the Administrative Court more towards the

⁸⁹ *R (Sivasubramaniam)* (n 78) [56].

⁹⁰ A set of claims each of which can be categorised as more high-level or constitutional in nature such as, those raising a Welsh devolution issue, claims turning on the proper implementation of European Union law, and significant town and country planning issues with broader public interest connotations.

normative exposition of important legal principles, inter-institutional allocation of power, and public interest functions of judicial review; effectively a more constitutionally-flavoured role.

The numerical significance of cases that must be argued on the basis of exceptional circumstances or compelling matters, also goes to show that the Administrative Court's jurisdiction is very much about claims where there may have been a miscarriage of justice in specific *individual* circumstances and no other adequate route to legal redress.

On the other hand, the high number of individual grievance or own fact cases that do not require some form of compelling or exceptional circumstances may alternatively point against the reformation or constitutionalisation image, especially (as I shall argue in later Chapters) given that many of these claims are also relatively un-contentious as a matter of legal principle and do not involve human rights issues. What is notable however is that these individual grievance cases are also claims where there is no other appropriate route to legal redress, and on that basis alone they could be described as compelling or exceptional.

One can perceive two sides to the reformationist image of judicial review. On the one hand there is evidence for the reformation in certain conclusions of this Chapter such as the increased prominence of high-level or constitutional claims dealing with the normative exposition of important legal principles or the inter-institutional balance of power between particular branches of state. I call this 'top-down constitutionalism' as it is largely based on the activities of elite lawyers and judges, individuals are only a 'trigger' to

get these claims into the system, their personal concerns are less important than the potential to determine legal limits on public power in accordance with relevant values.

On the other hand the reformation can also encompass the common law constitutionalist account of judicial review as community justice which is both constitutive and reflective of the broadest range of societal values. I call this ‘ground-up constitutionalism’, and it is dependent upon access to justice in the context of the widest possible range of matters affecting citizens.

In the following Chapter I examine whether this account of ‘ground-up constitutionalism’ fits with social practice by considering the extent to which AJR litigation is driven by the needs of communities and individuals (bottom-up) or by the interests and strategies of elite lawyers (top-down).

Chapter Five: An *Operative* Interpretation of the Role of the Administrative Court - Judicial Review as Community Justice

In late 2007 delays in the Administrative Court (the result of expanding asylum and immigration caseloads) became so severe that the Public Law Project issued a letter before claim, alleging breaches of the common law right of access to justice and Article 6 of the European Convention on Human Rights (ECHR). The Administrative Court set in train a number of practical measures, collectively known as the ‘blitz’ in order to clear the backlog of cases.¹

The transfer of the majority of asylum and immigration claims to the Upper Tribunal was not specifically a blitz measure; it was the product of broader reforms to the tribunal system.

More recently the speed and efficiency of Administrative Court litigation has improved;² nevertheless it may be the case that the vast majority of citizens, of various social classes, are currently largely excluded from judicial review litigation. If this is the true then the Administrative Court cannot hope to be a site of common law community justice reflecting the broader range of issues affecting citizens and ground-up constitutionalism would be a poor fit.

5.1 Common law community justice and ‘regionalisation’

¹ Sarah Nason, ‘Regionalisation of the Administrative Court and the Tribunalisation of Judicial Review’ [2009] PL 440, 442.

² Sarah Nason, Maurice Sunkin, and Duncan Hardy, ‘Regionalisation of the Administrative Court and Access to Justice’ (2010) 15(3) JR 220.

In its report *Justice Outside London*, a Judicial Working Group proposed reforms to regionalise the Administrative Court. It considered the clustering of public law legal services around the Royal Courts of Justice (RCJ) to be, ‘prejudicial to those who do not live and work in London and the South East’.³ It was hoped that regionalisation would encourage greater awareness of public law litigation in the English regions and in Wales, and a decentralisation of the market for public law legal services, potentially leading to greater competition, increased efficiency, and reduced costs.

While not expressed in these terms the approach taken by the Group fit with the view that a highly centralised system of AJR litigation was becoming increasingly difficult to justify given expectations that government and redress mechanisms will be devolved and localised wherever possible.⁴ This was coupled with evidence that London’s virtual monopoly over AJRs (and other Administrative Court claims) was likely to have had significant adverse effects on access to justice.

Respondents to this research, most notably those based in the regions, believed that over time the new Centres would be a significant catalyst to decentralisation of the market for legal services. There was an evident mentality of, ‘if you build it they will come’, ‘they’ being specialist lawyers clustering around the new Centres and raising awareness among the general population.

That different arguments were made for establishing each of the Centres

³ *Justice Outside London* (2007) [48] available online: <<http://www.judiciary.gov.uk/publications/justice-outside-london/>> [48] (accessed 6 October 2014).

⁴ See eg, the Localism Act 2011; Mark Elliott and Stephen Bailey, ‘Taking Local Government Seriously: Democracy, Autonomy and the Constitution’ (2009) 68(2) CLJ 436.

outside London also says something about the plurality of values served by the AJR and other Administrative Court claims.

Regionalisation is an unfortunate turn of phrase in relation to Cardiff and Wales; the case for a Centre in Cardiff was primarily constitutional, matters pertaining to Wales ought to be determined in Wales.⁵ While the specific case for each of the other regional Centres varied, a common theme was that the proposed locations fit well with the interests of the local legal profession and its perception of the needs of the relevant communities.

For Birmingham, the arguments were a mix of enhancing social justice alongside a commercial rationale. The commercial case seems particularly ill fitting given that the vast majority of AJRs pertain to social justice issues affecting some of the least advantaged groups in society.

In Manchester, access to justice for vulnerable sections of society and increased opportunities for the local legal profession formed the key arguments. Submissions from Leeds focused on the commercial case, presenting the city as a centre of business, finance, and legal expertise to rival London. The arguments in favour of each Centre and the case for regionalisation generally, suggest that the success of the project in opening access to public law procedures and remedies ultimately depends on whether it helps to improve the availability of local legal services.

In the following sections I analyse some impacts of regionalisation, in particular whether there is evidence to support a *manifest* interpretation of judicial review as enhancing common law community democracy. My first

⁵ *Justice Outside London*, (n 3) Appendices F and G.

concern is to examine whether the rights and interests of citizens outside London and the South East of England continue to be under-represented in AJR litigation.

5.2 ‘Community-based’ public law

Identifying local claims can be done in number of ways, each of which is limited. The first is by focusing on claims that are issued in the English regional Centres and in Wales. However, it cannot be assumed that claims necessarily concern the particular English region (or country in the case of Wales) in which they are issued as claims may arise in one location and be litigated in another. An alternative, and potentially more reliable way of identifying the local character of claims, is by examining the addresses of the parties and the nature of the issues. However, the claimant’s address is generally only recorded when the AJR has been issued by a litigant in person (LIP), although if they later instruct a solicitor both their and the solicitor’s details are recorded. During this research period claimants’ addresses were recorded on average in 38% of all ordinary civil (non asylum and immigration) AJRs and solicitors’ addresses were recorded in 70% of all ordinary civil AJRs.

5.2.1 Total outside London Receipts

The total number of Receipts (which includes AJRs and other Types of Administrative Court claim) received outside London has increased from 1,642

(9.8% of all Receipts) in 2009/10 to 2,341 (16.2% of all Receipts) in 2013/14. There has been a slight but significant decrease in the number claims issued outside London between 2012/13 and 2013/14. The reduction specifically relates to AJRs as opposed to other Types of Administrative Court claim. This is interesting in itself because other Receipts are primarily statutory appeals that relate to individual grievances rather than broader public interest or constitutional claims. This reduction in AJRs outside London may suggest recent damage to any constitutionalisation, or reformation, in local judicial review.

Manchester sees the highest number of Receipts outside London; statutory appeals accounted for 26% of Manchester's caseload over the five years since regionalisation (compared to an Administrative Court average of 7.2% during this period) and 94% of these Manchester claims involved the General Medical Council (GMC) as defendant. The GMC is a national body having powers and responsibilities under the Medical Act 1983 regarding doctors' fitness to practice. The GMC's Manchester office handles a significant proportion of this work, although these cases stem from the whole of England and Wales.

The recent increase in Receipts received by Manchester (largely made up of statutory appeals) has been offset by a reduction in Leeds and Birmingham Receipts. In Leeds this is largely the result of fewer asylum and immigration AJRs; in Birmingham the number of ordinary civil AJRs has also decreased.

Figure 5.1 shows the location of issue of ordinary civil AJRs.

Figure 5.1: Ordinary civil AJRs by Centre

Centre	2009/10		2010/11		2011/12		2012/13		2013/14	
	No	%	No	%	No	%	No	%	No	%
Birmingham	137	6.5	178	8.4	162	7.8	176	8.2	118	5.6
Cardiff	61	2.9	80	3.8	68	3.3	86	4	101	4.8
Leeds	221	10.5	238	11.2	199	9.5	198	9.2	214	10.2
Manchester	215	10.2	212	9.9	231	11.1	281	13.1	213	10.1
Sub-total outside London	634	30.1	708	33.2	660	31.6	741	34.4	646	30.8
London	1,476	70	1,425	66.8	1,431	68.4	1,412	65.6	1,454	69.2
Total	2,110		2,133		2,091		2,153		2,100	

Predictions that the local Centres would initially receive between 27% and 33% of ordinary civil AJRs were largely accurate.⁶ However, despite reaching a high of 34.4% of ordinary civil AJRs being issued outside London in 2012/13, the proportion has dropped to 31% in 2013/14. There were only 12 more ordinary civil AJRs issued outside London in 2013/14 than were issued in 2009/10 when the local Centres were first established.

The drop in local issue overall is largely down to the low number of applications issued in Birmingham, and a notable dip in Manchester claims.

Cardiff is the only Centre that shows a fairly consistent trend of increase in claims; though in recent years this is due to the Centre taking over formal responsibility for administering applications originating in the South West of England. Claimants from the South West of England have issued approximately 40% to 50% of Cardiff Centre claims over the course of this research.

⁶ Nason, 'Regionalisation and Tribunalisation' (n 1) 444.

The volume of cases issued in each Centre over time is telling in its own right, but the relative incidence of AJRs across particular communities can be better assessed by considering the number of claims in the context of population statistics.⁷ In particular this helps to identify possible unmet demand for judicial review litigation.

5.2.2 The scale of judicial review and population

Unmet demand includes issues suitable for redress by an AJR (and other public law procedures) not making it into the legal system for various reasons (which may include demographic factors, access to suitably specialist and affordable legal advice services, and distance from the nearest court).

Researchers have mapped the use of judicial review to challenge local authorities in England and Wales, concluding that:

analysis demonstrates the critical role of [geographically uneven] access to legal services in enabling the bringing of challenges against a local authority, which is perceived to have failed the claimant. It also shows the importance of links between deprivation and the presence of legal services in explaining resort to judicial review.⁸

⁷ Sarah Nason and Maurice Sunkin, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law' (2013) 76 MLR 223, 236 and 240.

⁸ Maurice Sunkin and others, 'Mapping the Use of Judicial Review to Challenge Local Authorities in England and Wales [2007] PL 545, 566.

The researchers found that AJRs are at their highest where levels of deprivation are greater. The concentration of legal services is also at its maximum in areas of extreme deprivation, giving rise to; ‘The clear implication...that it is the concentration of legal services in areas of high deprivation that accounts for [high levels of judicial review challenge], rather than the characteristics of deprived populations themselves’.⁹ Lawyers are attracted to areas of deprivation where there is a perceived need for their services; they do not create litigation simply by their presence regardless of the needs of local communities.

I have examined potential unmet demand for judicial review outside London by considering practitioner views and by analysing the number of claims issued in each Centre per head of population resident in the geographical area.

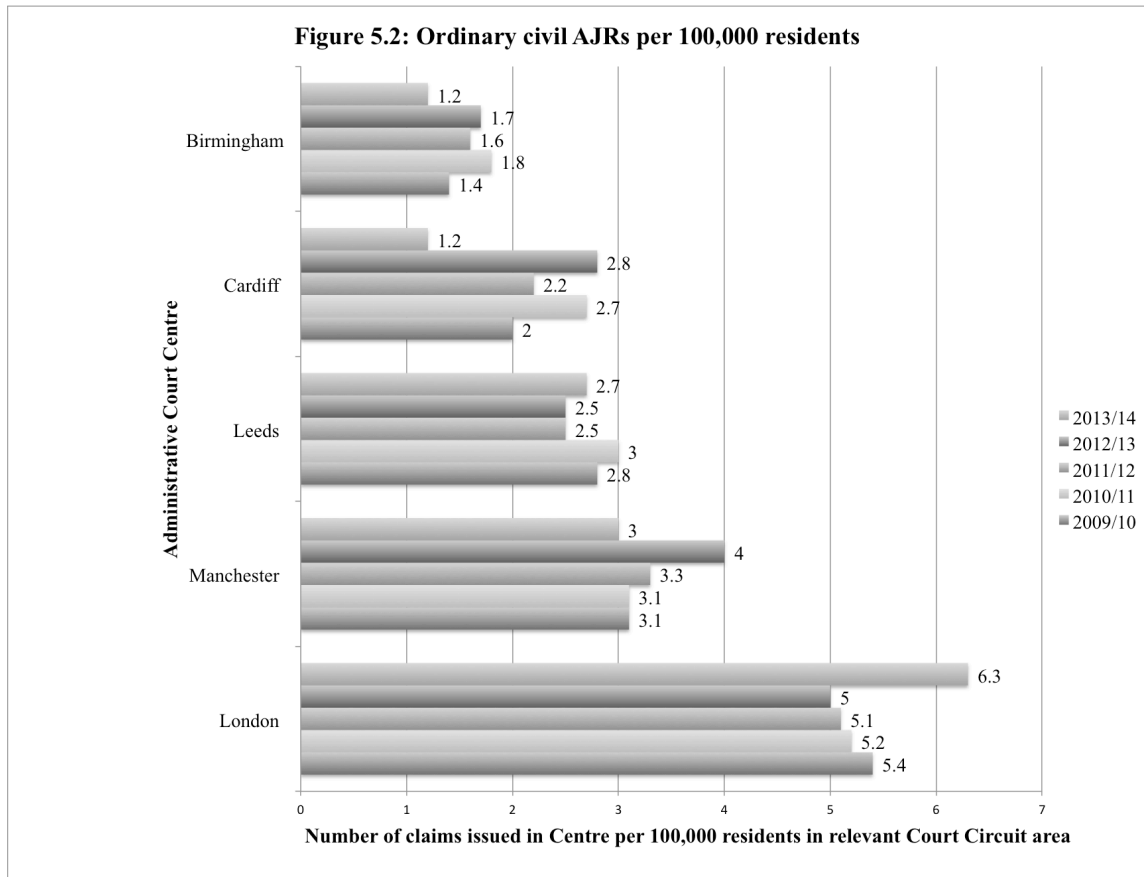
In response to the current e-survey,¹⁰ 41% of solicitors and 73% of barristers based outside London and the South East of England considered there to be unmet demand for public law litigation (especially judicial review litigation) within their Court Circuit area. However, no solicitors and only 15% of barristers, based in London and the South of England perceived any unmet demand in their Court Circuit area; five London respondents suggested that there was ‘too much access’ leading to weak applications.

Given the potential self-interest of practitioners their perceptions are not the most reliable measure. Another method is to examine the number of claims issued in each Centre in light of relevant population statistics. Figure 5.2 shows

⁹ *ibid* 560.

¹⁰ See Chapter Two, pp130-140 for details of methodology and response rates.

the number of ordinary civil AJRs issued in London and each of the Centres per 100,000 members of the adult population resident in relevant Court Circuit areas.¹¹



The situation of the Western Circuit causes some difficulty in interpreting Figure 5.2. During 2013/14 Cardiff gained formal responsibility for administering claims from the geographical area covered by the Western Circuit (the South West of England). Therefore for 2013/14 the population figure for

¹¹ Population data is taken from Office for National Statistics (ONS) mid-year population estimates, available online: <http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/2013/stb---mid-2013-uk-population-estimates.html> (accessed 6 October 2014). See Chapter Two p138 (n 82) explaining how the geographical Court Circuit area is identified.

Cardiff includes the population resident in the Western Circuit; in previous years this population has been categorised as served by London. The result is that Figure 5.2 shows a dramatic decrease in claims per head of relevant population served by Cardiff and an increase in claims per head of population served by London. For comparison sake if one takes the Western Circuit population away from Cardiff and adds it back to London one finds the relevant figures for 2013/14 are 3.3 claims per 100,000 head of population in Cardiff and 5.1 claims per 100,000 head of population in London.

Despite the difficulties caused by classifying Western Circuit claims, the data shows that the number of claims per head of population is lower outside London and the South East of England, notably so in the case of the Midlands (and Wales). Despite Manchester seeing a relatively bumper year in 2013/14, claims per head of population in the North West and North East also continue to be significantly lower than in London.

The data suggests that, at least in terms of the number of grievances raised in the Court Centres, judicial review litigation may not be addressing the broader range of issues facing communities outside London and the South East of England. These conclusions do not however throw much light on the broader normative functions of judicial review, such as the exposition of legal principles and constitutional allocation of powers. In these types of claim it may be irrelevant where the AJR originates, what matters is that important points of legal principle or practice make it into the legal system and a precedent is laid down, which in turn ought to guide the decisions of public bodies wherever they are located.

5.2.3 Key Topics of AJR claims

In the previous Chapter I identified the eight most common Topics of ordinary civil AJRs which together made up 62% of the Administrative Court’s ordinary civil AJR caseload. Figure 5.3 overleaf compares the relative incidence of these Topics in the English Centres, Cardiff, London, and the Administrative Court average.

Figure 5.3: Ordinary civil AJR key Topics 2009 – 2014

Topic	Birmingham		Cardiff		Leeds		Manchester		London		Average	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Disciplinary Bodies	24	3	13	3	23	2	66	6	453	6	579	6
Education	12	2	28	7	19	2	22	2	328	5	409	4
Family, Children & Young Persons	60	8	8	2	51	5	13	1	501	7	633	6
Homelessness	61	8	28	7	14	1	58	5	325	5	486	5
Housing	20	3	4	1	14	1	21	2	595	8	654	6
Police	33	4	37	9	81	8	76	7	326	5	553	5
Prisons	108	14	17	4	566	53	497	43	1,050	15	2,238	21
Town & Country Planning	64	8	57	14	43	4	66	6	736	10	966	9

Prisons is the most prevalent subject and such cases have been prominent in Leeds and Manchester. The most likely explanation for the high proportion of prisons cases issued in these Centres is the presence of local firms of solicitors who specialise in prisons law (especially in the North East). This specialty may

well be connected to the large prison population in the region. However, specialist solicitors located in the North East are regularly engaged in claims relating to prisons in other English regions and in Wales, and the majority of these applications are also now being issued in Leeds or Manchester.

After prisons claims, town and country planning cases constituted the next highest proportion of applications. Manchester and Leeds are both well below the Administrative Court average in relation to town and country planning, Birmingham somewhat higher, and Cardiff above average at 14%. The number of claims may in part be an issue of population demographics; a high proportion of planning litigation is related to environmental issues and more affluent (and more rural populations) may be the most likely to raise such claims.

Both Birmingham and Cardiff see a higher proportion of homelessness claims than the Administrative Court average. In Cardiff, solicitors based in Wales have been primarily responsible for issuing these claims; the activities of the charity Shelter Cymru are notable. In cases such as these involving vulnerable claimants it is likely that access to a local Centre is more significant, being a matter of need rather than choice.

A significant Topic of claims issued in Birmingham was one that is not among the eight most prevalent topics of claim across the Administrative Court. Over the course of this research 10% of claims issued in Birmingham related to community care, compared to an Administrative Court average of 4%. These claims are largely driven by the presence specialist lawyers based in the Midlands.

5.2.4 Asylum and Immigration

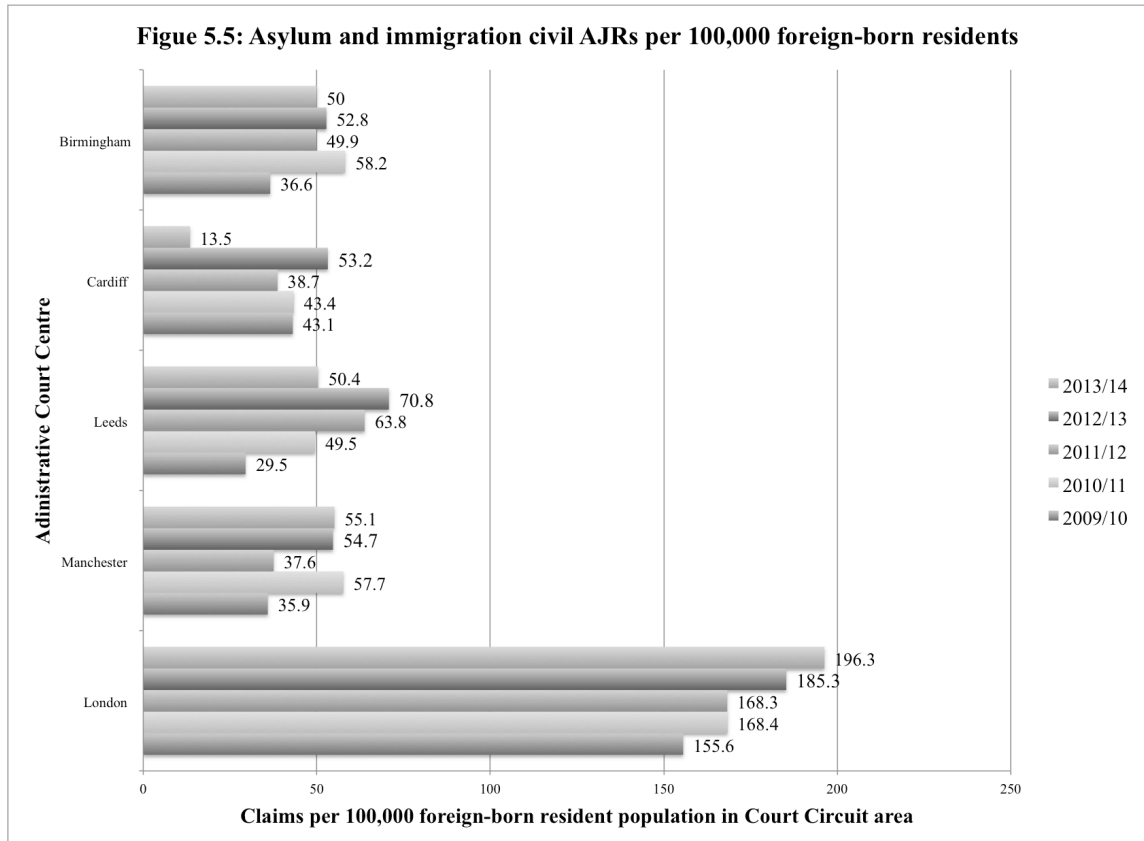
Figure 5.4 shows the number of asylum and immigration AJRs issued in each Centre. The caseload in Birmingham has always been high, though Manchester is catching up. The transfer of major classes of asylum and immigration claim to UTIAC is likely to have a significant impact on Birmingham. Once the full effects of this transfer begin to be felt Birmingham's caseload will be more comparable to that of Cardiff than to the major population centres in Leeds and Manchester.

Figure 5.4: Asylum and immigration AJR by Centre										
Centre	2009/10		2010/11		2011/12		2012/13		2013/14	
	No	%	No	%	No	%	No	%	No	%
Birmingham	334	4.4	517	6.3	547	5.8	538	5.1	518	5.2
Cardiff	59	0.8	69	0.8	64	0.7	88	0.8	78	0.8
Leeds	154	2.0	244	3.0	238	2.5	264	2.5	188	1.9
Manchester	186	2.4	284	3.5	288	3.1	419	4.0	422	4.2
Sub-total outside London	733	9.6	1,114	13.7	1,137	12.1	1,309	12.5	1,206	12
London	6,895	90.4	7,033	86.3	8,209	87.2	9,039	86.1	8,762	87.2
UTIAC					71	0.8	150	1.4	76	0.8
Total	7,628		8,147		9,417		10,498		10,044	

Figure 5.5 (overleaf) shows the number of claims per head of the adult foreign-born population resident in each English region and in Wales.¹² As with ordinary civil AJRs (Figure 5.3), in the most recent year (2013/14) the South

¹² The data is taken from the oxford Migration Observatory, available online: <<http://migrationobservatory.ox.ac.uk/>> (accessed 6 October 2014).

West of England is taken together with Wales rather than London. For comparison sake if the South West population is taken away from Cardiff and added back to London the number of claims per head of foreign-born resident population issued in London in 2013/14 was 179.6 and 47.2 in Cardiff.



The most striking aspect of Figure 5.5 is that the number of claims per 100,000 foreign-born residents issued at the RCJ in London is approximately four times higher than in any other Court Circuit area. This finding adds weight to previous research conclusions that high levels of deprivation and good access to specialist legal services are two important driving factors in the incidence of

AJRs.¹³ It also adds breadth to those previous findings which were based specifically on claims against local authorities, whereas most asylum and immigration applications are issued against central government.

Comparison between Figure 5.5 and Figure 5.3 is instructive. In Figure 5.3 there is a clear ranking, with London receiving the highest number of ordinary civil AJRs per head of population, followed by Manchester, then Leeds, Cardiff, and finally Birmingham with a low number of claims. In contrast, in Figure 5.5 relating to asylum and immigration, aside from the large value for London, the other Centres are similar in the number of claims received per head of resident foreign-born population.

The data suggests that whilst London is still streets ahead, legal services in the asylum and immigration field are comparatively well developed across the other larger cities in England and Wales. On the other hand, across the broader range of ordinary civil Topics of review, legal service provision is patchier and access to justice appears to be somewhat of a postcode lottery. There is a definite lack of awareness of, or appetite for, ordinary civil (non-asylum and immigration) judicial review outside London and southern England.

Discussions at the research Workshop, coupled with interview and survey responses, suggest a general lack of awareness of public law issues in the areas receiving the lowest number of claims. There simply isn't a 'public law culture'. In the words of one interviewee, vast swathes of the population are not, 'aware of their public law rights'.

¹³ Sunkin et al, 'Mapping' (n 8).

I think this concept of public law rights is insightful. There is a sense, though empirically disputed, that following the Human Rights Act 1998 citizens are more acutely aware of their human rights. Yet the notion of common law constitutional rights, or broader public law rights, which may include a *right to just administration* (covering all potential grounds of review) is one largely only encountered in textbooks and in the vocabulary of some (highly specialist) practitioners. Disappointingly in my view, the data suggests that the apparent righting of administrative law does not extend to the consciousness of most ordinary citizens, and especially not to those based in the Midlands and Wales.

The English regional Centres are developing as national hubs for certain Types and Topics of claim. In these specialist areas, work originates not only with local claimants but also from outside the Court Circuit. This chimes with responses to the e-survey disclosing that regional solicitors were most likely to specialise in one or two particular areas of law such as prisons, education, planning, or family, children and young persons.

The availability of specialist advice has evolved in response to certain needs within local populations, such as the need for prisons expertise in the North of England, which has a cluster of local prisons, or the establishment in Birmingham of expertise in asylum and immigration and community care. However, specialist provision is unlikely to meet the full range of need in any of the regions or in Wales. The relatively low number of homelessness and housing claims in Leeds compared with the number of prisons cases, for example, may indicate that specialist provision may be leaving other areas of

need unmet.

5.3 Legal specialisation and the purposes of judicial review

There is a perception of judicial review litigation as specialised and elite (in part due to the historic centralisation of the King's and Queen's benches and Lord Diplock's procedural exclusivity). The reformationist vision has perhaps added to this image of elite lawyers in the field as being responsible for 'creating constitutionalism'.¹⁴ Lawyer's constitutional creations are then said to be based on formal generalisable rules that might seem far removed from most people's experiences.

Regionalisation was contentious in some quarters largely due to concerns over the value of specialisation. Some members of the London-based Bar reacted in a manner reminiscent of the response of barristers to the creation of the county court in 1846. As Abel-Smith and Stevens put it:

The majority of barristers wanted as much business as possible to be kept in the most distinguished courts . . . They feared the consequences of any form of dilution on the recruitment to the Bar and hence ultimately to the calibre of the judiciary. There was also the traditional conservatism and self-interest.¹⁵

Echoing these concerns the Constitutional and Administrative Law Bar

¹⁴ Susan Sterett, *Creating Constitutionalism? The Politics of Legal Expertise and Administrative Law in England and Wales* (Michigan University Press 1997).

¹⁵ Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System 1750-1965* (Heinemann 1967) 83.

Association (ALBA) argued that access to High Court judges is, ‘part of the cornerstone to the rule of law’,¹⁶ expressing the fear that regionalisation might lead to increased use of inexperienced and inexpert Deputy High Court judges.

Approximately 60% of the current e-survey participants and interviewees expressed similar worries about the negative impacts of deploying Deputies. Even prior to regionalisation some practitioners had expressed concerns about the expertise and experience of judges determining AJRs. ALBA argued that rather than regionalising the High Court and increasing the number of judges, ‘there is a compelling case for developing a smaller and more specialist cadre of Administrative Court judges’.¹⁷

Fifty per cent of e-survey respondents (both barristers and solicitors) expressed concern that judges lacking the necessary expertise in certain subject areas (Topics), such as education and mental health, were already determining cases in London and that this would be exacerbated by regionalisation. Experiences in the regions have ultimately been mixed; one London-based barrister e-survey respondent commented that, ‘I have recent experience of a local government decision in Birmingham which was hugely superficial compared to the way in which the issue would have been treated at the RCJ’. Other practitioners have expressed ‘no complaints’ about the expertise and experience of judges handling claims in the local Centres.

Within my sample of 221 substantive judgments, 60 cases (27%) were

¹⁶ ALBA, *Regionalisation of the Administrative Court: Response of the Constitutional and Administrative Law Bar Association* Constitutional and Administrative Law Bar Association (May 2008) [34] available online: <http://www.adminlaw.org.uk/events_consultations/consultation_papers.php> (accessed 6 October 2014).

¹⁷ *ibid* [60].

determined by Deputy Judges and these were largely own fact claims (and many of these claims I considered to be relatively uncontentious as a matter of legal principle). It appears from this sample that the proportion of appeals stemming from decisions of Deputy Judges is higher than the overall average (and this is especially true in broader constitutional or public interest claims), though this is an area which warrants further investigation.

One difficulty here is that specialist expertise seemed to mean different things to different groups. Survey respondents were most concerned with expertise in particular legal Topics such as education, social welfare, planning, and prisons law. Yet ALBA's case for specialisation was based on the reformationist idea of the Administrative Court judge as an expositor of constitutional principle, determiner of fundamental rights, and guarantor of the constitutionally acceptable balance of power between particular institutions of state (including other courts). In short a role that is 'constitutionally' specialised rather than 'topic' specialised (though the two roles will inevitably over-lap).¹⁸ Given ALBA's leadership at the time of its response to the regionalisation reforms, and the agendas of some of its leading members, one can speculate that it would indeed like to see the Administrative Court re-fashioned as some form of more constitutionally specialised court.

ALBA's response to regionalisation assumes that AJR matters should be determined by a small and expert High Court judiciary, assisted by an elite Bar, in order to maintain the authority and consistency in principle of developing

¹⁸ The distinction between subject or topic specialisation and constitutional specialisation is attributable to some early views on this issue suggested by Maurice Sunkin.

public law. A key argument is that a small expert judiciary is best placed to balance the competing interpretations of particular values raised by public law claims and to enunciate clear legal tests for the benefit of citizens and public authorities alike. There is also an assumption that the centralised Administrative Court is likely to possess the status necessary to ensure respect for the normative principles it exposes.¹⁹ This concern was well captured by one of the solicitor interviewees:

If you were into conspiracy theories, as a by-product of that objective [access to justice], if you break the Administrative Court up, it's less powerful . . . If you had a group of judges all operating out of London, you can't help but have communication between them. Split that up and you draw your own conclusions . . . what is a defendant? . . . guess what, it's always the government . . . I can't imagine Jack Straw who was challenged a few times as Home Secretary would have been completely heart-broken at such a judicial grouping being split up.

Comments such as these reinforce the notion that a prize feature of the Administrative Court is its ability to ensure consistency in principle across various Topics of administration, and across the decisions of various inferior courts and tribunals, in a manner that is largely well respected; in short the Administrative Court is characterised by its authority.

¹⁹ Peter Cane, 'Understanding Judicial Review and its Impact' in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (CUP 2004) 19: 'The advantage that the Administrative Court has in [high-level or constitutional cases] derives from its being part of the High Court and being staffed by holders of high judicial office. It is certainly arguable that the status of the Administrative Court is critical to its ability to entertain complaints against the political executive central government in the reasonable expectation that any finding against the government will be taken seriously'.

5.3.1 Solicitors

Some e-survey and interview respondents, not surprisingly predominantly London-based solicitors and barristers, feared that local lawyers have yet to develop the necessary expertise in AJRs and that few would be likely to do so even after regionalisation due to limited work.

Both the notion of AJR work as highly specialised, in terms of particular Topics (topic specialisation) and/or in terms of normative exposition of rights and constitutional values (constitutional specialisation), can appear at odds with social practice.

On average over the seven years of this research, 65% of solicitors firms issuing ordinary civil AJRs in the Administrative Court issued only one claim in any given year. In asylum and immigration, 49% of solicitors firms issuing AJRs issued just one claim in any given year. This is not enough work to develop specialist expertise or to sustain a practice without further diversification, nor is it a ‘lucrative industry’ as the Lord Chancellor has supposed.²⁰

Another indication that AJR litigation is not a fertile specialisation for most solicitors is that the number of firms instructed to act for a claimant in any given year in at least one ordinary civil AJR has fallen, from 622 in 2007/08 to 529 in 2013/14.

²⁰ Chris Grayling, ‘The judicial review system is not a promotional tool for countless Left-wing campaigners’ *The Daily Mail* (London, 11 September 2013).

On the other hand (and in favour of specialisation) work has also become more concentrated amongst a smaller number of firms. For example, in 2007/08 half of all represented ordinary civil AJR claimants were represented by 16% of solicitors firms acting in that year, this figure has now bottomed out at an average of 9% of firms representing claimants in half of all ordinary civil AJRs between 2010 and 2014.

It may be that this increased concentration of work and the reduced number of firms involved can be linked to recent and on-going reforms to the legal aid system. One solicitor interviewee (who has worked for both London-based and regional firms) noted that, the Legal Services Commission (LSC) funding model was, 'based on reduction, merger and non-expansion [of firms undertaking publicly funded public law work] and certainly non-expansion into specialisations, the focus being on the volume of advice work'. The implication is that specialist firms dealing with a high volume of cases are able to attract public funding for AJRs, whereas the vast majority of solicitors who issue very few claims are not.

The Legal Aid Board (LAB) has now replaced the LSC, major reforms to the legal aid system have recently come into effect and more are planned. Some of the changes in relation to AJRs include higher fees, especially for oral renewals (where a claimant challenges a paper permission decision), despite permission success in such applications being more than double paper permission success rates. Legal aid funding will no longer be available in cases

where permission is refused,²¹ other than in exceptional circumstances. As funding follows permission success, lawyers are likely to be less willing to take on complex claims, and those who do not deal with a high volume of AJRs might be dissuaded from issuing perhaps even in more routine street-level claims.²²

In legal aid provision generally there has been a shift from equal access to a system based on efficiency and targeting (or rationing) resources to the most deserving cases.²³ This development has happened amidst a growing disrespect for lawyers and the courts and a proliferation (both in terms of volume and ideological support) for other methods of resolution, such as public legal education, self-help, ADR and tribunal adjudication.²⁴

Under the current rationing approach only certain types of claim are classified as deserving of legal aid (e.g., homelessness and loss of liberty), whilst others are considered undeserving (e.g., welfare benefits, employment, education, and most instances of family breakdown). A flaw in this approach is well captured by Robin Martin J, a previous President of the First-tier Social Entitlement Chamber, commenting that thematic categories of law cannot be used as proxies for determining who is in need, because the categories, ‘have only a loose association with real lives and real problems’.²⁵ Many disputes

²¹ Civil Legal Aid (Remuneration) (Amendment) (No 3) Regulations para 2(5).

²² These effects may also extend into pre-litigation negotiation by strengthening the defendant’s bargaining position.

²³ See eg, Richard Moorhead and Pascoe Pleasence, ‘Access to Justice after Universalism: Introduction’ (2003) 30(1) *Journal of Law & Society* 1.

²⁴ See eg, Elizabeth Thornberg, ‘Reaping What we Sow: Anti-litigation Rhetoric, Limited Budgets, and Declining Support for Civil Courts’ (2011) 30(1) *CJQ* 74.

²⁵ Quoted in, Justice for All, *Saving justice: where next for legal aid?* (2011) 1, available online: <www.citizensadvice.org.uk/saving_justice-2.pdf> (accessed 6 October 2014).

(especially those affecting the most disadvantaged in society) have multiple dimensions that cannot be captured by categorisation, and this is a point I shall return to when considering doctrinal law in the following Chapters.

In recent years there has been an increased concentration of the volume of work handled by solicitors in relation to certain Topics, (especially prisons, parole and police, but also town and country planning and environmental law, family, children and young persons and education) especially outside London. This topic specialisation might be partially driven by legal aid policies; it also invites the danger that the broader needs of litigants will not be met.

The area with the most concentrated work is the South East of England, largely due to the activities of one specialist firm dealing with planning and environmental law. Work in the North East of England is also very concentrated (due to two or three firms dealing with prisons and police claims).

Next comes the Midlands, which is striking given that the Midlands is a relative judicial review wasteland in terms of the number of claims per head of population. The concentration of work in the Midlands is due to the activities of relatively small firms (six-10 lawyers) with advertised specialisation in public interest law. These firms represent claimants in high profile cases and their work is unified not so much by specialisation in public law (or any specific topic thereof) but by broader public interest claims, fundamental rights cases with wider impacts, and class action style tort litigation. Some participants in the current research have suggested that the public interest litigation function of judicial review will take on increased significance in future as private funding will be more readily available to support claims that raise matters of concern to

larger numbers of people. Whilst public interest firms have worked to benefit some of the most disadvantaged in society we should nevertheless be concerned that public interest litigation does not become limited to the interests of those who can rally enough support to proceed without legal aid funding.

Recent (but ultimately shelved) proposals to reform the ‘sufficient interest’ requirement of permission in AJRs could have done substantial damage to this kind of public interest litigation. The Government wished to alter the test so as to require more direct interference with specific individual interests. Sir Stephen Sedley characterised this as a ‘kite flying’ exercise designed to draw attention away from the reforms to legal aid which have greater potential to damage access to justice across the broader range of individual grievances affecting claimants.²⁶

The two areas with the least concentrated advice work are Wales and the South West of England. Litigation in Cardiff is less skewed by the activities of specialist lawyers than work in the English regions. Whilst the number of claims issued in Wales is comparatively small, the spread of claims appears more representative of the broader range of issues facing the Welsh population than is the case with the English Centres.

Overall the proportion of ordinary civil AJRs issued by solicitors outside London and southern England has fallen, from 42% in 2007/08 to 36% in 2013/14. The largest decline has been seen in the North West of England, followed by the Midlands and Wales. It is only in the North East that local

²⁶ Stephen Sedley, ‘Beware kite-Flyers’ (2013) 35(17) London Review of Books 13.

solicitors are issuing more ordinary civil AJR claims in recent years, primarily as a result of the impacts of regionalisation on local prisons specialists.

The proportion of asylum and immigration AJRs issued by solicitors outside London has also declined, down from 16.6% of claims in 2007/08 to 13% of claims in 2013/14. Much asylum and immigration litigation outside London is driven by the activities of a small number of firms and the closure of even one firm can have a dramatic impact on caseloads.

Unlike in ordinary civil claims, asylum and immigration work is being handled by a larger number of firms, up from 870 in 2007/08 to 926 in 2013/14 (with a peak of 1,056 in 2011/12). However, as with ordinary civil AJRs the work has become more concentrated.

In 2007/08 half of all represented asylum and immigration AJR claimants were represented by 9.4% of all the solicitors firms acting in that year; but this figure has reduced to 4.6% in 2013/14.

Asylum and immigration representation in the Administrative Court has become less concentrated in the months immediately following the transfer of claims to UTIAC. This suggests that the type of AJR work handled by UTIAC is likely to be conducted by an even more limited number of solicitors than work in the Administrative Court. The benefits of specialisation were a key part of the case for tribunalisation. However, a system in which highly specialised lawyers issue claims before highly specialised judges with limited external supervision is evidently open to the danger that errors could become ossified. There is also the question of whether access to UTIAC itself is sufficiently local (regional).

5.3.2 Counsel

Solicitors are the GPs of judicial review responsible for diagnosing possible public law issues and representing claimants in less complex cases. Counsel are the expert surgeons, and one barrister and part-time judge responding to this research supposed that most of the recently developed grounds of review (e.g., legitimate expectations and the resurgence of common law constitutional rights) are attributable to ingenious, doggedly persuasive barristers, and a handful of more creative judges.

In 2013/14, just 50 barristers represented claimants in approximately half of all ordinary civil AJRs (1,050 claims), an interesting figure compared to the approximately 50 Administrative Court ticketed judges available to pass judgment on these applications.

In 2013/14 counsel from just 4.6% of chambers were instructed to act for claimants in half of all ordinary civil AJRs, indicating a high degree of concentration. However, across the course of this research 60% of chambers acting for claimants were instructed *only once* in any given year (and this figure has remained at exactly 60% in every year since 2007/08). One claim per annum is not enough to sustain any practice, and it suggests that the vast majority of barristers instructed are not specialists in AJR litigation. They may nevertheless still be specialists in public law, acting in statutory appeals and applications, acting in Court of Appeal and Supreme Court cases, doing work in

relation to public inquiries and so on. But it seems that judicial review (in terms of the AJR alone) is a specialisation known only to academic commentators.

Any tri-furcation between administrative, constitutional, and human rights law, or between public law appeals and judicial review, is not specifically reproduced in terms of the organisation of specialist legal practice, hence I question whether social practice generally has ‘in it’ the resources to sustain such distinctions.

5.4 Claimants in AJRs: judicial review as community justice?

It is difficult to identify regional or Welsh claims purely from the location of issue and this data must be analysed alongside the address given by the claimant.

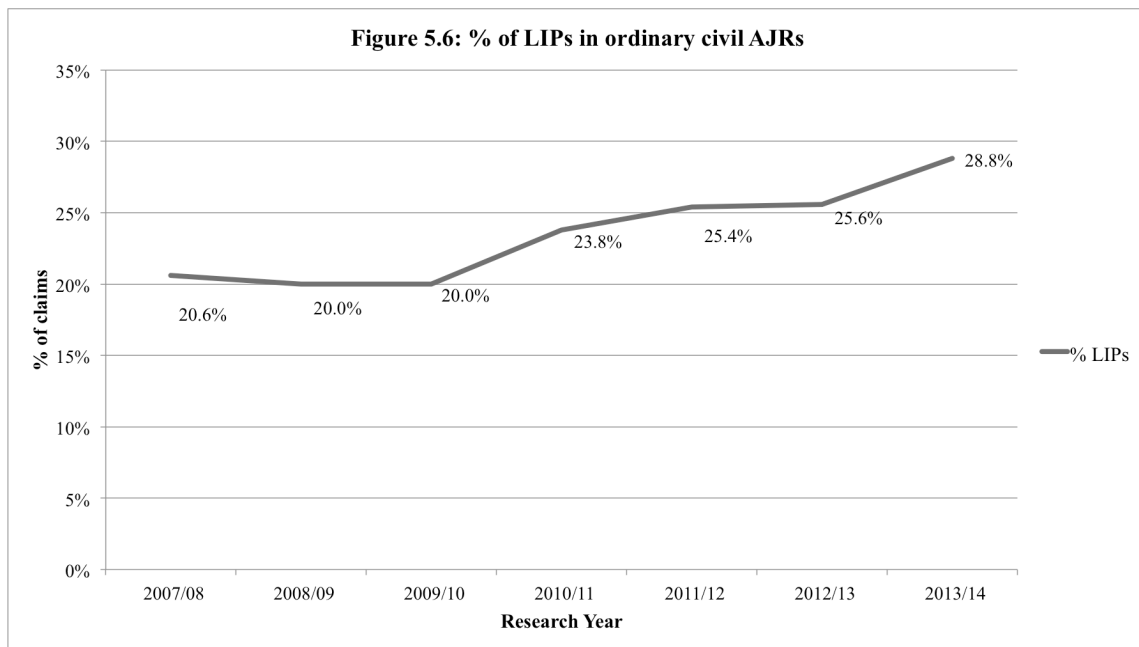
The overall proportion of all ordinary civil AJRs (where claimant location is known) issued by applicants with addresses in the four Court Circuit areas gaining new Centres increased from 26% in 2007/2008 to 39% in 2013/2014. The increase has been felt in all three English regions and in Wales. This increase may have gone some way to redressing the geographical imbalance in judicial review litigation, improving access to justice, and supporting the community-based common law democracy *manifest* interpretation of judicial review.

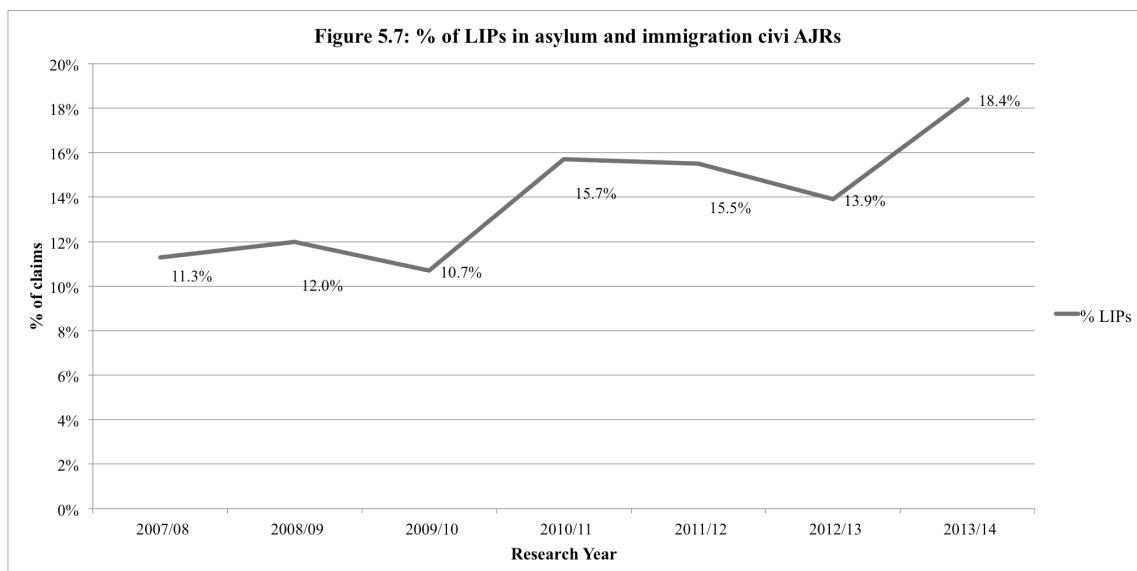
However, the figures should be treated with caution, given that the claimant’s address is generally only recorded where the claimant issues the application as a Litigant in Person (LIP), what the data shows is that this

particular class of claimants (those who issue without legal representation) are more likely to come from outside London than claimants who are represented from the outset. This finding corroborates analysis above suggesting a decline in the broader activities (beyond specific Topics) of solicitors based outside London and southern England.

5.5 Litigants in Person (LIP)

Figure 5.6 shows how the proportion of ordinary civil AJRs issued by LIPs has grown over the course of this research. Figure 5.7 depicts the same trend in relation to asylum and immigration claims (this figure excludes detained claimants).





Where claims are issued by litigants in person (LIPs), ease of access to a Court Centre is likely to be an important consideration, especially when the claimant is an individual (as opposed, for example, to a commercial body). Claims by LIPs therefore provide a better indicator of whether the AJR procedure is accessible from the perspective of ordinary citizens.

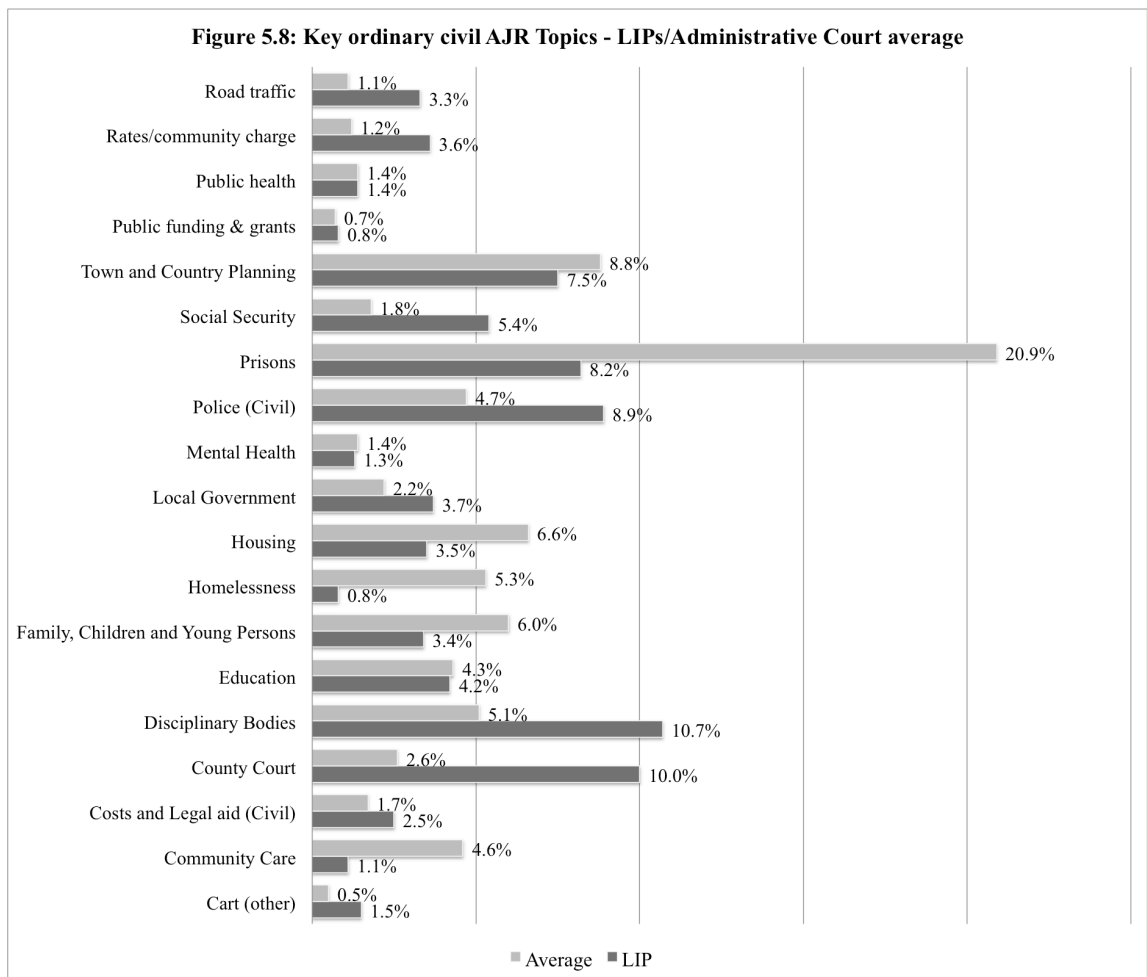
It is possible to conclude from the Figures above that the trend towards unrepresented litigation coincides with the establishment of the local Administrative Court Centres, but it is more likely that a combination of factors are responsible, including recent and on-going legal aid reforms, cut-backs to frontline advice service providers such as CABs and Law Centres, and the dissolution of a number of relevant charities.

LIPs present various challenges to the legal process, particularly in AJRs that are supposed to turn on questions of law and not on matters of fact (though I think the serviceability of this distinction is questionable).

The elitist vision of the specialist public law barrister is not helped by some practitioner attitudes to unrepresented claimants; one respondent to this research referred to LIPs as, ‘Tesco bag litigants’ (carrying their court papers in plastic bags rather than leather briefcases one assumes).

Whilst one might expect most LIPs to issue in their closest Administrative Court Centre, it is also common for LIPs in asylum and immigration claims especially, to issue in London. In the early years post-regionalisation this could be attributed to lack of awareness, but the continuing trend implies that other factors are at work; including ‘forum-shopping’ (purposively taking advantage of longer waiting-times in London), or perceptions of added *gravitas* associated with a day in court at the RCJ. One regional barrister respondent commented that; ‘Many clients still prefer coming to London where there is the perception that the matter will receive more serious consideration’. It is possible that some LIPs, in both asylum and immigration claims and ordinary civil claims, share this perception.

The Topics of LIP claims are instructive in terms of the issues affecting local populations. Figure 5.8 (overleaf) compares LIP claims to the overall Administrative Court average in relation to the most common ordinary civil AJR Topics, and those Topics most prominent among LIPs.



The range of LIP Topics is narrower than the Administrative Court average and is centred on areas of public decision-making that are of direct and local concern to ordinary citizens. Issues such as road traffic, local government, local taxation, social security, and claims relating to the police figure prominently. Professional disciplinary claims are another key Topic, again these claims

concern issues personal (and local) to the individual, with few repercussions beyond the specific case.

AJRs of county court judgments are also a growing category of LIP claims. This may be an impact of regionalisation given that the Administrative Court Centres are housed within existing local civil justice centres. It is easier to seek an AJR of a county court judgment when one only has to cross the hall to access an Administrative Court lawyer (a lawyer who will be less busy and more helpful than their London counterparts according to respondents to this research). This reinforces the image of an Administrative Court ‘for users’ and a proportionate dispute resolution focus on resolving individual grievances quickly and efficiently.

Of course it may also be that LIPs are less aware of the stricter interpretation of legal principles applied; a county court judgment can generally only be quashed in ‘exceptional circumstances’, namely where the judge has stepped outside his jurisdiction or where a fair hearing has been denied.²⁷

This might also explain why LIPs have issued the vast majority (81%) of Cart (other) claims; this is another area where review is more limited (at least at the permission stage). Practitioners are likely to be less keen to take on this kind of claim, knowing how strictly the relevant (second-tier appeals) criteria have been applied. This finding may bolster concerns that removing legal aid from unsuccessful permission applications will be particularly damaging in the most complex cases where success may be harder to predict. The danger is that

²⁷ *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738; [2003] 1 WLR 475, [56].

if local practitioners are dissuaded from taking on complex cases, even if their role is primarily to triage the case onwards to a more experienced specialist, the full range of issues affecting citizens will not make it into the legal system.

5.6 Defendants

That a high proportion of AJRs relate to local authorities reinforces the image of the procedure as a mechanism for the resolution of individual grievances.

Previous research found that challenges to local authorities constitute a large proportion of ordinary civil AJRs (just over 46% during the research period 2000-2005 inclusive).²⁸ During that period, 60% of challenges to local authorities involved London Boroughs (which were then home to approximately 14% of the total population of England and Wales).

During the current research period (1 May 2007 to 30 April 2014), only 33% of ordinary civil AJRs were recorded as challenges to local authorities, 54% of these were against London Boroughs (such Boroughs now being home to approximately 15% of the population of England and Wales). The findings suggest that in more recent years fewer claims are being issued against local authorities as a whole, and fewer of those claims which are issued involve a London Borough as defendant.

²⁸ Sunkin et al, 'Mapping' (n 8) 548.

Based on available data²⁹ there has been a steady rise in AJRs against defendants from outside Greater London, up from 24% of claims in 2007/08 to 33% in 2013/14 (this includes claims against local authorities, other local bodies, and national bodies with their key operations in the English regions or in Wales). This may be partially attributable to regionalisation and also to the localism agenda. However, the latter conclusion seems less likely given that the number and proportion of all AJRs against local authority defendants has decreased in comparison to Sunkin et al's findings.

A growth area is in litigation against national bodies based outside Greater London, such claims having more than quadrupled over the course of this research (from 22 in 2007/08 to 92 in 2013/14). This seems more likely to be an effect of decentralising the Court (and improving opportunities for local practitioners) than of localising governance.

There has also been an increase in claims against other local bodies (aside from local authorities), up from just 19 claims in 2007/08 to 105 in 2013/14, the most prominent type of defendant in this category being county courts. There has then been a major increase in applications for senior judges to review the decisions of inferior judges. For these claims to succeed there would have to be exceptional circumstances, such as some miscarriage of justice in the initial decision.

²⁹ In cases where the defendant contact information given is a firm of solicitors one cannot know precisely what type of public body the defendant is and where that defendant is based. Claims in which only the defendant solicitor's details were recorded accounted for on average 12% of ordinary civil AJRs during this research.

5.7 An *operative* interpretation of (Administrative Court) judicial review part two – Community justice

The fit of the AJR (and other Administrative Court claims) as providing some sense of common law community justice is mixed.

Previous London-centricity appeared to be breaking down following regionalisation, but the reforms may have largely benefited an emerging regional elite specialising in high volume litigation in particular Topics (notably prisons and police, and medical cases, in northern England).

Outside these specialisms LIPs are dominant in local litigation; LIPs face obvious inequalities when up against, for example, a central government department with access to experienced lawyers. This kind of inequality has been stressed in arguments against establishing new permission tests (especially in statutory appeals and applications) and against making existing tests stricter (such as in Cart-style litigation).

There are still some indications that the local Centres are yet to gain trust in their capabilities to handle the full range of AJRs, especially those that raise issues of broad public importance or constitutional sensitivity. The relevant Practice Direction adds weight to this view by prescribing that certain cases, including those relating to terrorism and serious financial crime, can only be issued and determined in London.³⁰ The ability of Administrative Court lawyers to group together cases raising matters of general importance to be joined and heard in London also reinforces this proposition.

³⁰ CPR PD 54D Administrative Court (Venue) [3.1].

A possible effect of regionalisation may be to create a two-tier jurisdiction. One tier (based in London) that comprises a largely constitutionalised court; demanding respect for fundamental values from equally elite decision-makers such as high-ranking members of central government, dealing with cases of national public interest, and ensuring consistency in principle across tribunalised, devolved, national, and international legal regimes. Another (local) tier primarily concerned with issues of importance to local communities or more routine individual grievance (street-level bureaucratic) applications often issued by LIPs.

The picture seems to be one in which the RCJ in London is still the apex for generating public law doctrines, for creating constitutionalism. That said the local Centres have played host to some cases of importance to regional and Welsh communities, including cuts to local authority budgets and the closure of local services. That such matters can now be dealt with close to home is an indication of the value of judicial review as an instrument of community-based justice. The local courthouse itself can be a symbol of community, equality, and justice,³¹ and more convenient access to judicial review could provide an additional means of holding local government to account in light of declining participation in local politics.³²

It is beyond the scope of this thesis to examine in detail whether judicial review litigation has a more instrumental impact on improving local justice or catalysing social reforms of benefit to particular sections of relevant

³¹ Thornberg (n 24) 74.

³² Though the cost of issuing an AJR might make this an unrealistic expectation.

communities. Existing research suggests that whilst judicial review litigation may be one factor in improving local service provision, it is questionable whether it has any more significant and direct impacts as a mechanism for broader social reforms.³³

5.8 The *operative* theory of (Administrative Court) judicial review as individualised justice

In conclusion to this part of my *operative* interpretation I want to suggest an account that may reconcile apparent inconsistencies between the two-tiers; high-level (London) and street-level (local) identified above, and the top-down and ground-up accounts of constitutionalism encountered in the previous Chapter.

On my unorthodox interpretation of *Cart*, the tensions between competing relevant values in the case could be addressed by recognising a general *right to just administration*, the requirements of which need to be worked out in particular circumstances. Judges have to consider what justice really means in each case; this is usually a matter of attempting to reconcile competing interpretations of the meaning of justice in context. It should also be noted that this is not a matter of justice *versus* scarce resources (be these court resources or otherwise); efficiency and the best use of resources are matters internal to the assessment of what is just rather than external matters to be

³³ Tony Prosser, *Test Cases for the Poor* (Child Poverty Action Group 1983) 83; Jeff King, *Judging Social Rights* (CUP 2012) 68.

balanced against it. This assessment of context specific justice tends to be most obviously taking place in high profile claims raising important matters of public interest or the inter-institutional allocation of powers; that is in top-down constitutionalist, London-centric claims.

What is interesting is that this process of taking seriously the parties' contending interpretations of justice and examining relevant and irrelevant considerations (including resource considerations in some cases) is also characteristic of many street-level, ground-up constitutionalist, local applications.

On examining the use of judicial review to challenge local authority public services (the Topic of most LIP claims outside London) Sunkin et al concluded that, 'judicial review promotes values that are central to the ethos of public administration and assists officials in resolving tensions between individual and collective justice'.³⁴ They go on to note that this kind of 'individualised administrative justice' focuses on the 'quality' of public decision-making in a way that other grievances measures³⁵ do not. This sense of individualism stems not least from the fact that the majority of claims are issued by individuals and are based on their experiences of public service delivery (or other aspects of public administration) that are perceived to have been of poor quality in their particular circumstances. As Sunkin notes:

³⁴ 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 (suppl 2) *J Public Adm Res Theory* 243, 248.

³⁵ Including statutory appeals and applications in the Administrative Court.

Judicial review is also distinctive in how it subjects public decisions to scrutiny, in particular, in its regard for what might be called individualised administrative justice. It is concerned to ensure...that decisions that affect individuals are justified, properly reasoned and fairly taken.³⁶

The individual is central to this account, as Peter Cane concludes; ‘...the distinctively judicial public-law task, expressed in common-law principles of judicial review and statutory interpretation, is the protection of *individual* rights and interests against undue encroachment in the name of social interests’.³⁷

Likewise a concern of the culture of justification could be not that the state must provide some generalised reasoned justification for its decisions, but that these justifications must be addressed more particularly to the individual involved. For Trevor Allan judicial review, ‘...reinforces the requirement of moral justification: it allows the citizen to explain his grievance, by recourse to arguments of fairness and reasonableness, and obliges the state to furnish *him* with satisfactory answers’.³⁸

I think this image of judicial review as individualised justice, aimed at adjudicating between different visions of justice in context, may provide both the best fit with, and justification for, judicial review in the Administrative

³⁶ Maurice Sunkin, ‘The Impacts of Judicial Review and Effective Redress’ (Cambridge Public Law Conference: Process and Substance in Public Law, September 2014) 11 (unpublished referenced with author’s permission).

³⁷ Peter Cane, ‘Theory and Values in Public Law’ in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays for Carol Harlow* (OUP 2003) 3, 15 (emphasis own).

³⁸ TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003) 9 (emphasis own).

Court across all levels, top-down constitutionalist and ground-up constitutionalist, London-centric and local.

My next question is whether Administrative Court judges really do perform this role of providing *individualised justice*, specifically whether they focus on the *quality* of public-decision making, as opposed to narrow questions of *vires* and traditional *Wednesbury* reasonableness.

Chapter Six: *Operative* Reasons for Deciding in Administrative Court

Judicial Review: Part One

In Chapters Four and Five I developed an interpretation of judicial review in the Administrative Court that I think provides a good fit with social practice. Under my *operative* interpretation judicial review performs numerous functions, extending from resolving individual grievances, to ensuring consistency in the development of legal principles, public interest litigation, and examining the inter-institutional balance of power between particular branches of state. There is no evidence, however, that judicial review is entirely, or even primarily, about human rights or matters of overt and highly contentious constitutional principle; the reformationist image may therefore be a poor fit.

My conclusion was that the plurality of roles can be harmonised under an interpretation in which the central aim of Administrative Court judicial review is to address tensions between different interpretations of justice (usually between visions of individual and collective justice) by focusing on the quality of public decision-making. This focus on quality could provide a good conception of the culture of justification as it pertains to judicial review, under this broader culture public decision-makers are required to act in a manner that is at least capable of reasoned justification; but are judges really deciding cases in accordance with this quality control understanding of their function?

In the current two Chapters I examine the judicial reasons for deciding in a sample of Administrative Court judgments. I analyse the cases based on my interpretation of the *operative* reasons for deciding, as opposed to their *ex post*

facto rationalisation in accordance with particular doctrines. I tentatively suggest a new categorisation of grounds of review based on this account, though with the caveat that this proposed taxonomy is permeable and requires further development. One of my conclusions is that judicial reasoning is based on the values outlined in previous Chapters as much, if not more, than it is based on the application of legal doctrines; administrative law is held together as much by values as by the bindings of textbooks.¹

Legal doctrines are the rules, principles, and conceptual tests purportedly utilised by decision-makers to resolve tensions between the parties' competing interpretations of justice. However, such doctrines are often used as *ex post facto* labels later affixed to judgments that have been made on the basis of moral values in context, rather than via the formal application of legal rules. Nevertheless, we have to have some devices for efficiently mediating between facts and values within social practice, and for structuring the process of analysing the parties' contending interpretations of justice. A claimant generally cannot appear before the Administrative Court citing some broad sense of unfairness or unease that something has gone wrong, there have to be organising pegs on which litigants can hang their arguments, and which can be used as a starting point for the identification of relevant facts.

Traditionally the grounds of review have been compartmentalised under Lord Diplock's tripartite headings, illegality, irrationality, and procedural

¹ Paul Daly, 'Administrative Law: a Values-Based Approach' (Cambridge Centre for Public Law Conference Sept 2014) 35, 'Administrative law is found in the books, where it is held together not only by the binding, but also by administrative law values'.

impropriety;² however, I think there may be a better way to organise and regiment relevant principles. The categories I develop reflect my own interpretation of the *operative* reasons for deciding³ in the sample of cases in light of the circumstances of social practice examined in previous Chapters. Nevertheless, the reader should not set conclusive store by them; they are more specifically a method to regiment the findings of case law analysis over a short period of time, than representing any more wide-ranging challenge to current understandings.

The revised headings are: (1) procedural impropriety, (2) mistake, (3) ordinary common law statutory interpretation, (4) discretionary impropriety or relevant/irrelevant considerations (5) breach of an ECHR right or equality duty, and (6) common law constitutional values, rights, or allocation of powers. In this Chapter I focus on the first three categories.

6.1 Methodology

These findings are based on an analysis of all reported Administrative Court substantive AJR judgments, from and including 1 January 2013 to and including 31 July 2013 (221 judgments in total).⁴ An initial objection to this

² *Council of Civil Service Unions and Others v Minister for the Civil Service* [1984] 3 All ER 935.

³ I call this *operative* because I analyse the reasoning, ‘from the inside, trying to make sense of lawyers’ reasons and arguments as they are actually presented and defended’. TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP 2013) 349.

⁴ This period was chosen as it fit with the progression of my research. My future intention is to extend the case sample period to improve its reliability and to expose changes over time. The findings should be read with the limitations of a relatively short time period in mind. Other similar studies include: Andrew Le Sueur, ‘The Rise and Ruin of Unreasonableness’ (2005)

methodology is that textbook analyses are built up with reference to tens or even thousands of years of case law developments including those authoritative precedents laid down by higher appellate courts, whereas an account based on a sample of cases in the Administrative Court alone provides a partial picture. This is true, but the partial picture is illuminating in terms of examining the fit between legal doctrines, social practice, and judicial reasoning, over a particular period in time.⁵ It shows us what is happening ‘on the ground’.⁶

Although textbooks provide a comprehensive analysis of the development of applicable principles, they can themselves be part of a top down elitist, positivist approach. Whilst the principles have developed organically, attempts to categorise or rationalise them in the author’s preferred fashion can detract from ground level experiences.⁷ Gee and Webber have argued that this ‘rationalistic propensity’ leads to the proliferation of ideology that takes on a life of its own untethered to judicial and litigant experiences. Particular contested principles such as legality, the influences of human rights law, and the related principle of proportionality, have dominated academic

10(1) JR 32 (41 reasonableness cases between January 2000 and July 2003); Paul Craig, ‘Proportionality, Rationality and Review’ [2010] NZ L Rev 265 (200 rationality cases); Paul Daly, ‘*Wednesbury’s* Reason and Structure’ [2011] PL 237 (examining *Wednesbury* and other rationality doctrines in the House of Lords, Canadian, and US Supreme Courts during the latter part of the 20th Century).

⁵ If law is indeed socially constructed as I have suggested throughout this thesis then snapshots may be the best evidence we have. As Kavanagh argues with respect to constitutional judicial review; ‘if the justification for constitutional review hinges (even in part) on empirical claims, then it will be contingent on the judicial record at a particular time and place’. Aileen Kavanagh, ‘Constitutional Review, the Courts, and Democratic Scepticism’ (2009) 62 CLP 102, 108.

⁶ Le Sueur, ‘Rise and Ruin’ (n 4) 43.

⁷ DJ Galligan, ‘Judicial Review and the Textbook Writers’ (1982) 2(2) OJLS 257; Graham Gee and Grégoire Webber, ‘Rationalism in public law’ (2013) 76 MLR 708.

discussion despite such issues rarely being directly raised in the Administrative Court.

In the case of constitutional review, Jeremy Waldron appears to argue that academic analysis should be entirely ‘uncluttered by discussion of individual decisions’⁸ whereas others seize upon specific judgments as part of a ‘war of examples’.⁹ My alternative sampling approach seems to be supported by Aileen Kavanagh who argues that, ‘an evaluation of the empirical record should ideally be based on a representative sample from the case-law, rather than relying on one or two high-profile decisions’.¹⁰

The specific method I adopt in developing the new taxonomy of grounds is one of constructive interpretation as examined in Chapter Two. On this basis I construct the categories based both on their fit with social practice, their moral value, and their usefulness in serving present purposes (my purpose primarily being to simplify the existing picture in a manner that better reflects the values served by judicial review). It should be noted from the outset that my categories are permeable, inter-acting and over-lapping; this is due to the nature of public law itself which is governed by a web or ‘total field’¹¹ of values. In this sense no taxonomy can be based on watertight compartments, only initial guides to be flexibly interpreted.

⁸ Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 Yale LJ 1346.

⁹ Colm O’Cinneide, ‘Democracy, Rights, and the Constitution: New Directions in the Human Rights Era’ (2004) 57 CLP 175, 180.

¹⁰ Kavanagh, ‘Constitutional Review’ (n 5) 123.

¹¹ See Chapter Two pp112-117.

6.2 The ‘grammar’ of judicial review¹²

In the case law sample, lawyers and judges referred to principles of review, principles of legality, standards of review, standards of legality, principles of public law, and principles and standards of good administration. These phrases were used indiscriminately, inter-changeably, and not in line with any specific meanings given to them by various academic and practitioner texts. Either the judges deciding these cases were mistaken or sloppy in their use of terminology, or perhaps terminological precision is not necessary to make a sound judgment in light of the issues at stake. My inclination is that the latter is true; there is so much intellectual disagreement about relevant conceptual tests that there is simply no grammatical or terminological certainty out there to be had. I think this limited need to refer to complex terminology is actually helpful to the large numbers of litigants in person (LIPs), and other less sophisticated or specialist claimants issuing AJRs in the Administrative Court.

One aspect of terminology that is important is the phrase, ‘grounds of judicial review’. The form N461 for issuing a judicial review application requires the claimant to cite the grounds on which their application is based;¹³ the grounds are the legal principles recognised as justifying the application.

The orthodox categories of grounds; procedural impropriety, illegality, and irrationality, were not watertight or exhaustive and many issues fell under

¹² Graham Gee and Gregoire Webber, ‘A Grammar of Public Law’ (2013) 14 GLJ 2137. The authors argue that the current terminology of public law emphasises a sense of abstraction and systematic coherence that is not evident in the messy world of social practice.

¹³ Form available online: http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=594 (accessed 6 October 2014).

two or more headings. Whilst my analysis suggests that these categories do more to confuse than to explain, I think there is value in retaining a procedural impropriety heading and this constitutes my first category.

6.3 Procedural impropriety

There were no direct references to the phrase procedural impropriety in the sample, though 37 of the 221 cases ultimately turned on more procedural matters.

The distinction between procedure and substance is one of the bipolarities that I think cannot be conclusively demarcated. Nevertheless, under an interpretative method one can construct categories based on their usefulness in context, and it is useful to retain procedural impropriety as a category of principles justifying an AJR. Whilst the category may not be capable of precise demarcation, when we think more pragmatically we can see types of problems that most ordinary people would class primarily as matters of procedure, such as fair hearings, freedom from bias, and a duty to consult. The beauty of common law procedural fairness is that it is already recognised as having elastic, qualities, not ‘engraved on tablets of stone’.¹⁴ It is largely already understood as an interpretive concept, the meaning of which is dependent upon social context and the values at stake, therefore a *prima facie* classification of procedural impropriety does not prevent exploration of the relevant values and social facts, even if this examination leads to the conclusion that only one

¹⁴ *Lloyd v McMahon* [1987] AC 625, 702 (Lord Bridge).

substantive decision could have been justified in the circumstances. Relevant values here include, but are not limited to; dignity, a broad need to treat individuals with equal concern (equality), and rule of law values such as clarity, consistency, and non-retroactivity.

Substantive success rates for claimants were higher in cases of procedural impropriety than across the other grounds of review. It may be that these claims are more likely to be successful because they primarily engage comparatively less contentious rule of law values, such as openness, independence, and impartiality that are supported by most *manifest* interpretations of judicial review.¹⁵ The meaning of these particular values in the context of claims involving specific individuals tends to give rise to less disagreement than is evident in the context of other values (such as democracy and the common good).

It is interesting that success rates are so high in these types of claims, given that cases in which a procedural defect was evident but would have made no 'substantial difference' to the outcome, may be doomed to failure at the permission stage if clause 70 of the Criminal Justice and Courts Bill 2014 is enacted. Again this is a case of proposed reforms being based on a lack of attention to relevant social facts and to the intrinsic value of judicial review.

¹⁵ Values that some scholars take to be immanent in law rather than based on critical or abstract political values. See the distinction between background and foreground theory in Carol Harlow, 'Changing the Mindset: The Place of Theory on English Administrative Law (1994) 14 OJLS 419 and Chapter One, 66-68 and 77-78.

Procedural propriety claims in the current sample largely involved some distinctive example of unfair decision-making; these were primarily instances of individual grievances or own fact cases.

For example, in *R (Stratton) v Chief Constable of Thames Valley*¹⁶ the applicant's caution was overturned because the implications had not been fully explained to her and she had therefore been unable to give informed consent; here one can say that individual dignity, openness, and clarity were at stake.

A contentious issue under the procedural propriety heading is the more recently expounded duty to consult. Such a duty is increasingly being recognised as a matter of common law in the absence of specific statutory requirements; this is part of the culture of justification. Nevertheless, some consultation cases may be different in principle to ordinary procedural propriety claims; specifically when they turn upon the extent of consultation legally required by a specialist decision-maker in the context of a contentious public interest issue. The adequate degree of consultation is then based not just on the implications of review in the instant claim, but on a broader and more direct reflection as to the purposes and values served by the AJR procedure itself.

One notable instance from my case-law sample was, *R (Buckinghamshire CC) v Secretary of State for Transport*, also known as *HS2 Action Alliance Ltd v Secretary of State for Transport*.¹⁷ This application was brought by a public interest group, and Ouseley J rejected nine of its ten challenges. However, he accepted an argument that the Secretary of State had

¹⁶ [2013] EWHC 1561 (Admin).

¹⁷ [2013] EWHC 481 (Admin).

failed to give sufficient information to consultees on matters of discretionary compensation, and had failed to conscientiously consider certain key stakeholder responses to the consultation process.

I think there may be some use in having two categories of procedural impropriety claims, one to denote ordinary individual grievances, and another to denote broader public interest or constitutional claims. This may aid in the deployment of appropriately experienced and specialist judges (a matter which the *operative* interpretation disclosed as important to practitioners). It is possible that the ordinary grievance claims could be adequately addressed by Deputy Judges. This opens the broader can of worms as to whether all AJRs really need to be issued and determined at High Court level. At present I think there is an endemic lack of awareness of the purpose and value of judicial review amongst generalist practitioners, and also amongst legal scholars and law students. In which case though in principle I think some classes of AJR could be well handled by the county courts, this is not a recommendation I make in the current thesis.

The procedural propriety (ordinary individual grievances) category covers clear errors in cases where public decision-makers should have known better. There is no major cost to the state in getting these things right; following clear, open, and impartial procedures is likely to lead to good outcomes for all concerned.

On the other hand, whilst procedural propriety (public interest/constitutional connotations) cases can be more costly for the government because their implications are likely to be more burdensome, in the

very few cases of this ilk in the current sample due respect (or deference) was paid to the expertise and authority of relevant public decision-makers.

6.4 Illegality and Irrationality

Whilst procedural propriety is a valuable category I think the same can no longer be said of illegality and irrationality.

The majority of claims in my sample turned on the interpretation of particular statutory provisions and these would most likely be classed as illegality cases under the orthodox headings. There is perhaps some general consensus that the Administrative Court should apply a correctness standard in these claims; i.e., if the decision-maker has interpreted the statute inconsistently with the Court's own later interpretation of the law then it has acted unlawfully and its decision is void.¹⁸

Irrationality, on the other hand has been subject to many interpretations. It can simply mean illogical; an illogical decision is clearly one that is incorrect. However, irrationality in public law has also been taken to encompass decisions that are so unreasonable no reasonable person could have come to them. On this account the court should be looking at what a reasonable public body could have legitimately decided, not what the court might have decided had the relevant initial questions been reserved to it (i.e., not a correctness test).¹⁹

¹⁸ Michael Fordham, *Judicial Review Handbook* (OUP 2012) 167-172.

¹⁹ A good account of the history of reasonableness in public law can be found in, Tom Hickman, *Public Law After the Human Rights Act* (Hart 2010) Ch 7. 'Reasonableness'.

On the orthodox illegality/irrationality account the judge must first assess compliance with statute using his generalist ordinary common law expertise and, assuming he finds the decision compliant, then assess whether it was reasonable showing deference or respect to the specialist expertise of the initial decision-maker.

The *operative* interpretation of social facts demonstrates that the distinction between generalist and specialist expertise is relevant and important to judicial review, but the boundary line between the two is not capable of clear demarcation. Nevertheless, the traditional illegality/irrationality demarcation purports to make this generalist/specialist demarcation central to doctrinal analysis. On my interpretation of both the broader social facts of litigation and the sample of case law, this distinction is no longer serviceable. There are many cases where a reasonable interpretation of statute has been deemed sufficient based on showing deference (or respect) to the specialist expertise of the initial decision-maker. Here we could say that a reasonable interpretation would then be one within a range of decisions that can be considered legally correct in this context. But given this ease of verbal manipulation I wonder whether the demarcation between a correctness standard in illegality claims on the one hand, and substantive reasonableness on the other, really provides any clarity.

Often in the case sample, illegality (unlawfulness in the terminology of most judges) and irrationality have been run together in various combinations, including; the decision was unlawful because irrational or perverse, the decision was unlawful because irrational and perverse, the decision was irrational and unreasonable, the decision was irrational and unlawful, the decision was

unreasonable and unlawful, the decision was unlawful because irrational, the decision was unlawful because unreasonable, the decision was unlawful because it was either irrational or otherwise unreasonable in the public law sense.

To talk of an explicit (and clear) distinction between illegality (unlawfulness) and irrationality seems largely unhelpful in light of the case law. Alongside the category of procedural propriety I think the case law discloses at least five other headings under which grounds can be organised and these transcend any purported conceptual distinctions between illegality and irrationality.

6.5 Mistake

My second new classification is that a public decision (or omission to decide) cannot be lawful if it is obviously wrong. On analysing the sample of cases it was striking how many AJRs were granted on the basis of a clear error. One would expect clear errors to be resolved prior to a substantive hearing (through negotiation, settlement and so on) but the *operative* interpretation discloses that the litigation strategies of the parties and their lawyers are sometimes contrary to this spirit of resolution. Some claimants are primarily interested in publicity and/or determination of the issue in the highest courts (one reason why some LIPs based far from London choose to issue their claims at the RCJ).

Defendants are not without blame; some public bodies are well known for dragging litigation out as long as possible, using their unequal bargaining

power (especially in the context of financial resources) to string out claims with little legal merit. Many of the mistake cases in my sample were asylum and immigration related (it coming as no surprise that the UK Border Agency and Home Office are often cited as culprits in tactical litigation).²⁰

In terms of specific claims, Maurice Sunkin has noted that, ‘practical impact is not necessarily associated with legal notoriety’;²¹ there are many claims which are straightforward from a legal perspective, but where the impact in terms of improving administrative procedures within the defendant body has been significant.²²

Whilst some variant of formal logical analysis may have helped demonstrate error in many of the sample judgments I am reluctant to specify a category of ‘error of logic’ because logic may just be one tool (and not always an easy one to master) to determine the presence of a mistake. In Chapter Eight I argue that there are a number of tools (tests and standards) within the judicial toolbox, and that not every tool is useful for solving every problem.

The subtitle to this mistake category could perhaps be failure of common sense. As I noted in Chapter Two, in order to grasp social reality doctrinal principles, ‘have to be founded upon the thought objects constructed by the common-sense thinking of men, living their daily life within the social

²⁰ See eg, Robert Thomas, ‘Immigration Judicial Reviews’ UK Const L Blog (12 September 2013) <<http://ukconstitutionallaw.org>> (accessed 6 October 2014).

²¹ Maurice Sunkin, ‘The Impacts of Judicial Review and Effective Redress’ (Cambridge Public Law Conference: Process and Substance in Public Law, September 2014) 7 (unpublished referenced with author’s permission).

²² 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 (suppl 2) *J Public Adm Res Theory* 243, 252-254.

world'.²³ There is a philosophical school placing common sense at its core whose supporters argue that other accounts of knowledge and how we come to it may be either so intensely sceptical, or so idealistic, as to be far removed from common sense; the sensations common to the ordinary man ought not to be side-lined but rather should become the focus of our understanding of human reason.²⁴

This category would include cases like *A v Secretary of State for the Home Department*²⁵ where both the First-tier Tribunal and the Upper Tribunal (UT) failed to recognise that the claimant had been treated throughout as a Ghanaian national despite being a German national who could not be subject to deportation except on serious grounds of public policy or security, grounds which had not been addressed let alone made out in the case. This application also goes to show that the UT is capable of making basic mistakes adding support to the view that its decisions should be subject to proportionate backstopping by the Administrative Court. In this category of case the concern is not so much who points out the error, but the gravity of allowing such a manifest wrong to go uncorrected.

In *R (South Tyneside Care Home Owners Association) v South Tyneside Council*²⁶ all the Council's relevant calculations regarding cost of care were exceedingly low because the effect of inflation had not been taken into account. Judge Belcher confessed himself 'astonished' by this, 'very significant error in

²³ Alfred Schutz, *Collected Papers I: The Problem of Social Reality* (Martinus Nijhof 1962) 59.

²⁴ See eg, James Fieser (ed), *Scottish Common Sense Philosophy: Sources and Origins* (Thoemmes Press 2000).

²⁵ [2013] EWHC 1272 (Admin).

²⁶ [2013] EWHC 1827 (Admin).

approach which undermines the whole basis of the Council's approach and inevitably renders the decision unlawful and/or irrational'.²⁷ I think it is better to use our common sense and class this decision as mistaken.

In *R (Belkevich) v Secretary of State for the Home Department*²⁸ all relevant documentation had been sent to the claimant's previous solicitors (including the reasons for refusing his asylum and human rights claims, the notice of his right to appeal, and his liability to removal from the UK). The claimant therefore did not know that these decisions had been taken.

One final example is *R (Mombeshora) v Secretary of State for the Home Department*²⁹ which concerned a Home Office form requiring certain information to be provided 'if known' as part of an application for leave to remain. The Home Secretary refused the claimant's application on the basis that certain information (in this case national insurance number and home office number) required 'if known' had not been provided. Clive Lewis QC (as he then was) held that if the Secretary had specifically required this information she should have indicated as much on the form. This type of case extends beyond the grievance of the individual litigant into improving administrative procedure (assuming that the Secretary of State acts on the judgment).

Under orthodox doctrine some of these mistakes might have been classed as factual, others as mistakes of law, some were logical errors and others may go against plain common sense. But the time spent making these distinctions (which may ultimately be incapable of demarcation) detracts from

²⁷ *ibid* [107].

²⁸ [2013] EWHC 1389 (Admin).

²⁹ [2013] EWHC 1252 (Admin).

the simple conclusion that the decision-maker has gone wrong, in substance none of these claims turned on whether the mistake was one of law or fact.

In light of the importance of simplicity and the difficulties faced by ordinary litigants noted in the *operative* interpretation I think it would be better to bring these cases under the simple heading of mistake.

There are parallels here with the doctrine of mistake in contract. This is a sensitive topic because the courts are concerned that any legal doctrine of vitiation by mistake should not allow either party to rescind what turns out to be a bad bargain.³⁰ But in the current context the bargaining position between subject and state is already unequal, making it even more important that mistakes be addressed. The most common form of mistakes in contract tend to be cases of mistaken identity, in the present sample *Belkevich* turned on a mistake as to the identity of the claimant's solicitors, and both *A* and *Mombeshore* related to mistakes about the claimant's characteristics and whether such characteristics were crucial to the initial decision-making process.

There is academic support for recognising mistake or manifest error as a category of judicial review claims. Historically there was a recognised common law distinction between errors of law that went to determining the boundaries of a body's jurisdiction and errors of law within that jurisdiction. Either as part of the reasons for deciding in *Anisminic Ltd. V Foreign Compensation Commission*,³¹ or in consequence of developments subsequent to that case, the

³⁰ Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (5th edn, OUP 2012) Ch 16. 'Mistake' and see *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407; [2003] QB 679 [28] – [32].

³¹ [1969] 2 AC 147.

distinction between jurisdictional and non-jurisdictional errors of law lost its prominence. In consequence the distinction between questions of law and questions of fact gained heightened importance, because most matters of law could now be reviewed, whereas matters of fact could only be reviewed in limited circumstances. The malleable distinction between jurisdictional and non-jurisdictional matters had been replaced by an equally porous cleavage between questions of law and questions of fact.

The fact-law distinction is now of reduced importance after the case of *E v Secretary of State for the Home Department*³² laid down guiding principles under which errors of fact will now be reviewable in a broader range of circumstances. Terminologically these mistakes are often referred to as errors of fact so unfair as to give rise to an error of law, thus maintaining the artificial distinction between law and fact, and review and appeal, on which the judicial review jurisdiction supposedly depends.

The fact-law distinction may be gaining renewed importance as a means of explaining the basis on which the Administrative Court can judicially review decisions of certain tribunals, (including the UT).³³ However, in these circumstances some judges have rejected the usefulness of conceptual boundaries, openly accepting the constructivist position that what is fact in one context may be considered to be law in another if the judge believes there are

³² [2004] EWCA Civ 49; [2004] QB 1044.

³³ See eg, *Jones (by Caldwell) v First-tier Tribunal* [2013] UKSC 19, in which the Supreme Court held that whilst the phrase 'crime of violence' has a specific legal meaning, whether the claimant's actions amounted to a crime of violence in accordance with that meaning was a question of fact for the lower tribunals. Effectively the Supreme Court deferred to the specialist expertise of the lower tribunals and to their institutional characteristics including closeness to the evidence presented.

good reasons for intervention.³⁴ In substance I agree with this approach since in my view law and fact are not clearly demarcated categories and their meaning essentially depends upon the cogency of reasons for ascribing that meaning. These reasons are ultimately based on interpretations of the values outlined in Chapter One.

The broader mistake ground I propose is similar to that identified by Rebecca Williams:

We already know that the terms “law”, “fact”, “jurisdictional” and “non jurisdictional” are simply flexible concepts that can be used to contain or even conceal more pragmatic reasoning, but we must accept that the same is true of the term “error” itself. A definition reached by a court as to any jurisdictional condition may be *different* from that reached by the initial decision-maker, but arguably it can only be an *error* if it falls short of an objective truth.³⁵

Williams cites the case of *R (Haile) v Immigration Appeal Tribunal*,³⁶ in which the decision-maker mistakenly thought that certain evidence related to a body called the EPRF where in fact the applicant was referring to a different body

³⁴ *Moyna v Secretary of State for Work and pensions* [2003] 1 WLR 1929, [27] (Lord Hoffman): ‘there are questions of fact; and there are questions of law as to which lawyers have decided that it would be inexpedient for an appellate tribunal to have to form an independent judgment [and which we therefore call questions of fact]’. In *Jones* *ibid*, Lord Hope considered the dividing line to be ‘pragmatic’ but my view is that it is based on principle; it is based on interpretations of the values outlined in Chapter One.

³⁵ Rebecca Williams, ‘When is an Error not an Error? Reform of Jurisdictional Review of Error of Law and Fact’ [2007] PL 793.

³⁶ [2001] EWCA Civ 663; [2002] Imm AR 170.

(the EPRP). Williams argues that such error claims ‘will inevitably be fairly rare’, but they were common enough in my sample to warrant unification under a specific principle of mistake justifying an AJR. At least 60 of the 221 sample claims turned on basic mistakes. Williams argues in favour of the category on the conceptual basis that, ‘the answer itself justifies the intervention’,³⁷ there is no reason of constitutional principle why the courts should not automatically correct such an objective mistake, regardless of the status of the decision-maker that made it. She also concludes that there is a pragmatic advantage in the court being able to automatically impose the correct answer rather than concern itself with the stages of rationality review. Essentially the court can cut to the chase and deal openly and swiftly with the mistake.

The suitable or rational connection limb of the proportionality test could also be subsumed under this mistake category. The limb requires that the means chosen to achieve a legitimate aim must have some more than negligible impact towards achieving it; if the measures don’t have this impact then there has been a mistake.

For example, in *Miller v General Medical Council*³⁸ (GMC), the GMC erred because it did not recognise that the claimant had a right to a public hearing (under ECHR Art 6) and the burden fell on the GMC to prove that derogation from that right was justified in the circumstances. The main argument for holding the hearing in private was that a crucial witness (who was also the complainant in the judicial review case) would not attend otherwise.

³⁷ *ibid* 799.

³⁸ [2013] EWHC 1934 (Admin).

However, there was no evidence presented that the witness would not attend, in particular he had not been called to give evidence of his intentions regarding attending the hearing. The GMC argued that the public interest required the witness to give evidence and that this justified holding the trial in private, however the means (private hearing) could not be proved suitable or rationally connected to the end because there was no evidence of the witnesses' intentions regarding giving their evidence.

Proportionality is a much-dissected doctrine and I discuss it further in later Chapters. For the majority of scholars it appears that the suitable or rational connection test only operates in cases where the means do advance the purpose, but only to a very limited extent, raising suspicions as to whether the 'purpose is, indeed, the real purpose'.³⁹ The test provides a 'quick solution in extreme cases'⁴⁰ where there is obvious incongruence between the aims and the means. In cases such as this there may be value in categorising the deficiency as a mistake rather than openly suggesting that such incongruence implies any dishonesty in the real aims of the measure or decision.

6.6 Ordinary Common law statutory interpretation

Challenges to a public decision-maker's interpretation of statute formed the largest proportion of claims in my sample, such claims being generally

³⁹Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) 315-316. Though other scholars associate suitable or rational connection with a test of 'necessity' based on the economic theory of pareto-optimality, see Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012).

⁴⁰ Barak, *Proportionality* ibid 316.

classified under the heading ‘illegality’ under the orthodox taxonomy. Given the large number of these types of claims I consider that ordinary statutory interpretation ought to be recognised as a specific function or purpose of judicial review, and hence I add this function to the taxonomy developed by Harlow and Rawlings, which I have reproduced and developed at page 52 of this Thesis.

The words illegal or illegality were rarely used in the sample, the most common label was ‘unlawful’ and this primarily applied to instances where a public decision-maker had misinterpreted their statutory grant of power.

There are a number of ways a statute can be interpreted; one can examine the text as a matter of ordinary language, conduct a more systematic analysis of relevant provisions in the context of the statute as a whole, or follow a more purposive approach examining the ‘mischief’ the statute may have been designed to address. These different variants of interpretation effectively express different compartments of rationality are they are not exclusive to public law. I think my case sample provides evidence that particular rational tools (such as ordinary language or systematic interpretation) were not chosen due to any social rules about when to apply them, but rather due to the consequences of adopting a particular tool in light of the values at stake in the particular claim.

For example, *R (Kebede) v Newcastle City Council*⁴¹ concerned the meaning of ‘expenses connected with education’ under section 24B(2) of the Children Act 1989. The matter at issue was whether the Council was under a

⁴¹ [2013] EWHC 355 (Admin).

duty to pay university tuition fees of former looked after children. Judge Timothy Straker QC (sitting as a Deputy High Court Judge) concluded that, ‘a principal expense associated with education is the cost of tuition. There is an inseparable connection between tuition and education...as a matter of ordinary, natural language, tuition fees are expenses connected with education’.⁴² Here he was concerned with linguistic rationality,⁴³ the intricacies of language.

The defendant Council relied on a different compartment of rationality arguing that the meaning of the word ‘education’ *in the context of the statute* connoted education that had already commenced and since the tuition fees needed to be paid before the education could commence they were not ‘expenses associated with education’ in this context. This can be described as ‘legal formal or systematic rationality’,⁴⁴ a concern for coherence and non-contradiction in light of the statute as a whole. It might also be an instance of pragmatic rationality, looking at the practical consequences of the measure and the options open to the judge (practically the fees had to be paid before the education could commence).

Since the parties disagreed over whether the statute ought to be interpreted in light of the ordinary meaning of words, or in line with a more technical meaning of the words in specialist statutory context, the judge had to

⁴² *ibid* [13].

⁴³ I draw here on a pluralistic approach to legal rationality developed by Imer Flores (individuating Dworkin’s interpretive account of fit and justification). Imer Flores, ‘Vis-à-vis Legal Rationality Revisited’ in Wil Waluchow and Stefan Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (OUP 2013) 103, 123; Under linguistic rationality, laws and legal decisions must be clear and precise to avoid problems of ambiguity and vagueness.

⁴⁴ *ibid* 123-124, legal decisions must be coherent, non-redundant, non-contradictory, non-retroactive, publicly presented to avoid redundancies and gaps, and to promote the completeness of the legal system.

move on to apply other tools of rationality. He had to consider the fairness of the scheme as a whole, ‘teleological’ or ‘purposive’ rationality, namely concern for the scheme of ends, functions, interests, principles, purposes and values served by the statute and any other supporting legal materials. Finally he was concerned with ‘ethical’ rationality, whether (in the current context) it would be inequitable to treat commenced education differently from future education.⁴⁵

Whilst I think the judicial reasoning in this case assists in the argument that decision-making is based more on values than on doctrinal categorisation, this is no reason to reject ‘ordinary common law statutory interpretation’ itself as a category of review. The case is one of statutory interpretation and it is ordinary common law interpretation; the category is broad, abstract, and capable of flexible application, but at least it ‘does what it says on the tin’, unlike ‘illegality’ which gives us nothing at all to go on and can nowadays be confused with a very different category (or principle) namely ‘legality’.

The compartments of rationality; linguistic, systematic, pragmatic, purposive, and ethical, are utilised in much the same way when interpreting statutes that apply, for example, only to private individuals or commercial organisations. The specialist expertise of the lawyer and judge in this instance relates to the specific statutory schemes of the subject matter (what I have referred to earlier as topic specialisation) and an appreciation of the kind of values engaged in the exercise of public power (those encountered in Chapter

⁴⁵ id, legal decisions must be fair or just and cannot admit violation of basic values and rights, including moral values and rights. Flores argues that this dimension of rationality must always be satisfied and therefore that there is a necessary connection between legal validity and ethical (moral) rationality, *ibid* 129.

One, among others). However, the reasoning process is still largely one of ordinary common law method.⁴⁶

Mark Walters has recently argued that it is the value of this method, as opposed to of specific common law doctrines that informed Dicey's later work. He concludes that Dicey's later account of the rule of law was, 'based not upon the supremacy of the ordinary common law as such, but the supremacy of the *ordinary interpretive process* or the *ordinary legal method* that is a distinctive part of legal discourse generally'.⁴⁷ Walters goes on to argue that conceiving of ordinary common law as a method may lead to a substantively richer interpretation of the rule of law than that often attributed to Dicey. I agree with Walters that there is value in what can be seen as an ordinary common law account of judicial rationality, a point to which I return in Chapter Eight.

In *Kebede* the judge chose to apply the ordinary language interpretation because it was also the interpretation that was fairest to the applicant in light of the purposes of the statutory scheme and the relevant practical consequences. The ordinary language interpretation was a conclusion based on assessing relevant facts and values, but it was still a useful tool as part of the process of judicial reasoning and communicating judgment.

⁴⁶ For support of this view see Paul Craig, 'Political Constitutionalism and Judicial Review' in Christopher Forsyth and others (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010) 19, 32-35.

⁴⁷ Mark Walters, 'Public Law and Ordinary Legal Method' (Cambridge Public Law Conference: Process and Substance in Public Law, September 2014) 3 (unpublished referenced with author's permission).

In *R (Stern) v Horsham District Council*⁴⁸ the claimant challenged certain enforcement notices on the basis that they were not compliant with section 172(3) of the Town and Country Planning Act 1990. The defendant responded that a challenge to the enforcement notices could only be made by way of an appeal and since the claimant's purported appeal had been dismissed as made out of time, judicial review should not lie. The Council relied on sections 174 and 285 of the 1990 Act. Section 285(1) states that, 'the validity of an enforcement notice shall not, except by way of an appeal under Part VII, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought'. Section 174(2) specifies the grounds on which an appeal may be brought, including 174(2)(e) which refers to where copies of the enforcement notice were not served as required by section 172. The defendant contended that section 174(2)(e) when read together with section 285 meant that the validity of the enforcement notices issued in this case could not be questioned in any proceedings (on the ground that they were not served on the claimant within the time required by section 172(3)). This was both an ordinary language and systematic rationality interpretation based on the inter-action of various sections of the legislation.

Leggatt LJ accepted that the defendant's interpretation was the 'more natural meaning of the words used', but he did not consider this to be the only possible meaning. He said, 'I accept that the statutory language is capable of being construed more narrowly to refer only to a situation where a copy of the notice has not been served at all, as required by section 172, and not to a

⁴⁸ [2013] EWHC 1460 (Admin).

situation where there was service but it did not take place within the time required by section 172'.⁴⁹ On this basis whilst accepting force in the argument for the natural meaning of the words used, Leggatt LJ instead concluded that, 'interpreted in the context of the legislative scheme as a whole, the words of that provision [section 174(2)(e)] must, to avoid unfairness which cannot reasonably have been intended and to make sense of the scheme of legislation, be given the narrower meaning which I think they are capable of bearing'.⁵⁰ In this case he rejected the defendant's systematic interpretation in favour of a competing interpretation that he considered to be both a systematic fit with the legislation under consideration and a consistent fit with other relevant legal materials in the field of planning law. He also interpreted the measures in a manner that would enable the statute to achieve its purpose, namely providing a fair (and proportionate) appeal mechanism, also adding moral weight to his decision. This is another case in which values rather than logic or language were truly determinative, would it really be fair to leave the claimant without any suitable route to a remedy? Nevertheless the tools of systematic rationality and ordinary language were used in interpretation.

A further example is the case of *R (T (a child)) v Newham*⁵¹ where the issue was whether the defendant was obliged to provide support to the claimant and her mother under section 17 of the Children Act 1989 pending determination of the mother's appeal against the refusal of her application for

⁴⁹ *ibid* [37].

⁵⁰ *id* [55]-[57]. He also held that the alternative broader construction was likely to breach article 6 of the ECHR, but that he did not need to refer to the ECHR given his finding on the basis of traditional common law statutory interpretation.

⁵¹ [2013] EWHC 344 (Admin).

indefinite leave to remain. The defendant accepted that the claimant was a 'child in need' within the meaning of section 17(10) of the Act. However, it maintained that it was prohibited from providing support and assistance to her mother by virtue of section 122(5) of the Immigration and Asylum Act 1999. Under this section no local authority may provide assistance to such a child or their family if the Secretary of State is currently providing such support or there are reasonable grounds to believe that the person concerned is one for whom support may be provided by the Secretary of State. The 1999 Act introduced a new system of support for asylum seekers and their dependents, the aim being to ensure that genuine asylum seekers were not left destitute whilst limiting the amount of public funds directed to providing for them. The key question disputed in *Newham* was whether the claimant's mother had made a 'claim' for asylum under article 3 ECHR by means of her indefinite leave to remain application letter. John Powell QC (sitting as a Deputy Judge) held that she had not made such a claim on the basis that the relevant statutory and case law context required 'claim' to be determined as the 'assertion of a right' attaching to the object that is claimed, not to the cause of action by which it is claimed or the grounds on which it is based. This is an assessment of the ordinary language (linguistic rationality) meaning of the word 'claim' alongside analysis of its more systematic meaning in light of the broader statutory context and the purposes of the relevant legislation.

Deputy Judge Powell held that the claimant had made no reference to article 3 either expressly or impliedly in her application for indefinite leave to remain and whilst the UK Border Authority purported to determine the

application under article 3 on their own initiative this was not consonant with the applicant specifically making that ‘claim’. He was especially concerned with the practical implications of his decision, the specific danger of falling between two stools and ultimately receiving lesser support, and the moral values at stake, what would be fair in the case of this mother and child given their moral claim to support?

This case is a more intricate example than both *Kebede* and *Stern*, given the complexity of the legal regime and the moral gravity of the outcome. It perhaps helps to illustrate the need (noted in my *operative* interpretation) for topic-specialist legal representation where lawyers must navigate a range of inter-connected legislation stemming from a variety of sources both national and international.

All these statutory interpretation claims had broader connotations beyond the individual parties to the case, the court’s interpretation of the relevant provisions forms part of a compass of case law (a past political decision) which has some authority, even though it may be distinguished or overruled in later claims.

One statutory interpretation case of particular interest was *R (Attfield) v London Borough of Barnet*.⁵² Under section 45 of the Road Traffic Regulation Act 1984 (RTRA), a local authority has the power to designate parking places on the highway, to charge for the use of them and to issue a parking permit as a method of collecting this charge. Should the charges collected amount to more revenue than is necessary to administer the scheme the authority may use the

⁵² [2013] EWHC 2089; [2014] 1 All ER 304.

surplus for the purposes identified in section 55 of the RTRA. The defendant had recently increased the amount it charged for parking permits for residents and visitors. The relevant surplus fund had been declining over the years (considerably due to the economic downturn and snowy winters limiting vehicle movement). Lang J found that the charges had been increased for the improper purpose of plugging a gap in the surplus fund so as to generate income to meet projected expenditure on a number of road transport projects including road maintenance and provision of concessionary fares. He noted that; ‘The issue is not whether or not the public body has acted in the public interest, but whether it has acted in accordance with the purpose for which the statutory power was conferred’.⁵³ Lang J rightly was not concerned with whether the surplus fund ultimately benefitted the community in some way (a policy choice), he was concerned with whether it was wrong as a matter of principle, in this case the relevant principles being that it would be undemocratic if it went against Parliament’s expressed intentions, and also against some possible common law (constitutional) right not to be subject to unauthorised taxation.

The purpose of the relevant surplus provisions had to be inferred from the ‘policy and objects’⁵⁴ of the relevant Act. This could be either explicit or implicit and in the latter case; ‘the purpose has to be inferred from the language used, read in statutory context, and having regard to any aid to interpretation that exists in the particular case...the exercise is one of statutory

⁵³ *ibid* [38].

⁵⁴ *Padfield v Minister for Agriculture Fisheries and Food* [1968] AC 997, 998 (Lord Reid).

interpretation'.⁵⁵ Lang J here was then applying linguistic rationality, systematic rationality, and most likely purposive (the policy of the statute) and pragmatic (its consequences) rationality as well.

There were numerous precedents supporting the view that revenue-raising powers, such as those pertaining to parking permits, were restricted to the cost of operating the schemes. However counsel for the defendant submitted that no restrictions should be imposed other than that the use must not be irrational and it must comply with section 122 of the RTRA, which imposes general duties on an authority's exercise of any functions under the Act. Section 122 confers a broad power to exercise functions to, 'secure expeditious, convenient and safe movement of vehicular and other traffic' and in exercising that function the authority should have regard (so far as reasonably practical) to a number of matters including any that appear to it to be relevant. It was argued that since in section 55(4) Parliament had expressly provided for uses to which a surplus could be put, it clearly envisaged a surplus arising and it was not therefore unlawful for the defendant to seek to raise a surplus (linguistic rationality). However, Lang J concluded that the RTRA is not a fiscal measure, it is not a taxing statute, and to propose as much would imbue local authorities with extremely broad powers (on the basis then of both pragmatic rationality (consequences) and moral value (taxation without consent may be undemocratic)).

⁵⁵ *R (Spath Holme Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2001] AC 349, 397 (Lord Nicholls).

The provisions for spending the surplus contained in section 55(4) all related to the safe and convenient movement of traffic and the provision of suitable parking facilities. When reading the Act as a whole (systematic rationality), section 55(4) is a narrow provision as to how any fortuitous surplus should be spent; it does not provide specific examples of how a surplus raised in pursuance of the general objects of section 122 ought to be invested.

Whilst Lang J largely based his analysis on the relationship between statutory provisions (and rejected any role as arbiter of the public interest) values were again instrumental in the ultimate reasons for deciding. A major problem of the parking charge scheme was that it could be viewed as a tax levied without the authorisation of Parliament, thereby breaching fundamental constitutional values (including among others democracy and dignity).

Where constitutional principle is so *central* to the context of the claim there may be a case for making this explicit in the categorisation of grounds. It should be noted that constitutional values may ultimately underpin all judicial review claims, but the question in the current context is how complex and hotly contested the relevant interpretation of value is likely to be and how directly it bears on the case.

Such obvious ‘constitutional value’ or ‘constitutional principle’ cases were few and far between in the current sample and their constitutional significance might be disputed. But nevertheless, even if it is the claimant (or more likely their lawyers) who self-certify a claim as constitutional in nature, this gives us more information (more data) about perceptions of constitutionality in the social practice of judicial review.

Another reason why this classification would be so useful at the level of grounds of review and Administrative Court categorisation of Topics is that when so many claims never make it to a substantive hearing, it would be interesting to know how many potentially constitutionally significant cases fail. For example, research by Sunkin and Bondy found that cases pertaining to the validity of a policy or practice (closer to my notion of constitutional claims) had a higher success rate (52%) than individual grievances claims (46%); with public interest claims having the lowest success rate (42%).⁵⁶

The progression of the *Attfield* case is also notable as it was found to have no reasonable prospect of success by two judges. Lord Carlile QC sitting as a Deputy High Court Judge had initially refused permission on the papers, a renewed permission application was refused by Robin Purchas QC (also sitting as a Deputy High Court Judge). The claimant was eventually granted permission on an application to Richards LJ sitting in the Court of Appeal. This gives support to concerns over the relevant expertise and experience of Deputy High Court Judges especially in cases with potential constitutional implications (noted in my *operative* interpretation especially in the context of the regionalisation reforms). Noting a case's potential for raising constitutional values, important matters of legal principle, or broader public interest, as part of categorising the grounds of review (on the N461 claim form) might assist in the allocation of more constitutionally-specialist judges to this type of claim. Rather than reducing the complement of Administrative Court judges (as ALBA has suggested), the better solution to the operative problem could be a

⁵⁶ Sunkin, 'Effects' (n 21) 20.

more nuanced taxonomy of grounds of review so that complex or constitutional claims can be flagged up from the outset. These claims are a world away from the mistake category and should be treated as such within the institutions and procedures of judicial review.

It is interesting to note that following the entry into force of the HRA 1998, there was a tick box on the N461 Claim Form for applicants to note if their grounds of claim included a human rights argument. In the first six months of 2002, research by the Public Law Project found that at the permission stage, 53% of asylum and immigration AJRs and 46% of other AJRs included a human rights claim.⁵⁷ However, the N461 tick box has now been removed and from speaking to Administrative Court officials it was suggested that this is because the proportion of claims raising human rights arguments is now much smaller and the Court staff no longer feel the need to track litigation in this category. My research does not extend to the permission stage in this regard, but from my analysis of substantive judgments, less than 10% involved a HRA-based argument.

As noted in Chapter Four, there are other new categorisations of Topics of claim that appear more constitutionally-flavoured or public interest flavoured, and it is these categories that the Administrative Court is seeking to track in some way. This suggests that the view within the organisation is of a court whose work is increasingly constitutionalised, but more in terms of Feldman's understanding of determining the inter-institutional balance of

⁵⁷ Varda Bondy, *The Impact of the Human Rights Act on Judicial Review* (Public Law Project 2003) 12.

power between particular branches of state, than on Laws LJ's account of constitutionalism being primarily a matter of individual rights.⁵⁸

⁵⁸ See my discussion in Chapter One, 53-59. The Director of the High Court during the greater part of this research period considered it unquestionable that the Administrative Courts acts as a constitutional court.

Chapter Seven: *Operative* Reasons for Deciding in Administrative Court

Judicial Review - Part Two

The first three categories of grounds encountered in the previous Chapter, procedural impropriety, mistake, and ordinary common law statutory interpretation, encompass legal principles that I think are part of the ordinary common law (the type that would please Dicey and which Sedley LJ recently described as ‘ordinary lawyers’ law’).¹

In this Chapter I construct three further categories of grounds that may be more closely aligned to specialist public law and the reformationist interpretation of judicial review as concerned with justification, rights, and constitutional values.

7.1 Discretionary impropriety² or relevant/irrelevant considerations

In addition to mistake and ordinary common law statutory interpretation, reasonableness and rationality (in their various incarnations) were the most

¹ In contradistinction to a new system of ‘administrative law’ that could be developed by the Upper Tribunal; (*Cart*) v *Upper Tribunal* [2010] EWCA Civ 859 [2011] 2 WLR 36 [42] (Sedley LJ).

² Lord Diplock used the phrase ‘procedural propriety’ rather than procedural fairness on the basis that the latter is usually taken as specifically referring to the common law principles of natural justice whereas the former includes common law principles, and any specific procedural requirements attaching to the relevant grant of power. I choose the terminology of ‘discretionary impropriety’ because the exercise of substantive discretionary judgment is also conditioned by the statutory context alongside common law principles. Under this title of ‘statutory context’ I include the whole compass of relevant materials, international law, European law, primary statutes, and delegated legislation (including policy documents, government circulars, and any relevant established standards within the specific context).

commonly cited categories of grounds in the sample, though there was little consistency in interpretation.

Under the orthodox account one would first assess whether enabling powers (specifically statutorily based) had been properly interpreted, a question of law or legality for the court; this is the category of ordinary common law statutory interpretation on my account. But even if the decision was found to be based on a correct interpretation of statute it might nevertheless be declared unlawful if it was irrational, or a decision at which no reasonable person could have arrived. In practice this distinction between illegality and irrationality (or unreasonableness) is largely chimerical; as I have noted in the previous Chapter there are many different compartments of rationality at work in statutory interpretation.

Assuming that the power is statutory, Paul Craig has noted that whether the case is decided on the basis of proper purpose and relevant/irrelevant considerations or irrationality/unreasonableness, ‘will inevitably depend on the degree of abstraction or specificity with which we frame the purpose/relevance inquiry’.³ If the purpose is framed broadly it is much more likely that the challenged interpretation of the relevant statute (or other enabling measure) will come within it. Then if the court still finds the decision offensive (for example, given its pragmatic or moral implications) it might apply a more searching standard of reasonableness. On the other hand if the purpose (and relevant/irrelevant considerations) are framed more narrowly, the decision

³ Paul Craig, ‘Proportionality, Rationality and Review’ [2010] NZ L Rev 265, 278.

could be considered unlawful on this standard and there is no need to resort to the reasonableness stage.

The same conceptual gymnastics have been noted in relation to proportionality and balancing generally, for example a judge determining legitimacy of aim (propriety of purpose) may engage in ‘subterranean balancing’, taking into account certain costs and benefits of the challenged measure as part of an assessment of what its aim might be and whether that aim can be considered legitimate.⁴ Yet these costs and benefits are supposed to be assigned to the final ‘fair balance’ stage conducted after legitimacy of aim has been established.

A tight conceptual distinction between propriety of purpose (relevance/irrelevance) and reasonableness, and/or between legitimacy of aim and fair balance, does not fit with case law practice. Likewise any sharp distinction between my category of ordinary common law statutory interpretation, and irrationality/unreasonableness will not fit.

My fourth category heading, discretionary impropriety or relevant/irrelevant considerations, is then not designed to be clearly demarcated from ordinary common law statutory interpretation (except in cases where there are no relevant statutory provisions). In effect it comprises a reasoning process that may be part of statutory interpretation, but which can also apply where the power is non statutory, or where there is no dispute as to the meaning of particular statutory provisions.

⁴ Frank Coffin, ‘Judicial Balancing: The Protean Scales of Justice’ (1988) 63 NYU L Rev 16, 26.

For those who accept a distinction between the interpretation and application of statutory provisions, it is this difference which the separation between my categories of ordinary statutory interpretation and discretionary impropriety may be taken to track. However, there are those who argue that interpretation and application are not separable, a statutory provision takes its meaning from the context of its application, thus there is no abstract meaning of a statute unconditioned by the circumstances of its application. For those who take this view my argument is that the fourth ground (discretionary impropriety) represents a particular species of interpretation that is so prevalent and so definitive of judicial review claims that it ought to be recognised as a key category of review. Again this category has been constructed by focusing on the sample of Administrative Court judgments and the following are only indicative examples.

In *R (Blackside Ltd) v Secretary of State for the Home Department*⁵ the claimant challenged the UK Border Agency's dockside seizure of a consignment of approximately 25,000 litres of beer. The claimant contended that there were no 'objective facts' sufficient to justify the seizure. Edwards-Stuart J concluded that an objectively factual basis was not required; the proper test was reasonable grounds for believing or suspecting that the consignment was liable to forfeiture because the goods were subject to an attempt to evade relevant taxes. He held that whilst there were no reasonable grounds for suspicion, the suspicion was nevertheless not irrational in the *Wednesbury* sense. He argued that; 'to apply a test of reasonable suspicion may set the bar

⁵ [2013] EWHC 2087 (Admin).

too high for a public law challenge in that it may involve setting a higher threshold than that produced by the application of a *Wednesbury* test'.⁶ A distinction was made between 'reasonable suspicion' and *Wednesbury* unreasonable, the latter being a test of irrationality or perverseness, in the judge's words, a 'decision might be irrational or perverse if there was no coherent basis for believing it to be justified'.⁷ In this case the defendant was found to have a coherent basis for the suspicion, but this was not enough to amount to a reasonable suspicion that the goods were subject to an attempt to evade the payment of duties.

Edwards-Stuart J held that he must first determine whether the seizure was arbitrary, when arbitrary is understood as the absence of good faith (he referred to this as a requirement of 'propriety of purpose'); however he went on to say that the second requirement is to determine whether the seizure was not *Wednesbury* unreasonable, referring to *Wednesbury* unreasonable decisions as irrational or perverse. This is confusing because elsewhere in the case law perverse is taken as analogous to in bad faith. He does not explain if perverse has a different meaning to bad faith and what that meaning is.

The matter was further confused because it was argued that the seizure could constitute an interference with property rights under Article 1 of Protocol 1 ECHR. Edwards-Stuart J noted that such interference would have to be justified, whilst acknowledging such implies that seizure must be a proportionate step he nevertheless concluded that, 'a rationality test will still

⁶ *ibid* [42].

⁷ *ibid* [40].

apply' on the basis that the, 'threshold for assessing proportionality may be fairly low'.⁸ Whilst he accepted that proportionality was relevant he did not apply any kind of structured proportionality test; he applied *Wednesbury* as requiring some coherent justification for the decision.

Importantly he did note why the standard of justification required was so minimal, namely the public interest in the prevention of smuggling and the fact that the owner of the goods could invoke condemnation proceedings (these proceedings establish whether legal ownership of seized goods should pass to Her Majesty's Revenue and Customs, or stay with the claimant).

Whatever talk of reasonableness, rationality, bad faith, perversity, and proportionality as legal terms of art, the *operative* reasons for deciding were I think, as follows; the Border Agency's decision was justifiable in this instance because it was not illogical or in bad faith and because despite the importance attached to property rights there is a strong public interest in preventing smuggling and the claimant would have another opportunity to contest whether title in the property had passed to the Border Agency.

Surely it must be possible to conceive of categorisations of review that allow these relevant *operative* reasons for deciding to be expressed with this degree of simplicity? Can we not simply say that, rather than being reasonable, capable of justification, proportionate and so, the decision was *just* (or at least justifiable) because it properly took into account relevant considerations including the public interest in the prevention of smuggling, and the fact that the claimant would have sufficient opportunity to challenge the passing of title

⁸ *ibid* [41].

to the goods? This particular element of the judgment was not specifically a matter of statutory interpretation (although statutes may sometimes be key evidence in identifying relevant/irrelevant considerations); it was a test of whether the decision maker had exercised their judgment in a manner that could be justified to the individual affected.

Take for example *Ozoemene v Secretary of State for the Home Department*⁹ in which the claimant Nigerian nationals argued that the Secretary of State's decision to seize and retain three of their passports and refusal to issue a passport to the fourth claimant, was *Wednesbury* unreasonable because she had not made any real efforts to establish whether certain key documents were genuine in the face of suggestions that they were forgeries. There was no discussion of the meaning of *Wednesbury* and Foskett J found in favour of the claimants on the basis that there was 'no sufficient evidential basis to justify' the Secretary of State's reasoning.¹⁰ The Secretary of State did not have 'substantial and well-founded reasons'¹¹ for doubting the validity of the documents. In orthodox terms this may not be an issue of reasonableness at all, rather an instance of lack of evidence more closely aligned to error of fact.

Yet in any case the lack of evidence is a relevant moral consideration, not least because matters as important to the individual as the grant of a passport and as personal to them as the validity of unique identifying documentation, such as marriage and birth certificates, are also relevant moral

⁹ [2013] EWHC 2167 (Admin).

¹⁰ *ibid* [47].

¹¹ *ibid* [52].

considerations. Again is it not better to simplify and cut straight to the chase of the relevancy of these considerations?

In *Mamdouh Ismail v Secretary of State for the Home Department*,¹² the Secretary of State was requested to personally serve a judgment of an overseas court in accordance with a request for legal assistance from the government of the country in which the judgment was issued. The claimant contended that in serving the judgment the Secretary of State would be assisting with the enforcement of a foreign conviction that had been obtained through a fundamental denial of justice. In the Secretary of State's view her role was merely an administrative act of giving the claimant a copy of the judgment and her discretion in such cases was minimal. Despite the human rights (fair trial right) context the case was decided on the basis that the Secretary of State had a wider discretion than she recognised and that she failed to take into account a key relevant consideration, namely the claimant's evidence about the unfairness of proceedings underlying the foreign court's judgment.

Goldring LJ considered whether the Secretary of State had, 'adopted an irrational and unlawful approach in exercising her discretion' and whether she 'irrationally fettered her discretion'.¹³ There was no discussion of what was meant by irrationality in either context. The argument centred on interpretation of the relevant provisions giving the discretion to the Secretary of State, this discretion was circumscribed by, 'vital considerations of comity and the United Kingdom's interest in mutual co-operation' in criminal trials with other

¹² [2013] EWHC 663 (Admin); [2013] Lloyd's Rep FC 329.

¹³ *ibid* [26].

nations.¹⁴ However, in extreme circumstances such as the present where the conviction had been obtained in a manner contrary to fundamental rule of law values, international comity must give way. The question was never really one of logic (rationality), or even perhaps of what a reasonable Secretary of State would have understood her discretion to entail, it was a matter of noting international comity as a relevant consideration as against an extreme breach of the right to a fair trial inherent in common law principles, also a relevant consideration. In this situation justice required comity to give weigh to upholding the rule of law, or perhaps better put, comity itself would be greatly damaged in the longer term if the UK failed to respect the rule of law.

In the majority of cases decided under the umbrella of reasonableness and/or rationality in my sample, judgment ultimately came down to an assessment of relevant and irrelevant considerations. For example, in *R (Ivlev) v Entry Clearance Officer, New York*,¹⁵ it was held that the UK Border Agency had been entitled to take into account outstanding criminal charges made against the claimant in Russia, and to treat those charges as having some factual basis even though there were strong reasons for suspecting them to be politically motivated.

In *R (Nawas) v Secretary of State for the Home Department*¹⁶ it was held that the Home Secretary had properly taken into account the best interests of the applicant's children in deciding whether to remove the family to Sri Lanka. These considerations included the children's ages and educational

¹⁴ *ibid* [55].

¹⁵ [2013] EWHC 1162 (Admin).

¹⁶ [2013] EWHC 1799 (Admin).

situation, their interests in staying together as a family, and the fact that they would be required to learn a different language to conduct their day-to-day life in Sri Lanka.

In *R (Raabe) v Secretary of State for the Home Department*,¹⁷ Raabe's appointment to the Advisory Council on the Misuse of Drugs had been revoked on the basis of his co-authorship of an article raising concerns over his credibility to provide advice on drug misuse issues affecting the lesbian, gay, bisexual, and transgender community. He had failed to disclose the article in his application or interview. The court held that the article could reasonably have been considered to be a relevant consideration to the initial decision of whether to appoint him, he should have disclosed it during the appointments process, and it was also a relevant consideration to the Secretary of State's decision to revoke his appointment.

In the Court's view the article was a relevant consideration because it was reasonably open to the Secretary of State to conclude that some parts of the article could reasonably cause offence to the LGBT community. This judgment was peppered with the word unreasonable, and in a number of instances it was said that the decision to revoke was neither unreasonable nor irrational. It seems in a number of instances the standard of reasonableness applied here was that of the reasonable person. I think the judgment may go somewhat off the point here; the question ought not to be whether a reasonable Secretary of State would consider the article be a relevant consideration, but as in the other cases discussed above, it is a question of whether the article *was* a relevant

¹⁷ [2013] EWHC 1736 (Admin).

consideration. Of course in deciding whether it was relevant or not the judge should also be looking at the expertise and experience of the Secretary of State, and all the circumstances of this particular decision.

In *R (Khan) v Secretary of State for the Home Department*¹⁸ the applicant had an unspent criminal conviction which he had disclosed in his application for British naturalization. The Home Secretary refused his application on the basis that he therefore lacked good character. The offence was of using a mobile phone whilst driving, it is one for which a fixed penalty notice can be issued, but in the applicant's case he had been given a fine and points on his licence. Holman J rejected counsel's argument that refusing naturalization in the case of an offence which could have been dealt with by a fixed penalty notice (though in fact it was treated more seriously) was, 'disproportionate to the point of being irrational'.¹⁹ He noted that the decision was adequately and properly reasoned and not one that, 'no Secretary of State acting reasonably could have made'.²⁰ However, the *operative* reason for deciding was that the availability of a fixed penalty notice for this type of offence was clearly an irrelevant consideration in light of this particular claimant because it was not the penalty he had been given.

In many of these judgments reasonableness and rationality have been mixed up with reference to the orthodox ground of relevant and irrelevant considerations, proportionality, and a broader concept of balance, yet it is the quest to sift relevant and irrelevant considerations that has been doing all the

¹⁸ [2013] EWHC 1294 (Admin).

¹⁹ *ibid* [40].

²⁰ *ibid* [46].

work. Hence whilst I initially labeled this category ‘discretionary impropriety’, denoting that it refers to the exercise of judgment on the part of the decision-maker which is not necessarily linked to statutory interpretation, the relevant/irrelevant considerations sub-heading both explains the substance of the judgments and fits with orthodox administrative law terminology.

Lord Carnwath has maintained that issues of propriety of purpose and relevancy of considerations are central to judicial review. Notions of logic, anxious scrutiny, moral outrage, or what a reasonable decision-maker may have been entitled to decide take us too far away from the central concern which is; ‘not whether the decision is beyond the range of reasonable responses, but why?’²¹ For Carnwath the ‘why’ usually stems from an interpretation of the statutory context (presumably using the tools of interpretation noted under my category 3, ordinary common law statutory interpretation) and other separately identifiable common law principles. He goes on to argue that; ‘We may also have to abandon the search for residual principles, whether of reasonableness or rationality. *I doubt if there are any, other than the interests of justice*’.²² Now without wishing to read too much into this comment, I think Lord Carnwath may be right that our concern should be to identify purposes and considerations rendered relevant by the statutory context, and also those rendered relevant by the interests of justice. The latter being constituted by the demands of ensuring

²¹ Lord Carnwath, ‘From Judicial Outrage to Sliding Scales – Where Next for Wednesbury (Constitutional and Administrative Law Bar Association Annual Lecture 2013) 17, available online: <<http://www.supremecourt.uk/docs/speech-131112-lord-carnwath.pdf>> (accessed 6 October 2014).

²² *ibid* 19 (emphasis own).

individualised justice for the citizen in light of whichever values (such as those identified in this thesis) are relevant to the case at hand.

Lord Carnwath locates the answer to this question of ‘why unreasonable’ partially in Jeffrey Jowell’s account of a number of ‘phrases’ taken to indicate unreasonableness.²³ These include illogicality, uncertainty/vagueness, relevant and irrelevant considerations (including the degree of weight ascribed to particular relevant considerations), mistake of fact, violation of rule of law values, and decisions that are unduly harsh or oppressive to the citizen(s) affected. These examples are similar to what Paul Daly has termed ‘indicia’ of unreasonableness. Daly analysed the reasonableness principle in the supreme appellate courts of the UK, US, and Canada, and concluded that it has both an, ‘internal logic and structure’.²⁴ Whilst his evidence base is different to mine (in particular he has focused on supreme courts) my findings can be well captured by some of his indicia. Daly concluded that the indicia each raise a presumption of unreasonableness which the defendant may then rebut by providing adequate justification for its decision (usually based on the cogency of its own reasons or sufficient evidence of reasonable decision making even in light of the indicia).²⁵

For Daly the five main indicia are, illogicality, disproportionality, inconsistency with statute, differential treatment, and unacknowledged or

²³ Jeffrey Jowell, *Proportionality, Unreasonableness, and Other General Principles* (Consiglio di Stato Rome October 2013), quoted in Carnwath, ‘Where Next for *Wednesbury*’ *ibid* 16.

²⁴ Paul Daly, ‘*Wednesbury*’s Reason and Structure [2011] PL 237, 254.

²⁵ Le Sueur has similarly noted that it is now common for courts to require the defendant, ‘to produce a justification for the decision that satisfies the court that it was properly made’ as opposed to the burden of argument remaining with the claimant. Andrew Le Sueur, ‘The Rise and Ruin of Unreasonableness’ (2005) 10(1) JR 32 42.

unexplained changes of policy. I have found evidence of all these indicia in my case sample, though in the current taxonomy illogically is classed as an incidence of mistake, and inconsistency with statute is classed as ordinary common law statutory interpretation. These indicia and Jowell's examples are all ordinary common law principles with fairly lengthy pedigrees.

In effect there may be no need for a separate heading of reasonableness or rationality (or even proportionality) as long as existing common law principles are interpreted expansively enough to ensure justice for individuals (and in my view this includes ensuring that individuals are treated with equal concern and respect). The danger is very much that the debate over conceptual demarcation, reasonableness, proportionality, and categories of intensity, obscures this far more important debate over values.

A factor uniting all my sample cases under the current heading (and the work done by others in this context) is indeed that the Administrative Court is concerned to assess the quality of the decision-maker's reasoning in the particular context. But that quality may be more specifically a function of whether the decision maker properly took into account relevant considerations and rejected irrelevant considerations, than a matter of variable reasonableness, rationality, or proportionality.

Given the reformationist and righting accounts, one might have expected disproportionate interference with human rights to be the most frequently argued ground of review. At least as far as the present sample is concerned one is more likely to see dis-proportionality being raised as an indice

of unreasonableness (or irrationality) than specifically in the context of a human rights claim in which unreasonableness is not also cited.

For example, in *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs*²⁶ the claimant was a UK national convicted of trafficking narcotics and sentenced to death by firing squad by an Indonesian Court. The High Court of Denpasar dismissed her appeal and she then wished to appeal onwards to the Supreme Court. Her AJR was against the Secretary of State's blanket policy of refusing to provide funding for legal fees and expenses to UK nationals facing the death penalty abroad. The Administrative Court, Court of Appeal, and Supreme Court concluded that her circumstances did not fall within the jurisdiction of the EU Charter of Fundamental Rights or the ECHR, and the remaining ground for consideration was whether the policy was irrational (*Wednesbury* unreasonable). Two of the arguments run by counsel in the Administrative Court litigation raise indicia of unreasonableness (illogicality and unexplained change of policy).

Counsel's argument on the rationality point was that whilst there are practical problems associated with providing legal fees and expenses to UK nationals sentenced to death overseas, these would not present themselves in all cases and in particular not in the case of this claimant. That it would be difficult to judge whether funding should be granted in some circumstances is not a rational basis on which to refuse funding in all cases. Counsel submitted that the applicant's case was clear. However, the defendant rejected this contention on the basis that if funding were provided in this death penalty case it would

²⁶ [2013] EWHC 168 (Admin).

have to be provided in analogous death penalty cases in both Indonesia and other countries. The defendant also contended that this case was not clear or exceptional. First, on the matter of the comparative cost of funding it was said that the monetary sums involved could always be considered small in comparison to the consequences (death by firing squad). Second, it was not exceptional that the claimant had no alternative means of funding her defence; this was the case with respect to other UK nationals who had faced or were currently facing the death penalty.

These issues so far seemed to turn on relevant and irrelevant considerations in context (the case for differential treatment or equal treatment). However, counsel also referred to arguments of legitimate aim and least intrusive means as grounds of unreasonableness. It was argued that to operate a blanket ban on providing legal fees and expenses was inconsistent with the UK Government's own foreign policy of denouncing the death penalty in all circumstances, in which case it can be inferred that the ban is based on some illegitimate aim. It was also proposed that the Government's previous policy (of providing loans to death row inmates such as the claimant) was effectively a less intrusive means of achieving the same aim (the aim being avoidance of considerable expense to the public purse). These contentions were rejected, but counsel was not chastised for raising them as going to reasonableness.

The Supreme Court sided with the defendant²⁷ largely on the basis that there is no precedent for rejecting indiscriminate policies established by prerogative (as opposed to by statute or some other source of power). To me the blanket ban is dubious since it doesn't allow for relevant personal considerations to be raised. It could be argued in response that in a context so serious as the death penalty there are simply no considerations that could legitimately be relevant to making one claim to legal aid more justly deserving than another. The only relevant considerations from the defendant's perspective are then the overall costs of providing such assistance, and international comity.

7.2 Breach of ECHR protected right or equality duty

In the current sample there were less than 20 judgments out of 221 in which a possible breach of the ECHR was alleged; thus refuting any suggestion that the righting of judicial review, and administrative law more generally, is specifically associated with an increase in claims concerning Convention rights.

To argue in an AJR that the defendant has breached the claimant's rights under the ECHR is to raise a specific form of statutory appeal under the HRA 1998,²⁸ perhaps then these claims would be better categorised by the Administrative Court under its 'Type' heading, statutory appeals and applications.

²⁷ *R (Sandiford) (Appellant) v The Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [74]-[75]. Whilst it rejected the appeal, the Supreme Court urged the Government to reconsider the claimant's case.

²⁸ Section 6, 'it is unlawful for a public authority to act in a way which is incompatible with a Convention right'.

The difficulty with classifying these cases is that a human rights breach is rarely cited as a stand-alone ground, it primarily sits alongside an allegation of unreasonableness and/or procedural impropriety. Similarly a breach of the public sector equality duty contained in the Equality Act 2010 section 1, is also a particular form of statutory appeal but one that is most often run alongside another ground of review (and sometimes alongside a breach of HRA 1998 section 6 as well). These issues tend to be brought by way of an AJR largely as a matter of practicality given the mixture of common law and statutory claims, and the perceived relevant expertise of Administrative Court judges.

In *R (Y) v Secretary of State for the Home Department*²⁹ the claimant challenged the Secretary of State's decision not to grant him indefinite leave to remain on the basis that his mental condition rendered the refusal a breach of articles 3 and 8. The Secretary of State was asked to exercise her discretion to waive compliance with her published policy (which was to grant discretionary leave to remain for three years) on the basis of interference with ECHR rights. She argued that article 3 imposes only a negative duty on the state to avoid the administration of certain kinds of 'treatment'³⁰ and that her refusal to grant leave did not amount to a positive action directed at the claimant's condition. HHJ Anthony Thornton concluded that it is not usually of much help to distinguish between negative and positive duties since in many cases inaction can be converted to action and *vice versa* depending upon phraseology. He then explored all the moral considerations pertaining to the claimant, such as

²⁹ [2013] EWHC 2127 (Admin).

³⁰ See especially *R v Secretary of State for the Home Department ex parte Limbuela (FC)* [2005] UKHL 66; [2006] 1 AC 396 (Lord Hope).

witnessing the death of his father and brother, being sent to the UK alone as a teenager, having his application considered and rejected on five separate occasions by the UK authorities, and having his application considered as ‘exceptional’ by the First-tier Tribunal on the grounds of article 8.

The key consideration tipping the balance in the instant assessment was new medical evidence disclosing a ‘direct link’ between the Secretary of State’s refusal to grant leave to remain, the breakdown of the claimant’s mental health and well-being, and the risk that this breakdown would intensify if he was unable to embark upon a course of treatment that could provide real and substantial improvements to his condition. Judge Thornton also held that article 8 was engaged and breached. He concluded that the interference with the claimant’s private life could not be outweighed by the need to maintain the UK’s immigration laws or any other countervailing interest of the state.³¹ He described the Secretary of State’s attempts to justify upholding her published policy in this case as ‘rigid, inflexible and misdirected’.³²

Despite finding breaches of articles 3 and 8 he also concluded that the Secretary of State’s decision was clearly, ‘irrational in a Wednesbury sense in being unlawful and in failing to take proper and full account of [a relevant medical report] and the other relevant circumstances of [the claimant’s] immigration history and mental health and social disabilities...’³³ Judge Thornton first found breaches of the ECHR and then went on to consider that had it been necessary he would have held the decision to be irrational

³¹ *R (Y)* (n 31) [64].

³² *id.*

³³ *ibid* [66].

effectively for the same reason, namely that relevant considerations had not been taken into account.³⁴ This adds support to the view that the judiciary are continuing to expose a common law rights jurisprudence that would remain in place if the UK withdrew from the ECHR. Many of the cases in my sample suggest that in both ECHR claims and ordinary common law claims, the judiciary are primarily concerned with the quality of reasons for a public decision and that the distinction between a legal appeal (a HRA 1998 claim) and judicial review is largely illusory. Again in this case the Court was examining whether the claimant had been treated justly by the state in light of the relevant considerations. Though immigration policy was relevant it was outweighed by the moral harm done to this individual by the Secretary of State's failure to take properly into account his immigration history, and his mental and social disabilities.

A claim in which the defendant was successful was *R (Butt) v Secretary of State for the Home Department*³⁵ in which Michael Kent QC (sitting as a Deputy High Court Judge) agreed with the defendant's view that if the claimant was in a subsisting relationship (and such was highly questionable on the facts) this was outweighed by the need to maintain proper immigration control, and any interference with article 8 would therefore be justified; the relationship, including its questionable authenticity, was not a factor sufficient enough to render the Secretary of State's decision unjust.

³⁴ In other cases judges have preferred to make the finding of irrationality first and then conclude that the rights-based argument (though likely to succeed) is not necessary, eg, *Miller v General Medical Council* [2013] EWHC 1934 (Admin) discussed in Chapter Six 297.

³⁵ [2013] EWHC 1793 (Admin).

The claims above largely relate to individual grievances, but roughly half the sample rights claims were also concerned with the broader exposition of legal principles. For example, in *R (Shuai Zhang) v Secretary of State for the Home Department*³⁶ the claimant was successful in an article 8 challenge to the legality of an immigration rule under which she had to return to China to make her application for leave to remain. It was held that only in ‘exceptional circumstances’³⁷ would the interests of the state be such as to require an individual to leave the country merely to change the status under which their application should be considered (in this case from a ‘General’ migrant to the ‘Partner’ of a Points Based System Migrant). Whilst immigration policy is a relevant consideration, it is also a relevant considerations that applicants would be forced to leave the country, with all that this entails for their own stability and that of their family, merely to change immigration status.

The large number of prisons claims (noted in my *operative* interpretation) also feature prominently here. An example of an individual grievance claim is *R (Kaiyam) v Secretary of State for Justice*³⁸ where the claimant was serving an sentence of Imprisonment for Public Protection (IPP), and sought to challenge what he viewed as the defendant’s continuing failure to provide him with a reasonable opportunity to reduce his risk of reoffending through the provision of rehabilitative work. The claimant contended that without such a reasonable opportunity his detention would become arbitrary in breach of article 5 ECHR. It was held that the relevant duty applies only to the

³⁶ [2013] EWHC 891 (Admin); [2014] 2 All ER 560.

³⁷ *ibid* [60].

³⁸ [2013] EWHC 1340 (Admin).

availability of systems and resources to address risks of reoffending and rehabilitation, and does not confer rights on individual prisoners.

A prisons claim with broader consequences was *R (Massey) v Secretary of State for Justice*³⁹ where the claimant challenged the Tariff Expired Removal Scheme (TERS) created by the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO). Under TERS a foreign national sentenced to IPP whose tariff period has expired and who is liable to removal will be removed from the UK (subject to some exceptions). The claimant argued that this provision was discriminatory under article 14 ECHR in conjunction with article 5 ECHR because foreign national prisoners subject to removal need not satisfy the Parole Board that they are no longer a danger to the public before they are removed, whereas those prisoners who cannot be removed must satisfy the Parole Board that they are no longer a danger before they can be released. Moses LJ held that the case was concerned with, ‘the power of the Secretary of State to focus the limited resources of the prison estate on those who are to be released into the community in the UK’.⁴⁰

He found that whilst the sentencing court and Parole Board must take into account the danger a prisoner may present to the public both in the UK and abroad it does not follow that the Secretary of State also has to consider the danger that prisoners subject to removal might present outside the UK when he is deciding how to allocate limited prison places. In practice this allows the Secretary of State to prioritise the safety of the UK public over and above the

³⁹ [2013] EWHC 1950 (Admin).

⁴⁰ *ibid* [14].

public in the removed prisoner's country of reception, yet this was not found to be discriminatory under article 14 ECHR. Whatever one thinks of the conclusion,⁴¹ the reasoning comes back to a matter of sifting relevant considerations (including the safety of the public in the UK and abroad when prisoners are released in the UK, and the resources of the prison estate), and what the judge considered to be an irrelevant consideration (the risk to the public abroad when an offender is released and immediately removed from the UK).

7.3 Constitutional principle / constitutional allocation of powers

My view (from the sample and other social data noted in the previous Chapters) is that there ought to be a category specifically denoting cases that directly raise matters of constitutional principle, including the inter-institutional allocation of powers between particular branches of state and the possible identification of further common law constitutional rights.

In terms of allocation of powers a classic example is *Cart and MR*⁴² itself which involved examining the scope of the Administrative Court's inherent supervisory jurisdiction. Other cases of this kind could include those where the Administrative Court lays down general guidance about its

⁴¹ An appeal is currently outstanding.

⁴² See Chapter Four, 203-219.

relationship with other persons and institutions such as the Director of Public Prosecutions,⁴³ Attorney General, or even members of the Royal Family.

For example, the case of *R (Evans) v Attorney General*⁴⁴ concerned the power of the Attorney General to issue a certificate determining that certain correspondence between the Prince of Wales and particular government departments should not be disclosed under the Freedom of Information Act 2000. The Information Commissioner dismissed the applicant's claim that a Government refusal to provide information breached the FOI. On appeal the Upper Tribunal (UT) determined that correspondence in which the Prince of Wales advocated certain causes of interest to him (especially environmental issues) should be disclosed. The Attorney General issued a certificate (under FOI s.53(2)) purporting to overturn the UT's decision. Not surprisingly the constitutionality of this statutory power was also at issue in the case.

In the Administrative Court Lord Judge determined that given the highly unusual nature of s.53(2) the court's power should not be restricted to *Wednesbury* unreasonableness:

....the aggrieved applicant is not required to go so far as to demonstrate that the minister's decision is 'unreasonable' in the familiar *Wednesbury* sense. Rather, the principle of constitutionality requires the minister to address the decision of the Upper Tribunal (or whichever court it may be) head on, and explain in clear and unequivocal terms the reasons

⁴³ *L v Director of Public Prosecutions and Met Police Commissioner (Kevin Pratt)* [2013] EWHC 1752 (Admin).

⁴⁴ [2013] EWHC 1960 (Admin); [2013] 3 WLR 1631.

why, notwithstanding the decision of the court, the executive override has been exercised on public interest grounds.⁴⁵

Davis LJ (giving the leading judgment) again spoke of the constitutionality of the issue, noting that the reasons given must be ‘cogent’ and that the words ‘on reasonable grounds’ imply an objective test.⁴⁶ There were clearly important considerations of public interest here, including the constitutional position of the Prince of Wales and his possible influence on government; it was for the Attorney General to justify his certification. Davis LJ concluded that the Attorney General had given cogent reasons to justify his certification; the reasons were cogent and rational. Ultimately the Attorney General was entitled to form a different view to the tribunal as to the relevant public interest balance. There might be two equally valid and reasonable assessments of the public interest balance, the one reached by the Attorney General and the one reached by the relevant tribunal.

However, this decision was overturned by the Court of Appeal with Richards LJ concluding that; ‘whether a decision is “reasonable” depends on the context and the circumstances in which it is made...But whether it is reasonable for X to disagree with the reasonable decision or opinion of Y depends on the context and the circumstances in which X and Y are acting’.⁴⁷ In short the question is not whether X’s decision is reasonable per se but whether it can be considered reasonable given the contrary decision by Y, when

⁴⁵ *ibid* [14].

⁴⁶ *ibid* [90] and [113]-[115].

⁴⁷ [2014] EWCA Civ 254; [2014] 2 WLR 1334 [37].

Y is an independent and impartial expert in full possession of all relevant facts. The status of Y is a relevant consideration, and a very important one. Richards LJ held that it would not be reasonable for the AG to disagree with the UT on the very question the UT had been tasked to decide in meticulous detail without something more than the statement that in his view the public interest balance fell in the opposite direction. If the UT's decision could be overturned for reasons that were sensible and rational, but not otherwise cogent, this would undermine constitutional values and the efficacy of appeal rights (rights backed up by constitutional values such as access to justice). Richards LJ found that in this context it might only be reasonable for the Attorney General to issue a certificate if there was some material change in circumstances, or some evidence that the UT's decision was demonstrably flawed as a matter of fact and/or law.

Reasonableness in this instance was flavoured by constitutional values; one can question whether the discussion of what is reasonable in a particular context merely clouded what was really a decision based on separation of powers, rule of law, and access to justice (concepts that have to be interpreted in light of values such as, democracy, equality, dignity and so on).

Another example of this type of case involved assessing the consistency in principle between national, regional, and international law. The case of *R (HC) v Secretary of State for the Home Department*⁴⁸ concerned the Home Secretary's refusal to revise a Code of practice under the Police and Criminal Evidence Act (PACE) so as to distinguish procedures applicable to a 17 year

⁴⁸ [2013] EWHC 982 (Admin); [2014] 1 WLR 1234.

old from those applicable to an adult. This refusal was held to be in breach of article 8 ECHR. In these circumstances 17 year olds were an anomaly because under all other UK laws and UN Conventions a person is considered to be a child or young person up to 18 years old. What may have been the Secretary of State's strongest argument, that the increased provision of appropriate adults for 17 year olds would come at crippling cost to the public purse, was unsuccessful due to the insufficiency of the evidence presented. It appeared that even within the Home Department the evidence was not well regarded. A policy document disclosed to the court noted that the cost assessments relied upon, 'a number of assumptions that are not capable of rigorous testing, and as such we recommend that you do not present them to the Joint Committee on Human Rights'.⁴⁹ Moses LJ dryly concluded; 'I suppose it renews faith in our democratic institutions that while it was feared that the figures would not stand the forensic scrutiny of a Parliamentary Committee they can at least be offered to the court'.⁵⁰ It is worth noting here that beyond the courts, scrutiny by bodies such as the Joint Committee on Human Rights (JCHR) is also considered to be part of the culture of justification, but the impact of such procedures is weakened if evidence is withheld from relevant committees (as happened in the instant case). This debacle shows the importance of retaining both parliamentary and court-based oversight.

In *R (HC)* the Administrative Court was also asked to consider whether the Secretary of State's decision was irrational, but given that Parliament had

⁴⁹ *ibid* [73].

⁵⁰ *id.*

made no distinction between 17 year olds and adults in the relevant provisions of PACE, to describe the Secretary of State's decision as irrational would be tantamount to declaring an Act of Parliament irrational. Moses LJ was not prepared to go this far. He based his decision on a breach of section 6(1) of the HRA 1998. Noting that; 'To invoke the Act is constitutional, to challenge legislation for incoherence is not'.⁵¹

This case addressed the grievance of an individual litigant, the broader interests of all those 17 year olds subject to relevant criminal procedures, and the inter-institutional allocation of power between the courts and Parliament (it is not 'yet' for the courts to declare a statute irrational despite the overwhelming evidence).

Other cases that could be classed under this constitutional principle and allocation of powers heading are those that concern the effective implementation of European Union law and those concerning various devolution settlements.

7.4 Conclusions of the *operative* case law analysis

The *operative* taxonomy of grounds provides a better fit with how judges in the Administrative Court are deciding cases and with the multiple purposes served by judicial review as noted throughout this thesis.

Alongside procedural impropriety, statutory human rights and equality claims, the notion that something has gone seriously and obviously wrong with

⁵¹ *ibid* [77].

the decision-making process (a clear mistake) is a lot easier to grasp than various conceptual doctrines about types of errors (that often are not errors at all but interpretive disagreements). On the contrary, the category of ordinary common law statutory interpretation openly acknowledges the pervasiveness of interpretive disagreements about the meaning of particular statutory provisions, and guides the judge to solve these using the ordinary tools of common law judicial rationality, without the need to refer to confusing labels such as illegality, legality, or unlawfulness.

Whilst discretionary impropriety may be harder to grasp, it ultimately turns on whether the decision-maker took into account (and fairly weighted) relevant considerations and rejected irrelevant considerations. Relevant and irrelevant considerations can be determined by the statutory context, and by common law principles with historical pedigree (such as those concerning fettering of discretion, consistent treatment, and over-rigid policies) in light of the values at stake in the claim.

Finally, there is a category of constitutional values or constitutional allocation of power, fitting with my *operative* interpretation under which there are some relevant differences between street-level bureaucratic cases and higher-level constitutional cases, but the distinction is not sufficient to be entirely characteristic of the role of judicial review in the Administrative Court (this role still being largely concerned with resolving individual, own fact, grievances).

Chapter Eight: The *Target* Interpretation and Judicial Rationality

In this thesis, I have exposed certain misconceptions about, or lack of attention to, the facts of social practice in judicial review litigation. In doing so I have begun to construct an *operative* interpretation that is a more accurate fit with current practice. In the course of developing my methodology, examining the history of judicial review, analysing the social facts of practice, and constructing a taxonomy of grounds, I have noted the difficulties in applying some current conceptual doctrinal tests.

As constructed so far, the *operative* interpretation of judicial review in the Administrative Court is that judicial review performs many roles; from redressing individual grievances, to ensuring consistency in principle across diverse legal regimes, to assessing the inter-institutional allocation of power between particular branches of state. It portrays a distinctive sense of top-down constitutionalism based on the rationality of an elite set of lawyers and judges (still largely centralised in London), and (though to a lesser degree) ground-up constitutionalism exposing legal principles that both constitute and reflect societal values based at least in part on the demands of a broad range of claimants.

The third central aim of this thesis is to develop a *target* interpretation that provides a good fit with social practice and a moral justification of that practice. In this Chapter I continue to defend judicial review as individualised justice as a *target* interpretation. On this account judicial review is characterised by ordinary common law method, alongside judicial (and

practitioner) specialisation in relevant Topics, and a focus on individualised justice examining the quality of the initial decision-maker's reasoning primarily by asking whether relevant considerations were properly taken into account and irrelevant considerations excluded.

I foresee two criticisms of this *target* interpretation; first, that it gives too much power to unelected judges to fashion and apply their own theories of justice and as such it is unpredictable and insufficiently grounded in social fact-based rules. Second, the command to do justice gives little guidance to the judge and provides insufficient certainty for litigants and public decision-makers. This Chapter is concerned with fleshing out the *target* interpretation with these two criticisms in mind; I also explore how it fits with recent conceptual debates about variable intensity of review and proportionality.

8.1 Individualised justice

Under my *target* interpretation the judge must take seriously the contending visions of justice presented by the parties; these being based on their respective interpretations of the values at stake. He must then supply a conception of justice, based on what he thinks justice really means, and what it really requires, in light of all the circumstances of the case. The difficulty here is that the variable range of circumstances, or context, can be infinite, and contextualism¹ (or individualisation) has therefore been described as an empty

¹ *R v Secretary of State for the Home Department ex parte Daly* [2001] UKHL 26; [2001] 2 AC 532 [28] (Lord Steyn); 'In law context is everything'.

label.² Mike Taggart has noted that; ‘We must get beyond simply talking about context and actually contextualise in a way that can generate generalizable conclusions...we need a map of the rainbow of review that is reliable and helpful, and we need willing cartographers’.³

This analogy of needing cartographers however, implies that there is one correct map of the terrain out there to be discovered, yet the pluralistic and socially constructed practice of judicial review does not have ‘in it’ sufficient agreement to develop such a map.

In my view the need is not for cartographers but for coastal navigators who work with certain fixed points, we might call these abstract plateaus of agreement or paradigms, in order to tri-angulate and plot a position and adjust a course over time.⁴ In the case of judicial review the fixed points include; past precedent, institutional constraints, and the different interpretations or conceptions of justice (informed by different interpretations of values) held by the parties. These limits begin to address concern that my *target* interpretation of judicial review as individualised justice is somehow illegitimate, arbitrary, or uncertain.

8.2 The ‘rainbow of review’

² Elliott considers contextualism, ‘intellectually vacuous’; Mark Elliott, ‘Justification, Calibration and Substantive Judicial Review: Putting Doctrine in its Place’, forthcoming in, Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart 2015).

³ Michael Taggart, ‘Proportionality, Deference, Wednesbury’ [2008] NZ L Rev 423, 454.

⁴ George Saville has likened the law to a trimmer, perhaps one can say a tiller on my nautical analogy, ‘...our laws are Trimmers between the excesses of unbounded power and the extravagance of liberty not enough restrained...’ 1st Marquis of Halifax, ‘The Character of a Trimmer’ *Miscellanies by the Marquis of Halifax* (W Rogers et al 1704).

Current moves to map Taggart's rainbow can be seen as a recent manifestation of over-emphasis on conceptual analysis.⁵ The call to map the rainbow has been taken up as a challenge to find conceptual answers to an interpretive debate about the value of judicial review in particular contexts; in this sense it may be a project doomed from the outset. The crux of current debate is whether particular degrees of intensity of review can be explicitly calibrated; in short I think this is a question of how we conceptualise individualised justice. On my understanding mappers agree that judicial review is ultimately about doing justice by requiring the decision-maker to give reasons of sufficient quality; where we part company is whether the required quality can be calibrated in advance by demarcation into categories of intensity of review.

Intensity can be calibrated in a number of ways (all of which are disputed). The broader discussion of variable intensity of review is illustrated by a specific debate about whether proportionality (as a general standard that can be applied more or less intensively) should be available across all types of review (beyond rights, EU law, and other specific circumstances such as cases involving overly harsh penalties).⁶

⁵ See eg, Murray Hunt 'Against Bifurcation' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart 2009) 99; Dean Knight 'Mapping the Rainbow of Review: Recognising Variable Intensity' [2010] NZ L Rev 393; Jeff King, 'Proportionality: A Halfway House' [2010] NZ L Rev 327; Tom Hickman, *Public Law After the Human Rights Act* (Hart 2010) Ch. 9; Elliott 'Calibration' (n 2). There are some excellent points made in these contributions but they broadly share the same defect of failing to place values at the core of analysis and in some cases they appear to introduce new conceptual distinctions that may do more to over-complicate than to explain. A work that I think does not fall so deeply into this conceptual trap is Paul Craig, 'Proportionality, Rationality, and Review' [2010] NZ L R 265.

⁶ Citations at (n 5) and see also, Mark Elliott 'The Human Rights Act 1998 and the Standard of Substantive Review' (2001) 60(2) CLJ 301; James Goodwin, 'The Last Defence of

The first conception is to align various intensities with specific categorisations of the grounds of review; largely this harks back to the orthodox tri-partite taxonomy (with the addition of rights claims). Where illegality and/or procedural impropriety are alleged a correctness standard applies (the only correct interpretation of ‘the law’ is the one reached by the reviewing judge). Where unreasonableness is alleged traditional *Wednesbury* applies (absent a total failure of logic the initial decision will stand). Where a human right (and/or perhaps a constitutional principle) is argued to have been breached the standard is again a strict one of correctness, it is for the judge to determine whether the right has been breached, but he should do so using the specific proportionality standard (as opposed to any other method for determining what counts as an acceptable justification). I call this the ‘strong-bifurcation’ conception in which *Wednesbury* and proportionality are considered to be conceptually distinct tests, with the latter only being available in limited categories of claims. The difficulties of this conception have been noted throughout this thesis, it simply doesn’t fit with how judges are deciding cases, or with the problems of real-life claimants and the nature of legal practice.

Second, the above categories could be accepted as a starting point with room for variation. Generally it could be agreed that in cases of illegality (ordinary common law statutory interpretation under my taxonomy) it is for the court to determine questions of law (correctness) but *sometimes* an alternative reasonable interpretation of the relevant statute will suffice even if it is not the

Wednesbury’ [2012] PL 445; Phillip Sales, ‘Rationality, Proportionality, and the Development of the Law’ (2013) 129 LQR 223.

same conclusion that the court would have reached (e.g., in complex planning disputes or in cases pertaining to economic policy). This account can also include variable *Wednesbury* extending from failure of logic to the standard of a reasonable man, and perhaps even unreasonableness as disproportionality. I call this conception ‘weakly bi-furcated’; an approach can be ‘weakly bi-furcated’ by accepting a variable *Wednesbury* standard, it can also be ‘weakly bi-furcated’ by supporting a traditional strict (failure of logic) interpretation of *Wednesbury* whilst allowing proportionality to extend beyond its apparently orthodox use, when its application to new categories is compelling.⁷ Initial categorisation (with flexibility) is helpful, but, as I have argued in Chapters Six and Seven, some traditional categories (illegality and irrationality especially) no longer fit with practice and the resulting uncertainty damages any claim that they are justified.

A third approach is to adopt a continuum of intensity, on this account the courts should first identify relevant intervention and deference factors applicable to the instant case in order to calibrate an appropriate intensity of review, they should then apply this standard to the facts of the case. This is the ‘sliding-scale’ interpretation under which *Wednesbury* and proportionality are not considered to be conceptually distinct standards (or tests) but merely part of the same continuum of variable intensity of review.⁸

⁷ Hickman, *Public Law* and King, ‘Halfway House’ (n 5) provide different accounts of ‘weak-bifurcation’, though both perceive a clear distinction between the concepts of reasonableness and proportionality.

⁸ An approach associated with Elliott ‘Standard of Substantive Review’ (n 6).

A fourth and related approach is to adopt a sliding scale but this time one which is ordinal rather than cardinal, there being a set number of categories of intensity to be selected and then applied. I call this the ‘bi-furcated but universal’ conception, *Wednesbury* and proportionality are conceptually distinct standards (and tests) but both should be available across the whole spectrum of topics (rights and non-rights) and each can be interpreted more or less intensively.⁹

The final option is to reject explicit calibration and to merely ask; all things considered noting the circumstances raised by the claimant and the respondent’s justification, should the claimant be granted a remedy and what should that remedy be?¹⁰ Different interpretations of *Wednesbury* and proportionality are merely tools in the judicial toolbox for assessing whether a justification is sufficient in the circumstance of the case; they are tools of judicial rationality, just the same as the tools of ordinary common law statutory interpretation noted in Chapter Six.¹¹

I cannot analyse all these options within the confines of the current thesis, but my worry is that in any case some of them take us too far off the

⁹ A view of this kind can be attributed to Craig, ‘Proportionality’ and Hunt, ‘Against Bifurcation’ (n 5).

¹⁰ Trevor Allan takes this view, see eg, TRS Allan, ‘Deference, Defiance and Doctrine, Defining the Limits of Judicial Review’ (2010) 60(1) UTLJ 41 and ‘Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory’ (2011) LQR 96, as I think do many judges (at least from my case law analysis) see especially Lord Carnwath, ‘From Judicial Outrage to Sliding Scales: Where Next for *Wednesbury* (Constitutional and Administrative Law Bar Association Annual Lecture 2013) 19, available online: <<http://www.supremecourt.uk/docs/speech-131112-lord-carnwath.pdf>> (accessed 6 October 2014) citing Lord Donaldson in, *R v Take-over Panel ex parte Guinness plc*. [1990] 1 QB 146, 160C; ‘the ultimate question would, as always, be whether something had gone wrong of a nature and degree which required the intervention of the court and, if so, what form that intervention should take’.

¹¹ 299-309.

point. The different accounts are ultimately based on interpretations of the value of a particular degree of judicial intervention in specific contexts. Those who favour a scheme of ordinal categorisation tend, I suggest, to value legal certainty and protected expectations for decision-makers as to the standards that will be required of them. Those who favour infinite cardinal calibration may be more concerned with doing justice in particular cases, and more accepting that no set of facts and values can be exactly the same.

The conceptions provide different answers to three questions: 1. What are the relevant factors in assessing variable intensity (that is what factors are relevant to assessing the quality of reasons given by the decision-maker)? 2. Are these factors of a different order to other considerations at play in the judicial assessment? 3. Do these considerations require human rights cases (and perhaps also cases directly questioning the interpretation of constitutional principles and the inter-institutional balance of power between branches of state) to be treated as a different category?

8.3 Variable intensity factors

There are plateaus of agreement among those in the variable intensity debate, namely that the factors conditioning intensity include; legitimacy, expertise, and institutional constraints.¹² Many of the values examined in Chapter One can

¹² See eg, Jeff King, 'Institutional Approaches to Judicial Restraint' (2008) 28(3) OJLS 409; David Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in Michael Taggart (ed), *The Province of Administrative Law* (Hart 1997) 279; Aileen Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 LQR 222.

be subsumed under one or more of these headings, and they mirror my historical interpretation of the Administrative Court's concern for authority (legitimate authority), specialist expertise, and the proper use of judicial resources (institutional constraints).

In the literature, legitimacy concerns the constitutional position of the court relative to that of the initial decision-maker. Under the legitimacy heading one may variously find; rule of law values, democracy, equality, liberty, and of course authority. It is worth noting again that these values are interpretive and capable of different meanings, each of which has different implications for what we conceive to be the proper role of the judiciary.

Expertise/specialisation requires us to take into account the relative knowledge and abilities of judges and initial decision-makers. Under the expertise heading we find; expertise itself, legal justice, administrative justice, and rationality. It should be noted from both Chapter One and the *operative* account that the meaning of expertise/specialisation in Administrative Court judicial review is pluralistic (with two key categories being 'topic-expertise' and 'constitutional-expertise').

Institutional design concerns the 'forms and limits of adjudication', including the limitations of the adversarial method and the courts' restricted capacity to examine in detail the consequences of their decisions given limitations of the material before them. Again, just how limited one thinks the Administrative Court's design and operation should be will be based on one's

interpretation of the value of particular claims (such as judicial review applications) and the functions they serve.

Of the five approaches to mapping noted above, those based on categorisation are unlikely to fit because they depend on a level of agreement over the meaning of these variable intensity factors that simply is not present. On the other hand approaches based on infinite calibration may provide no certainty for public decision-makers, for litigants, or for judges. The latter may be the best in terms of individualised justice, but not in terms of legal certainty, a relevant rule of law value which must also be taken into account. The best approach is one able to combine some *prima facie* categorisation with *sufficient* flexibility.

8.4 A different order of factors, bi-furcated or tri-furcated review

There are two (perhaps three) aligned variable intensity debates. The perennial problem of the appropriate degree of review in cases of administrative discretion (especially where matters of complex social and economic policy are at stake), debates concerned specifically with human rights review, and an additional distinction between administrative review, human rights review, and constitutional review.

The culture of justification in administrative law is attributed in part to the growing influence of human rights (and broader constitutional) adjudication in which a claimant raises a *prima facie* rights breach and if such is found to exist, the defendant must then prove its decision was justified by reasoning of

adequate quality. This is arguably different to the methodology of orthodox administrative review where the onus is on the claimant to prove that the initial decision was unreasonable, inconsistent with statute, procedurally unfair and so on.

This apparent distinction can be resolved in two ways: First, it could be argued, as I have done in my unorthodox reading of *Cart*,¹³ that there is in effect, a *right to just administration* which includes the full panoply of grounds of review. Claims that are colloquially labelled as non-rights claims can be interpreted as raising a rights argument, either because there is a constitutional *right to just administration* and/or because the claimant always has a right to a legal decision that is justified by the past political record (which includes legislation, precedent, principles and so on) whether this is properly labelled as constitutional or not.

Second, we can utilise Daly's notion of 'indicia'.¹⁴ Any of the existing grounds of review could be indicia of illegitimate decision-making, if the claimant raises an indice with supporting argument then the defendant must respond with a adequately reasoned justification.

My sample analysis suggests that in most cases where an indice of unreasonableness was alleged, the claim was approached on the basis that the defendant ought to supply some form of justification for its decision, and that the court would assess the adequacy of that justification.

¹³ *R (Cart) v The Upper Tribunal; R (MR (Pakistan)) (FC) v The Upper Tribunal (Immigration & Asylum Chamber) and Secretary of State for the Home Department* [2011] UKSC 28; [2012] 1 AC 663, and Chapter Four, 206-219.

¹⁴ Paul Daly, 'Wednesbury's Reason and Structure' [2011] PL 237.

The resultant concern seems to be that if the same sufficiency of justification method applies to all types of claim then judges will not be alive to the relevant differences between cases involving fundamental human rights and those which do not. It is said that a categorical approach is needed to formalise an interpretation of legitimacy, expertise, and institutional competence, under which judges are better at protecting rights (and therefore review should always be more intensive) than they are at ensuring just administration (where review should always be more limited). One has to question whether social practice has in it the necessary agreement to conclude that judges really are always ‘better’ at vindicating rights than they are at say, structuring good administrative procedures, or protecting the broader public good. I shall return to this bifurcation issue, but for present purposes I think it does not fit with practice, though since there were such a tiny number of human rights claims in my sample it may be hard to draw solid conclusions.

The matters that go to variable intensity are also referred to as markers of, deference, restraint, or respect.

One area of disagreement has been whether the deference or respect factors should be seen as cohering to form an independent doctrine. This seems to imply that the judge would decide if a legal right (be that a human right or otherwise) has been *prima facie* breached, conclude that the defendant cannot justify the breach, but nevertheless hold for the defendant because its decision must be respected or deferred to. On this basis the deference factors appear to be separable from degrees of justification.

Aileen Kavanagh has argued that institutional considerations (expertise and institutional design) are of a different kind to the substantive reasons for deciding in particular rights claims. There could then be a contest between the judge's view of what legal rights really require on the one hand, and the decision he is forced to reach due to his institutional limitations on the other. The final decision, being a balance between legal rights and institutional limitations, will supply the relevant individualised conception of justice.

Kavanagh uses the analogy of judicial precedent supposing a separation between the moral reasons at play in particular claims and the weight of previous case law.¹⁵ However, I think the better view is that of Trevor Allan who argues that institutional considerations are intrinsic to the examination of what justice requires; likewise; 'Deference to precedent is not external to adjudication: it identifies the main criteria for judgment in what would otherwise hardly qualify as a *legal* determination at all'.¹⁶

I noted in Chapter Three that despite much criticism there is value in Ronald Dworkin's distinction between principle and policy, and this can be applied in the deference (or variable intensity context). It is common language in administrative law to speak of showing deference or respect to policy-centric decisions.

If Dworkin's analysis was intended to depict a one-to-one correlation in which the courts are the sole arbiters of principle and legislatures solely concerned with policy then it must be rejected. As noted under my discussion

¹⁵ Kavanagh, 'Defending Deference' (n 12) 232.

¹⁶ Allan, 'Judicial Deference and Judicial Review' (n 10) 112.

of ordinary common law statutory interpretation, judges are regularly tasked to interpret statutes (and other legal materials) in accordance with the policies they were designed to achieve. On the other hand, legislatures are regularly concerned with arguments about what kind of rights people have and the best way to create and protect new rights and duties via legislative programmes. Administrators too are concerned with even more specific gradations of what rights people have when legislative policies are put into effect. Whether such rights are also what Dworkin called ‘back-ground’ rights (that exist in the abstract), they now have a specific existence as ‘institutional-rights’ (being based on past political decisions).¹⁷ In administrative law perhaps the most obvious example being legitimate expectation claims where a clear and unambiguous representation can give rise to a legally enforceable right to a substantive benefit.¹⁸

Dimitrios Kyritsis argues that whenever the legislature has a role in creating or fashioning certain rights the courts have a duty to respect the content of these decisions based on the institutional status of the legislature.¹⁹ He utilises a distinction between first- and second-order considerations of principle which he argues, ‘correspond to two different *parameters of good governance* by political institutions. They form part of our answer to the question: How is

¹⁷ Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 93.

¹⁸ *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622.

¹⁹ Dimitrios Kyritsis, ‘Principles, Policies and the Power of the Courts’ (2007) 20 Can J L & Juris 379.

political power to be exercised in order justifiably to lay claim to our allegiance?’²⁰

First-order considerations are to do with the substance or content of the relevant measure or decision made by the legislature (in the current context this extends to any initial decision-maker) as a matter of justice (which includes both whether it promotes some conception of the common good and individual rights). Whereas second-order considerations relate specifically to, ‘the reasons we have (or the conditions under which we are willing) to give an institution of some sort or a number of institutions acting together the power to make decisions of some sort that are to be binding on us’.²¹ Such can clearly include considerations of democratic legitimacy, expertise, and institutional design. However, this does not always mean that second-order considerations will trump first-order considerations; both considerations are matters of principle to be assigned weight and ‘balanced’ in particular cases. It may be that the content of a past political decision (made by the legislature or an administrator) is so unjust as to outweigh any second-order considerations pointing in favour of deference.

This is a different distinction to that which Kavanagh draws between matters of substantive justice (what would be a just moral decision for the judge to reach based on analysing the content of the rights at issue) and institutional reasons. Putting the two accounts together I think there would be three levels; the first-order assessment of justice and the common good made by the initial

²⁰ *ibid* 393 (emphasis original).

²¹ *ibid* 394.

decision-maker, a different account of substantive judicial justice and the content of individual rights (seemingly based on the same factors but in a more constrained manner) made by the judge, and finally the considerations of institutional design. Institutional design then mediates in some way between the judge's assessment of the substantive justice and rights compliance of the measure, and that of the primary decision-maker.

I remain sceptical as to whether such a distinction really exists at the abstract conceptual level, but in any case the judicial reasoning process involves examining the conceptions of justice supplied by the initial decision-maker and the claimant in light of past precedent and institutional constraints. The conclusion will be a matter of individualised legal justice. As Kavanagh notes:

The appropriate division of labour between the three branches of government in a constitutional democracy is a moral question, and when deciding whether to be more or less restrained, judges are required to make moral judgments about how the powers of government should be distributed, exercised, and constrained. Therefore what justice requires in an individual case is the judicial decision that is supported by a proper balance between the relevant substantive and institutional reasons.²²

²² Aileen Kavanagh, 'Judicial Restraint in the Pursuit of Justice' (2010) 60(1) UTLJ 23, 32.

In my view both initial decision-makers and judges are concerned with matters of policy and principle in exercising their respective roles but to different degrees and in different combinations dependent upon their specific tasks and limitations.

Kyritsis reaches a similar conclusion suggesting that the way ahead is to consider how these roles inter-act (and over-lap) by utilising the notion of, ‘active and passive institutional roles’.²³ The legislative function is more creative (as can be the functions of particular administrators depending upon the specific context) whereas the role of the court in judicial review claims is inherently parasitic on that of first-instance decision-maker. Different branches of state have different capacities for creativity in constructing substantive interpretations of justice in the circumstances at hand.

Despite the clarity proffered by Kavanagh and Kyritsis, I still think it may be confusing to speak of particular ‘orders’ of considerations because this implies a hierarchy in which institutional factors are somehow external to the content of particular judicial review claims. I think Trevor Allan makes the best assessment when he argues that:

Matters relevant to deference are *internal* to ordinary legal analysis, just as the application of the ordinary standards of review is itself dependent on close engagement with an almost infinite variety of circumstances, in which legal principle must accommodate specific demands of governance. Even such well-established grounds as error of law,

²³ Kyritsis, ‘Policy’ (n 19) 396.

improper purposes and irrelevant considerations express the *conclusions* of an analysis that depends, in each case, on a complex appraisal of interlocking matters of legal principle, factual assessment and policy choice: they articulate a distinction between review and appeal that varies in its nature and degree according to all the circumstances. It is the failure to grasp this point that underlies the misguided notion that the protection of constitutional rights is fundamentally different from judicial review on ordinary principles of legality.²⁴

In my view at least some of the existing grounds of review function in legal argument as conclusions to be drawn from a complex assessment of context (including legitimacy, expertise, and institutional design where relevant). However, they are also the starting point for that assessment, they must be pleaded as indicia on the N461 claim form, in which case they must have some abstract existence independent of context.

A conclusion of my *operative* interpretation was that whilst the social data indicates that judicial review in the Administrative Court performs a range of functions, any demarcation between administrative, constitutional, and human rights law, or between public law appeals and judicial review, is not clearly reproduced at the level of legal practice. I think the same is true at the level of legal principle, each case will turn on an assessment of the quality of reasons given by the initial decision-maker and the deference factors (legitimacy, expertise, and institutional design) are at work in every type of

²⁴ Allan, 'Judicial Deference and Judicial Review' (n 10) 116.

case, though they must be interpreted contextually. I still think there may be value in recognising a category of claims directly raising questions about the constitutional allocation of powers in the state, but this is not a distinction in the nature of legal reasoning or in the type of legal principles at stake, rather it is a function of how directly pertinent a detailed answer to the constitutional allocation of power question is to doing justice in the instant case.

8.5 Uncertainty

If we have to reject independent doctrines of deference and calibrated variable intensities of review in favour of a more holistic assessment of what justice requires then more information is needed about the nature of this assessment. In particular can it promise sufficient certainty and predictability?

Structured conceptual tests and specific categorisations (or demarcations) are said to be valuable in ensuring openness, clarity, and consistency in legal reasoning. However, since the various possible flaws in purported justifications of state power depend on interpretations of value they do not easily lend themselves to the clarity of an ‘all or nothing’ rule or conceptual demarcation.

For example, Stuart Lakin has argued that the key reformationist cases of *Simms*²⁵ (common law constitutional rights) and *Coughlan*²⁶ (substantive legitimate expectations), cannot be explained by a rule-based account of law as

²⁵ *R v Secretary of State for the Home Department, ex parte Simms and Another* [2000] 2 AC 115.

²⁶ (n 18).

the judgments display insufficient agreement over the content (and even the existence) of the kind of rules that would have been required to reach the substantive results.²⁷ Lakin argues that these cases are better understood as based on an interpretation of the value of coercion through law (legality) as integrity, encompassing the claimant's broader right to be treated with equal concern and respect by the state, which includes a right that public decisions be justified by reasoning of adequate quality.

In *Simms* the case turned on whether the specific right claimed, the right of a convicted murderer to have free association with the press, fit with the past legal record and was justified by prevailing interpretations of relevant values. Exactly what does liberty mean in the context of a convicted criminal alleging a miscarriage of justice, what restrictions are required to balance this liberty against the need to respect the feelings of victims and their families? How do we treat the prisoner, the victim and their families with equal concern, how does this fit with the broader common interest (common good) that might result from media coverage?

In *Coughlan* the question was whether the respondent's substantive promise of a home for life in all the circumstances of the case gave rise to a legal right to have that promise honoured. Again the existence of this right was determined by fit (an extensive examination of past precedent) and relevant justifications for recognising that right, including the consequences of doing so and the moral opprobrium of not doing so. The moral values in play were the

²⁷ Stuart Lakin, *The Moral Reading of the British Constitution* (UCL Ph.D Thesis 2009) 100-110.

dignity of the individual alongside the specialist expertise of the local authority in allocating scarce resources, and the rights of other individuals to the services that those resources would provide.

In the current climate cases turning on similar facts to *Coughlan* and *Simms* would perhaps be decided under the rubric of proportionality. Was the restriction on prisoners' communication a disproportionate interference with freedom of association? Would it be disproportionate to require the local authority to honour its promise of a home for life if doing so would greatly damage its service provision to the broader community (and other suitable arrangements could be made for the individual concerned)?

The value of proportionality may stem from its *potential* to avoid the difficulties of strict conceptual rules (and demarcated categories). Though its generality might also be seen as the mark of an under-developed legal principle that will (and should) in time, be explicated by specific sub-rules and finer-tuned demarcations of particular elements of the test.

Proportionality can take three forms; it is a specifically structured test (a formula), a general standard (akin to say, negligence in tort, or recklessness in criminal law), and it can also be interpreted as having a particular meaning as a matter of value (e.g., its essence has been linked to democracy,²⁸ the rule of law,²⁹ and distributive justice³⁰). The debate over proportionality is complicated

²⁸ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) 214-226

²⁹ *Ibid* 226-234.

³⁰ George Letsas, 'What is Proportionality?' (UCL Research Paper 2009) 9-16, available online: <http://www.ucl.ac.uk/laws/jurisprudence/docs/2013/George%20Letsas,%20What%20is%20Proportionality.pdf> (accessed 6 October 2014).

because one is never quite sure which sense of proportionality is being referred to.

I have argued variously throughout this thesis that lawyers have developed apparently value-free conceptual doctrines of administrative law for three reasons; so that the subject can be demarcated as law and not politics carried out by un-elected lawyers and judges, because the ordinary common law had historical resources from which to develop this new administrative law, and because these doctrines could be applied across all aspects of administration. Commentators argue that proportionality can (and should) be clearly structured and value-free, that its tenets have already been applied by the common law courts, and, most recently, that it can and ought to touch all areas of governance (and be available as a test across all topics of judicial review).³¹

However, even in those areas where proportionality is currently applied its clarity and simplicity have been disputed and broader concerns are raised that it invites either some form of utilitarian calculus or that the relevant elements to be balanced are incommensurable.³² It is even said to constitute an assault on rights, when a right is understood as a trump card that cannot be balanced away.³³ Interesting parallels can be drawn here with the concept of jurisdiction that was previously considered central to judicial review.

In the growth period of administrative law, circa 1960s onwards, certain tests were developed in order to demarcate the boundaries of an inferior body's

³¹ Most explicitly see Craig, 'Proportionality' (n 5).

³² Grégoire Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 Can J L & Juris 179.

³³ Stavros Tsakyrakis, 'Proportionality an Assault on Human Rights?' (2009) 7(3) ICON 468.

jurisdiction. The best known of these theories attempted to draw a distinction between errors of law relating to the *type* or *kind* of case a body was empowered to determine and those that related to the *situation* which the body was then to examine, its *truth* or *detail*, for example.³⁴

These analytical tests draw an analogy with mathematical functions of the form $F = (A,B,C \text{ etc.})$, i.e. F is true if the elements of A, B and C are all present. The classic example being that a tenancy (F) requires (A) rent, (B) a period of time and so on. The collateral or preliminary questions doctrine³⁵ purported to distinguish between certain elements within the bracket that were conditions precedent to the body's power to proceed to the merits of the case, and the merits of the case proper. So, (A) might relate to the *kind* of case and therefore be a jurisdictional issue, but (B) may be a matter of *truth* or *detail* and hence be within jurisdiction.

The doctrine of 'limited review',³⁶ on the other hand, decreed that all elements within the bracket were non-reviewable, on the basis that all the factors within the bracket were matters of *detail* with only (F) itself ever embodying a matter of *kind* or *type*.

The obvious difficulty with each approach is that (F) has no meaning independent of (A), (B) and so on; a function is merely a shorthand conclusion that the elements within the bracket exist. That is equally so whether those internal elements involve questions of fact or law. What really matters is not the

³⁴ Paul Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 475-480.

³⁵ Attributable largely to Diplock LJ (as he then was) in, *Anisminic Ltd v Foreign Compensation Commission* [1968] 2 QB 862, 887-906.

³⁶ DM Gordon, 'The Relation of Facts to Jurisdiction' (1929) 45 LQR 458.

formula but how the judge identifies the criteria to be put in it, and this is a matter of judgment, a matter of judicial rationality to which I shall return. The formula gives an illusion of certainty which more often than not doesn't exist.

Now let us consider the most popular formulaic representation of proportionality, Alexy's law of balancing. This is to be performed after the first three stages of the proportionality test; identification of legitimate aim, suitable connection of the measure to the aim, and necessity have been addressed. Under Alexy's account, constitutional rights are principles to be 'optimised'; 'as optimisation requirements, principles are norms requiring that something be realised to the greatest extent possible, given the legal and factual possibilities'.³⁷

$$W_i \cdot I_i \cdot R_{ie} \cdot R_{in}$$

$$W_{i,j} = \frac{\quad}{\quad}$$

$$W_j \cdot I_j \cdot R_{je} \cdot R_{jn}$$

W_i and W_j stand for the abstract weights of the two relevant principles P_i and P_j . Abstract weight is assigned independently of the circumstances of application. I_i and I_j are the respective interferences with each principle. R_{ie} and R_{je} on the one hand and R_{in} and R_{jn} on the other refer to the empirical and normative premises concerning the extent to which the relevant measure

³⁷ Robert Alexy, *A Theory of Constitutional Rights*, Julian Rivers (trns) (OUP 2002) 47.

improves the realisation of one principle whilst respectively damaging the realisation of another.

As with the jurisdiction formulae, each element must first be identified and given some form of status or weight and the reasons for ascribing a certain status or weight are key; ‘This “disproportionality rule”, creates a relation between judgments about degrees of intensity and the *reasons* for the judgment about proportionality. Judgments about degrees of intensity are the *reasons* for the judgment about proportionality’.³⁸

The essential matter is how we make judgments about degrees of intensity, the same is true with jurisdiction, the key concern is how we make judgments about which matters are jurisdictional and which are not. The formulae have their uses, and one of these may be to remind us of the centrality of such judgments, but the formulae should not become a proxy for judgment. The formulae are supposed to work regardless of what values we put into them. The much more difficult task is that the relevant values are not easily capable of being manipulated into numerical form. In the broader context the question is not which intensity of review, but *why that intensity?*

8.6 The ‘organic’ approach, a *target* interpretation of judicial rationality

³⁸ Robert Alexy, ‘Constitutional Rights, Balancing, and Rationality’ (2003) 16(2) *Ratio Juris* 131, 139.

I think a particular organic (ground-up) approach to rationality may help give greater clarity to the *target* interpretation especially in the context of how judges can arrive at an individualised interpretation of justice.

A positivist approach to rationality prioritises the social facts of legal rules. Legal rationality is about fashioning a comprehensive set of rules to be interpreted largely in accordance with their ordinary meaning. This approach of prioritising social rules over principle does not fit well with the common law method of reasoning by analogy with precedents through the prism of moral values. Common law rationality requires judges to consider not only the wording of relevant statutes, but also to read in relevant moral values. This is a different account of law and legal rationality under which moral values, and the individual rights which flow from interpreting these values, also supply basic elements of the legal order

However, moral reasoning can be equally rule-based (and formal) when the intersections between certain rights and principles are fashioned to form a universal and systematised pattern of entitlement. On this account legal rules (textual interpretation of statute especially) have been replaced by moral rules that might be equally inflexible, equally apt to prioritise the general and global over the particular and local. The argument goes that the judge as a moral philosopher will not be sufficiently sensitive to the administrative decision-making context. He will try to impose some system of globally applicable moral rules at the expense of the particular, and the local. He will ultimately prioritise principle over practice.

A better approach to legal rationality is one that appreciates the constructive relationship between facts and values, rather than purporting to base the very nature of law and legal rationality on a strict demarcation between the two.

Cliff Hooker has developed a constructivist account of rationality which he describes as, organic naturalist inter-activist-constructivist!³⁹ I sketch this account noting some of the ways in which it can be applied to judicial review, though I appreciate the following is a broad-brush picture that requires development.

Hooker notes that human problems (including moral and legal problems) are, ‘multi-normed, multi-constrained, under-defined and context sensitive’.⁴⁰ This captures many judicial review claims where there are the norms of different legal regimes, statutory and common law, topic specific, national, European, and international. The Administrative Court is constrained by judicial expertise, the forms and limits of adjudication, and institutional characteristics. Problems may be under-defined, not least due to the difficulty of estimating possible consequences and the context sensitivity of claims has now been widely recognised. In light of these factors reasoning with a formal account of rules or rights alone is not likely to solve the practical problem before the judge.

³⁹ Cliff Hooker, ‘Rationality as Effective Organisation of Interaction and its Naturalist Framework’ (2010) *Axiomathes* 99. This work has been applied in relation to some legal contexts by Barry Hoffmaster, ‘The Rationality of Judging and Judges’ McMaster University, Nature of Law Conference (May 2011) paper available online: <http://works.bepress.com/barryhoffmaster/40/>> (accessed 6 October 2014).

⁴⁰ Hooker, *ibid* 111.

Hooker's response is naturalistic, but not of the Quinean kind encountered in Chapter Two, he rejects a fully empirical approach, arguing that this would render philosophy redundant and equate all truths to scientifically verifiable facts. Instead he draws on an oscillating or homeostatic balancing process that can be observed in nature whereby organic forms (including human beings) function at their best through a process of constant re-adjustment. There is a natural unity to human forms, but it is a unity that rejects divisions imposed by human fiat. *A priori* metaphysical distinctions such as between mind and nature, normative and descriptive, and in the current context fact and law, jurisdictional and non-jurisdictional, proportionate and dis-proportionate, can be rejected.

Human beings can still strive for ideals, but the standards that guide our striving must be accessible to us, they must be learnable and improvable. The process by which humans come to reach these ideals is more important than formalism's location of reason in the character of the end product, namely certain truth. The apparently absolute nature of formal rationality (both legal and moral) suppresses the importance of human judgment.

The inter-activist, dynamic element of Hooker's naturalism takes the functional biological condition of self-regulation, taking inputs from the environment and divesting outputs, as a model for reasoning in morality and law in the real world of social practice. The roots of reason lie in a structured response process that incorporates feedback to increase effectiveness.

On this account fashioning an individualised conception of justice is a matter of process and judgment, rather than the formal application of legal or moral rules.

Judgment is central and it can be systematically improved through learning and training, and complemented by the presence of both expert and lay decision-makers.⁴¹ This is particularly true in the case of judicial review which has sometimes been described as a ‘topsy turvy’ process of ‘institutionalised second guessing’.⁴²

The process of adjudication in judicial review is a partnership between the initial decision-maker, the complainant and the judge that may be better captured by a ‘non-formal’ approach to reasoning. This interaction is not well captured by either *ultra vires* or the reformationist or righting models as both have largely been interpreted as giving a ‘limiting’ or ‘controlling’ role to the courts, as opposed to a role based on inter-action, partnership and shared learning.⁴³

Hooker draws on four particular processes of informal reason. These are observation, constrained but creative construction, systematic critical appraisal, and the use of both formal and informal reasoning tools. These processes interact and overlap as resources to improve our judgments.

Observation is concerned with obtaining reliable information about empirical features of the world, precisely what I hope to have achieved in the

⁴¹ eg, lay members in the Upper Tribunal or third party interveners in judicial review applications.

⁴² Timothy Endicott, ‘Questions of Law’ (1998) 114 LQR 292, 297.

⁴³ See eg, Harlow and Rawlings, ‘red-light theory’, *Law and Administration* (3rd edn, CUP 2009) 22-25, and Rivers’ account of the ‘state-limiting’ conception of proportionality, Julian Rivers, ‘Proportionality and Variable Intensity of Review’ (2006) 65(1) CLJ 174, 190.

earlier Chapters of this thesis. Socially organised observation, such as that carried out by judges in the context of deciding cases can be an improvement upon individual private observations because processes can be implemented that are inherently unavailable to private individuals. Such observation can also be more discriminating than private observation because it may involve multiple individuals, such as barristers and expert witnesses presenting their own observations before the judge, as well as certain modalities and resources. However, we must not fall back into the empiricist naturalist trap, observations cannot deliver simple direct truths, they must themselves be subject to critical assessment (judgments) concerning how the data are to be interpreted and understood in context. The question is not whether the social facts before the court are universally correct, but whether they are sufficient to enable the judge to make an appropriately reliable assessment.

It has been suggested that judicial balancing could be improved by the availability of more detailed and reliable empirical information⁴⁴ and moves to allow more judicial flexibility in demanding disclosure of documents in judicial review applications can also be seen as part of this desire to improve judicial rationality by the provision of more extensive supporting data.

Formal and non-formal reasoning tools are also to be applied. This includes logic, especially under my mistake category, but it can also include jurisdiction and proportionality as formulae so far as they remind us that values must be brought into relation with each other. Other non-formal methods of

⁴⁴ Frank Coffin, 'Judicial Balancing: The Protean Scales of Justice' (1988) 63 NYU L Rev 16, 35-37.

reason are equally important, such as casual reasoning, reasoning by metaphor, analogy, casuistry and narrative. These methods were often applied in my sample of Administrative Court judgments.

Creative construction can be understood in a similar vein to Dworkin's constructive interpretation, utilising paradigms (paradigms that are not necessarily provided by logic or formal reason, but which might arise by observation alone, or by analogy and so on), fit and moral justification. Creative construction can also involve the creation of new concepts, new conceptualisations of old problems, new analyses of existing assumptions, including complete departures from the historical record (which Dworkin would also allow if the historical record could bear no moral justification).

Hooker argues that, 'socially organised creative construction provides a way of transcending individual points of view',⁴⁵ this is essentially the process by which the common law develops as a site of community-justice. This element may also align with recent suggestions that a distinguishing feature between particular decision-makers in the process of ensuring legitimate governance is their respective capacity for creativity.⁴⁶

The fourth element, systematic critical assessment, requires the checking and re-checking of the accuracy of observations and of the results of the other reasoning processes. We must carry out tests, though in judicial decision-making these will often be hypothetical impact assessments, examining our assumptions in as wide a range of situations as possible. A judge

⁴⁵ Hooker, 'Rationality as Effective Organisation' (n 39) 151.

⁴⁶ See eg, Kyritsis, 'Policies' (n 19) 396 and King, 'Institutional Approaches' (n 12) 427-440.

may have an initial moral inclination or hunch as to how the case before him should be decided but he must systematically scrutinise his hunch by critically assessing arguments for and against it. Kennedy describes this as the judge's, 'how I want to come out' (HIWTCO) conception, arguing that this initial reaction (based most likely on experience and moral interpretation) is no bad thing so long as the judge recognises that he must subject it to strict scrutiny.⁴⁷ A key element of reaching an individualised conception of justice in the case at hand (and in more traditional balancing processes) is for the judge to make sure he properly explores each parties' conception of justice rather than relying on some pre-conceived notions that certain types of administrative decision-maker or claimant will always address issues in a particular way.

The institutional environment will restrain observation, creative construction, and systematic critical assessment. Institutional constraint goes a long way to explaining why judicial decisions are not arbitrary moral pronouncements, even though they are ultimately interpretations of moral value.

This organic interpretation of rationality might be well captured by Sir John Laws' shorthand, four building blocks of principle, that public law claims are ultimately based on, logic, precedent, consequences, and ideals.⁴⁸

8.7 Balance

⁴⁷ Duncan Kennedy, 'Toward a Critical Phenomenology of Judging' in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law* (Carswell 1987) 141-167.

⁴⁸ Sir John Laws, 'Judicial Review and the Meaning of Law' in Christopher Forsyth (eds), *Judicial Review and the Constitution* (Hart 2000) 180-183.

The *target* interpretation of judicial review as individualised justice has parallels with the notion of balance that is viewed as central to constitutional and human rights adjudication. In relation to the US experience Frank Coffin notes:

Confronted with a wide variety of claims by individuals against government, we did what came naturally. We saw that *a priori* general principles could resolve few concrete cases, and instead were drawn to focus on the particular interests at stake. We balanced.⁴⁹

The notion of balance might be seen as a self-conscious search for middle-ground between legal positivism with its emphasis on social facts and idealism with its emphasis on moral values, and I believe it is within this shifting middle-ground that we can find resources to solve practical problems thrown up by adjudication.

I cannot do justice here to all the criticisms of balancing and sophisticated defences;⁵⁰ unease with balancing and proportionality is well captured in this passage from Grégoire Webber:

⁴⁹ Coffin, 'Protean Scales' (n 44) 21.

⁵⁰ These include at least; that balancing may provide insufficient reference to moral argument, that it cannot represent any inviolable core of human rights, that it is a calculation but a flawed one due to the incommensurability of values, and that it brings the terminology of adequacy and appropriateness to an area where we really ought to be talking in terms of rightness and correctness.

The method of practical reasonableness promoted by proportionality and balancing brings with it a vocabulary all its own, including “interest”, “value”, “cost,” “benefit,” “weight,” “sufficient,” and “adequate.” The concepts of “good” (and “bad”), “right” (and “wrong”), “correct” (and “incorrect”) are absent ... Though one may speak of a correct (good or right) result when applying the principle of proportionality, this judgment evaluates correctness (or goodness or rightness) in a technical sense: has the principle of proportionality been correctly applied? The structure of balancing and proportionality analysis itself does not struggle (or even purport to struggle) with the moral correctness, goodness, or rightness of a claim.⁵¹

I have the same concern with the culture of justification; the terminology ‘capable of justification’ does not tell us anything much about right or wrong, just or unjust.

Proportionality originated in Prussian administrative law, refuting the notion that its infiltration into the law of England and Wales is necessarily part of the constitutionalisation of administrative law and judicial review generally.⁵² Historically it had been used to determine whether police powers had been used excessively and whether penalties fit the crime.⁵³ On this interpretation proportionality need not be parasitic on any particular right,

⁵¹ Webber, ‘Cult of Constitutional Rights’ (n 32) 180.

⁵² Moshe Cohen-Eliya and Iddo Porat, ‘American Balancing and German Proportionality: The Historical Origins’ (2010) 8(2) ICON 263, 271-273.

⁵³ *ibid* 284-287.

rather the question is whether the administrative decision imposed some ‘excessive burden’ on the individual.⁵⁴

Indeed Moshe Cohen-Eliya and Iddo Porat consider the growing influence of proportionality to be part of what they term the, ‘administrativisation of constitutional law’,⁵⁵ in contradistinction to the popular view that the growth of proportionality reasoning is *vice versa* part of some constitutionalisation, or righting, of administrative law and judicial review especially.

A specific concern with the popular four-stage proportionality test is that it brings measures more at home in economic analysis into legal and moral reasoning with the potential to transform debates over values and rights into assessments of costs and benefits. The argument then runs that the relevant rights and interests are either incommensurable, or that they can be rendered commensurable only by the assignment of value based on improvements they may make to welfare or utility, or their contribution to the avoidance of harm.

This same argument of incommensurability is raised especially in relation to the fourth ‘fair-balance’ stage, otherwise known as proportionality *stricto-sensu*; this stage is closer to the more holistic form of US balancing. Whilst ‘fair-balance’ in the abstract may be reducible to Alexy’s formulae above, moral reasoning is ultimately required to make assessments about degrees of interference with rights and degrees of realisation of aims. This is

⁵⁴ Paul Craig, *Administrative Law* (n 34) 657.

⁵⁵ Moshe Cohen-Eliya and Iddo Porat, ‘Proportionality and the Culture of Justification’ (2010) 59 *American Journal of Comparative Law* 463, 487.

especially true when multiple principles are at stake, which is the case more often than not.⁵⁶

It is more simplistic, clearer, less time-consuming, and I think more in line with the purposes of judicial review, to begin with some indicia based on precedent and then cut straight to the chase of moral reasoning.

8.8 Individualised justice

The moral reasoning I support need not be based on aspirational, Herculean attempts to access global, generalisable, moral rules or principles. Ideals are important but we also need more realistic standards. Ronald Dworkin acknowledges that Hercules is not real, better instead I think to see him as constituting, ‘a relationship between a court and a public political culture’.⁵⁷

In my view there is a sense in which an individualised conception of justice is the ‘virtuous middle between extremes’. But it is not the middle in some mathematical or weighted sense; I think of it more in terms of Aristotle’s account of moral reasoning as situation sense or practical wisdom:

it is hard to be good, because in each case it is hard to find the middle point; for instance, not everyone can find the centre of a circle, but only the person with knowledge. So too anyone can get angry, or give and

⁵⁶ Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012) 140; ‘We sometimes say that we need to ‘balance’ all the morally relevant considerations, and what we mean by that is that we have to develop a moral argument...Balancing then is a synonym for practical reasoning’.

⁵⁷ Simone Chambers, ‘It is not in Heaven! Adjudicating Hard Cases’ in Omid Payrow Shabani (ed), *Multiculturalism and Law: A Critical Debate* (University of Wales Press 2007) 115, 125.

spend money—these are easy; but doing them in relation to the right person, in the right amount, at the right time, with the right aim in view, and in the right way—that is not something anyone can do, nor is it easy. This is why excellence in these things is rare, praiseworthy and noble.⁵⁸

In the more common parlance of judicial review, Aristotle is talking about identifying relevant and irrelevant considerations.

George Letsas has developed an interpretation of proportionality that links to Dworkin's equal concern and respect account of justice, concluding that proportionality really means sifting relevant and irrelevant considerations.⁵⁹

Letsas concludes that it is better to understand proportionality as having moral value, as opposed to merely being a 'heuristic device' (such as the formula above) for bringing rights and interests into relation with each other. In an earlier version of his argument he specifically refers to this as the value of 'distributive justice'.⁶⁰

This value is triggered when one has something to distribute or apportion to others, and is under a specific responsibility to those others to apportion it justly. For example, there are only so many waking hours in a day, it is in my interests to work on completing my thesis, but I have a responsibility to my two year old daughter to spend time with her, the allocation of my time in

⁵⁸ Aristotle, *Nicomachean Ethics*, Bk II Ch 9, *The Complete Works of Aristotle* (rev trns vol 2. Princeton University Press 1984).

⁵⁹ George Letsas, 'Rescuing Proportionality' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP forthcoming 2015).

⁶⁰ Letsas, 'What is Proportionality?' (n 30).

a sense then tracks this value of distributive justice. The age of my child might be a relevant factor in determining what is a just amount of time, on the whole younger children require more of their parents time in order to develop a sense of security, they also have basic physical needs. On the other hand a child approaching their teens may not require so much of their parents time, except perhaps during difficult periods such as school examinations and so on. The age of my child, and perhaps any difficulties they are facing in their life at present are relevant factors in assessing how much time I must justly devote to them. On the other hand the fact that I have a daughter rather than a son is an irrelevant consideration in this context.

Letsas argues that in ECHR claims judges are not really balancing in the sense of weighing costs and benefits, or degrees of interference and realisation and so on, rather they are sifting relevant from irrelevant considerations in order to determine exactly what it is one has a right to in any given context. On this account, ‘the judicial test of proportionality is an inquiry into whether the government offended the status of the applicant as an equal member of his political community whose dignity matters’.⁶¹ In short did the state act justly on the basis of Dworkin’s equal concern and respect account of *distributive* justice?

It can be seen from the values discussed in Chapter One that the state (legislative, executive, and administrative), or indeed anyone who exercises public-power, one is under a duty to act justly.

⁶¹ Letsas, ‘Rescuing Proportionality’ (n 59) 18.

Letsas draws out two forms of human rights claim in which equal concern and respect plays a key role. The first category is where the decision-maker has deployed an overly rigid or indiscriminate measure that prevents it from taking into account relevant considerations. The second is where the decision-maker has taken into account a consideration that would normally be considered irrelevant in light of the requirement to treat individuals with equal concern and respect.⁶²

These two factors are characteristic of judicial reasoning under my category of ‘discretionary impropriety’ or relevant/irrelevant considerations, in both human rights and ordinary administrative claims.

As much as we need to be wary of the judicial role in relation to matters of policy there is inevitably a sense in which most judicial review claims involve a contestation between individual and collective justice in light of scarce resources, ultimately a question of distributive justice.

In the case of judicial review (including in claims raising human rights arguments), I think the abstract *concept* of justice is that individuals should be treated with equal concern and respect; the judgment reached in the specific case is a *conception* that solves a particular problem.

It may be better not to see this as a balancing exercise, or an adversarial contest between individual rights and the state’s conception of the public good, but rather as reaching some form of compromise between different conceptions of the meaning of legitimate governance. A compromise on schemes of justice

⁶² id.

rather than a compromised scheme of justice, as Dworkin has put it.⁶³ This compromise will be based on the parties' differing accounts of which considerations are relevant and irrelevant. It is only once the relevant considerations are sifted that we should focus on ascribing degrees of moral value to particular considerations, and this is not the same as assigning mathematical values of utility or harm.

This process requires that the authenticity of individual conceptions of justice be recognised,⁶⁴ precisely the kind of individualised justice based on the assessing the quality of reasoning that is characteristic of all species of judicial review claim. This process also accommodates both ground-up and top-down constitutionalism, and is not based on conceptual demarcations between different types of law or distinct categories of intensity that are not evident in social practice.

In this sense of accommodating conflicting interpretations of values the musical metaphor of counterpoint may be more apt than balancing.⁶⁵ This is where two very distinctive melodies that are seemingly incompatible sound harmonious when played together. It may be unlikely in the rough and tumble of litigation that a great deal of harmony can be achieved, but certainly I think an Aristotelian or Aretaic method, looking to what, if anything, unites the

⁶³ Ronald Dworkin, *Law's Empire* (new edn, Hart 1998) 179.

⁶⁴ Jerry Mashaw, 'Small Things Like Reasons' (2001) 70 *Fordham Law Review* 17. Though not to the extent of treating them as matters of fact as advocated by David Beatty, *The Ultimate Rule of Law* (OUP 2005) 166.

⁶⁵ Coffin, 'Protean Scales' (n 44) 20.

parties rather than divides them, could be of assistance here.⁶⁶ Given that such a high proportion of AJRs settle (often in favour of the claimant) prior to any judicial involvement, one can question whether in seeking resolution of those claims that do proceed further we should be focusing more on the role of the judge.⁶⁷ This may even go towards solving practical problems in the administration of justice caused by legal aid reforms. Perhaps if more is spent on the judiciary and Administrative Court lawyers,⁶⁸ and we move further to an inquisitorial approach (as is the case in some continental systems) it would no longer be open to a judge to complain that the unrepresented claimant has alleged some general sense of unfairness unlinked to specific precedents. We could reply *iura novit curia*, the court knows the law.

⁶⁶ John Valauri, 'Dialectical Jurisprudence: Aristotle and the Concept of Law (2010) available online: < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1659924> (accessed 14 October 2014).

⁶⁷ Lawrence Solum, 'The Aretaic Turn in Constitutional Theory' U San Diego Public Law Research Paper (2004) available online: < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=512882>

⁶⁸ Who are increasingly playing case-management roles.

Chapter Nine: Concluding Remarks

In this thesis I have argued that that some existing interpretations of judicial review display a lack of appreciation of the social facts of litigation and legal practice, whilst others are based on misconceptions about these facts. In particular I have challenged a group of theories under which it is argued that administrative law and judicial review have undergone a reformation, righting, or constitutionalisation.

I have developed a methodology of constructive interpretation, combining the traditional tools of legal theory and those of empirical legal research. Under this approach we can contrive or construct categories depending on our interests and ingenuity, and what we find useful in a particular context. It is within these constructed categories that judgments as to what is objectively true, fruitful, or best, can be made.

Grounded in a better appreciation of the social facts, I conclude that judicial review is a pluralistic activity performing a range of functions; from resolving individual grievances, to the normative exposition of broader ranging and complex legal principles, to public interest litigation, and protecting fundamental rights.

In favour of the reformationist or constitutionalisation conception, I have exposed that 43% of the Administrative Court's AJR caseload may concern broader matters of principle or practice (including constitutional issues), important public interests, or otherwise compelling cases (such as those raising serious miscarriages of justice). However, declining claimant success

rates at the permission stage may imply that applicants are rarely successful in accessing this more constitutionally flavoured jurisdiction. This decline may also be evidence of ‘function-creep’; where the growing number of restrictions on judicial review brings the danger that limitations on accessing justice (or on the breadth of applicable legal tests) legitimately present in one species of claim, leak into judicial handling of other applications where restrictions can be damaging to the efficacy of the procedure, and to the fundamental values it ought to serve.

Whilst there has been some growth in more constitutionally flavoured claims, at the very least some 50% of AJRs across the Administrative Court relate to individual grievances confined to their own facts, where no other route to legal redress is available or appropriate.

Despite approximately one-third of public law claims being issued in local Administrative Court Centres, the broader rights and interests of citizens outside London and the South East of England in particular continue to be under-represented in judicial review litigation. English Regional and Welsh claimants are far more likely to issue without legal representation, thus making it even harder for them to navigate the permission and substantive stages.

In Chapters Four and Five, I proposed an interpretation of judicial review in the Administrative Court that reconciles apparent inconsistencies between two-perceptible tiers of AJR litigation; high-level or constitutionalised London litigation, and street-level own fact local claims.

On my interpretation of the values underpinning judicial review, supported by an unorthodox reading of *Cart*, I argued that tensions between

competing values evident in judicial review claims could be best addressed by recognising a *right to just administration* (a right to individualised justice) the requirements of which need to be worked out in particular circumstances. This is usually a matter of assessing competing interpretations of the meaning of justice in context. The conducting of such a process tends to be most obvious in high profile claims raising matters of public interest or the inter-institutional allocation of powers; that is in top-down constitutionalist London-centric claims. However, I argued that this assessment of competing conceptions of justice is also characteristic of street-level ground-up constitutionalist local applications.

Under an individualised justice conception of judicial review, the procedure still provides a forum for debates about constitutional values and rights, and the appropriate allocation of powers between different branches of state, but its over-arching concern is to achieve justice for individuals, often in relatively non-complex cases. Both in highly contested and technical claims with broader implications, and in cases turning largely on their own facts, justice is done by way of ordinary common law reasoning and specifically by assessing whether the initial decision-maker has taken relevant considerations (including moral considerations) into account, and excluded irrelevant considerations.

Such can be seen from my analysis of over 200 substantive Administrative Court AJR judgments. Based on an interpretation of these cases, I constructed a ground-up taxonomy of reasons for deciding, or more ambitiously perhaps a new categorisation of the grounds of judicial review.

These categories were; mistake, procedural impropriety, ordinary common law statutory interpretation, discretionary impropriety or relevant/irrelevant considerations, breach of an ECHR protected right or equality duty, and constitutional allocation of powers, constitutional rights, or other complex constitution principles.

In his biography of Ronald Dworkin, Stephen Guest refers to the Anglo-American academic, legal, and political culture as based on, ‘scepticism, deconstruction, and relativism’;¹ these are forces I have battled throughout my research. The account presented in this thesis is based on an alternative culture; it is premised on the notion that there may be universal right answers to questions of value, but that particular practical solutions to moral problems (such as how to provide an individualised interpretation of justice) will be dependent on the constructive interaction of moral knowledge and sensory experience. I have argued that the alternative scholarly tendency to seek descriptive conceptual solutions to what are in effect interpretive questions of value has led to over-complication and correspondingly may weaken access to justice for individuals.

In Chapter Eight I presented the bare bones of an account of informal constructivist rationality that I think can assist in determining what individualised justice requires in any particular case. Throughout this thesis I have stressed alignment with moves towards a renaissance of classical natural law scholarship with its concern that individual rights should be informed by broader notions of the good as the right (just) thing to do. On this account

¹ Stephen Guest, *Ronald Dworkin* (3rd edn, Stanford 2012) 252.

goods and rights do not conflict and balancing should be understood more in the manner of Aristotle's situation sense, or as a process whose success does not depend upon formalism's location of reason in the character of the end product, namely absolute truth.

My moves towards a simplified categorisation of the grounds of review, a constructivist approach to judicial reasoning (based in part on institutional creativity), and greater investigation of relevant social facts, could form the prologue to a post culture of justification account of judicial review.

The impacts of on-going reforms to the judicial review procedure present a challenge to judicial review as individualised justice and this thesis forms part of a body of evidence suggesting that some recent reforms are potentially damaging to the rule of law and individual (and community) access to justice. Whilst the 'resistance'² will continue to campaign against and criticise the more damaging aspects of procedural and institutional reform, the judiciary have the power to send signals about the value of judicial review through their creative interpretation of substantive law; recognising a constitutional *right to just administration* (individualised administrative justice) may be one way forward.

The notion that constitutionalised or righted judicial review is a European interloper has been challenged, and my case law analysis suggests that orthodox common law principles, of purpose and relevancy of considerations, can provide an account of review that is just as intensive as that demanded by proportionality (or by any variant of *Wednesbury*). If this is where

² Mike Fordham's terminology, used in a recent Law Society meeting.

the future lies then a key role for the Administrative Court will be to ensure that the resurrection (or renaissance) of these principles proceeds in a manner that displays overarching consistency and ensures that individuals are treated with equal humanity.

Law is not specifically about only rules, rights, or conceptual boundaries, as Dworkin argues, 'Law's Empire is defined by attitude not territory or power or process'.³ The best light interpretation of the reformation of administrative law and judicial review may truly lie in the rise of Protestantism, in this case, 'a protestant attitude that makes each citizen responsible for imagining what his society's public commitments to principle are'.⁴ To that I would append, an attitude that makes each public decision-maker responsible, to the Administrative Court, for ensuring that society's public commitments to principle, including the principle that individuals must be treated with equal concern and respect, are adhered to in the process of administrative action. This is how justification ought to be interpreted, and I think it is largely how it has been interpreted within the Administrative Court.

³ Ronald Dworkin, *Law's Empire* (new edn, Hart 1998) 413.

⁴ *id.*

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Localism Act 2011

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