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Article (Accepted Version)

Arvind, T T and Stirton, L (2017) The curious origins of judicial review. *Law Quarterly Review*, 133. pp. 91-117. ISSN 0023-933X

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The Curious Origins of Judicial Review*

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Introduction: “The greatest achievement”?

This article tells the story of the birth of modern judicial review. In the conventional account, the judge-led development of judicial review is one of the great successes of the twentieth century common law: “the greatest achievement of my judicial lifetime”, as Lord Diplock famously put it.¹ On this interpretation, from the mid-twentieth century onwards, the judiciary abandoned its earlier quiescence and, building on doctrines, approaches and remedies that had been used to control inferior tribunals since Victorian times, fashioned a new body of law capable of subordinating the administrative state to the rule of law.² The modern law is thus seen as representing the same common law commitment to the rule of law seen in early cases such as *Entick v Carrington*³ and *Cooper v Wandsworth Board of Works*⁴, revived in the monumental *Wednesbury*⁵ decision and extended by Lord Reid in the ‘Quartet’,⁶ and finally systematised by Lord Diplock, in *GCHQ*.⁷

*This paper is part of a broader project funded by the Nuffield Foundation to study the impact of the Human Rights Act. We are grateful to the Foundation for their support. We would also like to thank Carol Harlow, Richard Kirkham, Daithí Mac Síthig, and participants at the Public Law Conference 2014 in Cambridge for their comments on earlier drafts of the paper. Lindsay Stirton thanks Edinburgh Law School, where he was a MacCormick fellow while completing this article. All file references in this article refer to archival materials held at the National Archives.

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¹ *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Business Ltd* [1982] AC 617, 641.

² See for example W Wade and C Forsyth, *Administrative Law* (11th, Oxford University Press 2014) 10–13; this view is challenged to an extent by S Sedley, ‘The Sound of Silence’ (1994) 110(2) *Law Quarterly Review* 270.

³ *Entick v Carrington* (1775) 19 Howell’s State Trials 1029

⁴ *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, 143 ER 414.

⁵ *Associated Provincial Picture Houses Ltd v Wednesbury Cororation* (1948) 1 KB 223.

⁶ The ‘Quartet’ is sometimes used to denote four monumental House of Lords administrative law decisions of the 1960s, *Ridge v Baldwin* [1964] AC 40 (HL); *Conway v Rimmer* [1968] AC 910 (HL); *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL); and *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 AC 147 (HL).

⁷ *Council of Civil Service Unions v Mnister for the Civil Service* [1985] 1 AC 374 (HL).

This article challenges this story of continuous unbroken development. On the face of it, the cases from *Ridge* to *GCHQ* did indeed draw on an older line of case law. Yet, as we demonstrate, the 1960s and 1970s were a transformative period in administrative law. Underlying the seeming doctrinal continuity and consolidation, lay a deeper conceptual and theoretical discontinuity—a fundamental shift of approach in relation to the questions of how, why and to what end the courts should provide redress against government bodies.

Our purpose in this article is to call attention to the fact of this shift, the process by which it occurred, and the profoundly limiting implications it had for the incipient discipline of administrative law. As we show in Part 1 of this article, for much of the twentieth century, jurists saw the tasks of administrative law as one of mediating conflicts between public and private interests. The growth of the administrative state, it was thought, required not just the development of new remedies but also the creation of a common law of public bodies, which would define the proper extent of public powers and provide guidance that would ultimately improve the practice of administrators whose work necessarily brought them up against private interests. In stark contrast with modern administrative law, it was taken virtually for granted that this would necessarily involve the development of *substantive* principles which spoke directly to the balance between private interests and the public interest.

How, then, did we end up with a system of judicial review that abandoned both these planks of mid 20th century juristic thought? In Parts 2 and 3, we use a detailed examination of the key texts of that period, including previously unexamined records in the National Archives, to show that this shift was born out of a conscious rejection of this ‘mediating’ conception of administrative law, and a subsequent reorienting of the law around the entirely ‘public’ task of ensuring that public bodies discharge their statutory and common law duties. This shift responded to concerns about the judicialisation of administration raised by sections of the government, and shared by one senior judge, who were alarmed at the possible intrusion of the judiciary into questions of public policy. Behind the appearance of continuity with the older law, therefore, lay a form of review that was very different from what anyone in the 1960s might have envisaged, both in terms of the kinds of decisions that would be reviewed and the grounds on which that review would be based. As we demonstrate in Part 4, key aspects of modern judicial review doctrine reflect the concerns that lay behind this shift.

Our purpose in telling this story is not simply historical. In the final, concluding part of this paper, we argue that whilst the motivation behind the shift away from the ‘mediating’ conception to the ‘public’ conception was laudable, the resulting system of judicial review must be taken to have failed to achieve its objectives. These failures which acquire particular relevance in the context of governmental attempts around the common law world to

restrict judicial review ostensibly “to ensure that the right balance is struck between reducing the burdens on public services, and protecting access to justice and the rule of law.”⁸ If, as we argue, the source of the problems lies in a system of judicial review designed to eschew questions of “merit”, then the focus of recent and ongoing reforms on restricting the availability of judicial review are unlikely to solve the problem—and may even make it worse, by forcing complainants to plead alternative, less suitable grounds or seeking alternative forms of redress. Truly addressing the problem will require us to revisit the issues which were at the forefront of debate in the first half of this century, but which have never received a satisfactory resolution.

1 A forgotten orthodoxy

1.1 The demise of private law constitutionalism

By the late 1950s, there was a broadly held sentiment that the United Kingdom lacked an effective system to supervise the administrative state. Persons with legitimate grievances against the state were unable to obtain redress for no reason other than that the law gave them neither a forum before which nor a language of actions in which they could articulate their grievances. This sentiment was not new. It had been on the rise for much of the 20th century, growing as the administrative state grew and took on more functions. What was new, however, was a sense that existing common law doctrine did not and could not provide the answer, and that a new approach was needed.⁹

For much of the first half of the twentieth century, common law thinking about the problem had been dominated by ‘private law constitutionalism.’ It was thought that the law of tort, in particular, gave the courts all the tools they might need to keep administrative bodies in check. Yet it soon became apparent that tort law was not actually restraining executive overreach, not least because procedural and remedial hurdles meant that suits could in practice only succeed if the department concerned co-operated.¹⁰ Nor did abolishing the doctrine of Crown immunity help. When it came in 1947, the Crown Proceedings Act was hailed as “the greatest legal reform

⁸ Ministry of Justice, *Judicial Review: Proposals for Reform* (Cm 8515, 2012) para 6. The responses to the consultation were implemented by the Civil Procedure (Amendment No 4) Rules 2013, SI 2013/1412 (L. 14) and Criminal Justice and Courts Act 2015, s 84-92.

⁹ E. C. S. Wade, for example, expressed the sentiment with great clarity, in referring to “the inadequacy of the common law and the methods of its judges to control what has been called by one recent writer the law of statutory discretions.” A V Dicey, ‘An Introduction to the Study of the Law of the Constitution’ in E C S Wade (ed) (Macmillan and Co, Ltd 1939) xviii.

¹⁰ For a full discussion, see TT Arvind, ‘Restraining the State through Tort?’ in TT Arvind and J Steele (eds), *Tort Law and the Legislature* (Hart Publications 2012).

of the past hundred years.”¹¹ Lord Denning, speaking extra-judicially, said that the Crown Proceedings Act had “placed the Government Departments fairly and squarely under the law.”¹² He saw particular potential in equity which, through doctrine of estoppel,¹³ and the remedies of the injunction and declaration,¹⁴ would pronounce on rights, restrain the executive from interfering with them, and hold the government to its commitments.

Ultimately, however, private law proved to lack the conceptual tools it would have required to become the central plank of legal accountability of government. The Crichton Down affair, for example, was almost universally seen at the time as an example of executive overreach, but neither the tort of trespass nor any other private law action would have given a remedy, because in this case—as in many others—the actions were done in purported exercise of a statutory power.¹⁵ Nor was this episode out of the ordinary. Post-war governments had embarked on several ambitious schemes requiring the acquisition of privately-held property—improving the quality of the housing stock, building council houses, road-building, improving agricultural production, among others. There was a perception that the government had been cavalier in pressing ahead with such schemes, while the procedures for acquisition as well as the compensation paid was unfair. In one such case a landowner faced with compulsory acquisition committed suicide; in another the compensation paid was less than a hundredth of the amount outstanding on a mortgage on the property.¹⁶ Yet there was no forum to provide an independent review of these decisions, nor did private law provide any redress.

An initial response was to find fault not with the courts, but with the expanded role of government—and with the ‘unconstitutional’ behaviour of Parliament in conferring ‘judicial’ powers on ministers and other official tribunals. Hewart’s *The New Despotism*¹⁷ and C.K. Allen’s *Bureaucracy Triumphant*,¹⁸ are prominent examples, though the general attitude manifested itself in much mainstream legal thought. The power of the court to declare an exercise of power *ultra vires* was, as W. I. R. Fraser argued, “a most valuable safeguard against unduly autocratic action”, yet was limited in its usefulness if Parliament “does not define the powers reasonably clearly.”¹⁹

¹¹ LCO 2/3362, Morgan to Mayell, 20 February 1947.

¹² AT Denning, *The Rule of Law in the Welfare State* (Birkbeck 1953), reprinted in AT Denning, *The Changing Law* (Stevens 1953) 20–44, 24.

¹³ *ibid.*, 39–40

¹⁴ Alfred Thompson Denning, *Freedom under the Law* (Stevens and Sons 1949)

¹⁵ For a full discussion of the Crichton Down affair, see IF Nicholson, *The Mystery of Crichton Down* (Clarendon Press 1986).

¹⁶ See the press clippings in T 222/671.

¹⁷ G Hewart, *The New Despotism* (Earnest Benn 1929).

¹⁸ CK Allen, *Bureaucracy Triumphant* (Oxford University Press 1931).

¹⁹ WIR Fraser, *An Outline of Constitutional Law* (William Hodge 1948) 184.

The same view had been expressed by Sir Cecil Carr,²⁰ and before that by the report of the Donoughmore Committee.²¹ But a return to the old style of drafting, conferring limited powers on administrative officials which Parliament would tightly police, was infeasible because the new policies pursued by the incipient British administrative state required the grant of broad, widely framed powers. A new approach was needed if the challenges posed by the growth of the state were to be dealt with.

In the received telling, the story of what happened next appears clear. Faced with the collapse of private law constitutionalism, judges and jurists looked instead to modernise the exercise of the supervisory jurisdiction of the High Court. In effect, the intellectual baton passed from the private law constitutionalists to a new generation of “common law rationalisers”, a set of practitioners, academic commentators, and senior court judges who sought to achieve with the prerogative writs what equity and tort had not achieved. They did not necessarily deny that the system of prerogative orders was incapable (in its then current form) of providing effective remedies against the Crown and other public bodies. But they thought that the principles inherent in the common law could provide the basis for reworking the details of the rules on judicial review. They were conscious that Victorian judges had assiduously kept magistrates under control through these writs. Whilst the passing of administrative functions to a professional administrative class meant that the judiciary were prepared to cede that ground to civil servants, they now had reason to revive and adapt these older powers. And, through incremental case-based development, distilled and systematised through successive editions of treatises and academic commentary, this is precisely what they managed to achieve.

Yet if we set this received account to one side and focus instead on what was actually being said and done in the 1950s and 60s, a very different picture emerges. Writings from the period make little or no reference to the prerogative writs as instruments of redress, or as ways of controlling administrative bodies. Although texts on the prerogative writs continued to be written, of which the first edition of S. A. de Smith’s *Judicial Review of Administrative Action*²² was perhaps the outstanding exemplar, this work was self-consciously expository and was not seen as charting a path to a fully-fledged system of redress of grievances concerning the discretionary decisions of the executive.²³ Few things illustrate this as clearly as the

²⁰ Cecil Thomas Carr, *Concerning English Administrative Law* (Humphrey Milford/Oxford University Press 1941) 50–51.

²¹ *Report of the Royal Committee on Ministers Powers* (Cmd 4060, 1932)

²² SA De Smith, *Judicial Review of Administrative Action* (Stevens and Sons 1959)

²³ J. A. G. Griffith put it pithily in a review of the first edition of de Smith’s treatise, when he described the book as being “about ‘the law’ and touches only occasionally on the prophets”. JAG Griffith, ‘Judicial Review of Administrative Action’ (1960) 18 *The Cambridge Law Journal* 228.

evidence offered to the Franks Committee. Oral and written evidence was given by virtually every leading jurist and legally concerned organisation of the day and, despite the narrowness of the Committee's remit, those giving evidence invariably expressed views on what a fully evolved system of administrative law might look like, and the place different adjudicative institutions might occupy within it. The prerogative writs, however, do not feature significantly in any of these accounts.²⁴ Even more surprising, given its centrality to modern administrative law thinking, is that *Wednesbury* review was not discussed.²⁵

What we see, instead, is the formulation of proposals for reform that were on their face very diverse – ombudsmen, tribunals, new administrative courts, and new divisions of the High Court all had their partisans – but which nevertheless reflected a clear consensus about the broad contours of what would need to be done to deal with was seen, in essence, as a two-fold problem: of providing effective redress against administrative action and hence bringing the administration under legal control, and of facilitating the growth of a commitment to legality in the administrative branch through the creation of a common law of good administration. Seen from our position half a century later, it is startling to see that this emerging consensus bore little resemblance to what we now know as the law of judicial review. For it not only rejected the prerogative writs as instruments of redress and control, but also expressly repudiated three of the central shibboleths on which modern judicial review is founded: firstly, the modern position that judicial review should resist any direct engagement with the substantive merits of a decision; secondly, the modern view that judicial review seeks to protect the public interest rather than the private interest of the claimant; and thirdly, the modern understanding that both of these are necessary to avoid drawing the judiciary into matters of policy.

1.2 The emerging juristic consensus

1.2.1 Substantive review and the administration

Let us begin with the first of these. In the 1960s, it was taken for granted that the legal system must provide redress going to the merits of the case—not just in the trivial sense that any review of discretionary powers necessarily involves some consideration of the merits, but in the sense of giving express consideration as to whether the decision was right or wrong in substantive

²⁴ De Smith was the only witness to discuss the prerogative writs in detail, and he expressly stated that his evidence was concerned only with the law as it was, and offered no view on what the law should be. Committee on Administrative Tribunals and Inquiries, *Minutes of Evidence Taken Before the Committee on Administrative Tribunals and Inquiries: Appendix I* (, HMSO 1956) 8-11.

²⁵ Cf. Sir Stephen Sedley's aphorism that, "Far from being the point at which public law woke up, the *Wednesbury* case is a snore in its long sleep." Sedley (n 2) 278

terms, and developing doctrines which speak to these substantive questions. Equally, it was taken for granted that this redress must expressly address the private interests at stake, and their relationship to broader public interests. This was of fundamental importance not just from the point of view of the subject, but also from the point of view of the administrative departments, because it was only through such a focus that a proper common law of good administration could evolve.

The idea of a common law of good administration was expressly discussed in a report from JUSTICE published to mark the tenth anniversary of the landmark Whyatt Report.²⁶ In a pamphlet published earlier in 1955, the Inns of Court Conservative and Unionist Society had called for the establishment of an Administrative Division of the High Court as a means to facilitating the development of a judge-made administrative law.²⁷ JUSTICE took up this call, but their proposal went further. The point to such a Division, they argued, was that it would facilitate the evolution of a common law of public bodies, incorporating a common law conception of good administration. This could be most effectively achieved if Parliament provided a basic legislative scaffolding of ‘Principles of Good Administration’, which judges could then develop and elaborate on in the usual common law way of reasoning upwards from individual cases. In tandem with this, the report recommended a revision of the grounds of judicial review to include breaches of the Principles. The remedies would include the power to vary or reverse a decision as well as to award damages.

This proposal built upon a line of thinking that JUSTICE had already set out in the Whyatt Report,²⁸ and which reflected a more widely held view as to the purpose of administrative law. Whyatt had drawn a distinction between cases where, on the one hand, the source of grievance was that a discretionary power had been exercised wrongly — where “there may be no allegation of bias, negligence or incompetence but merely the charge that the decision is misguided” — and on the other hand cases involving an allegation of official misconduct or ‘maladministration’.²⁹ Where complaints of maladministration were made, Whyatt recommended the creation of a new Office of Parliamentary Commissioner, based on the Scandinavian Ombudsman.³⁰ Misguided discretion, however, demanded a different form of redress. Whyatt argued for the removal of such decisions from Ministers to

²⁶ K Goodfellow, *Administration Under Law* (Stevens 1971).

²⁷ Inns of Court Conservative and Unionist Society, *The Rule of Law* (Conservative Political Centre 1955).

²⁸ J Whyatt, *The Citizen and the Administration* (Stevens 1961).

²⁹ *ibid* para 10. The term ‘maladministration’ had earlier been used in the Franks Committee.

³⁰ The idea had earlier been championed by the libertarian Society for Individual Freedom, which still claims the establishment of the Parliamentary Commissioner for the Administration as one of its greatest contributions. See TE Utley, *Occasion for the Ombudsman* (Christopher Johnson 1961).

a reformed and rationalised tribunal system. Such a “comprehensive system of impartial adjudication”, Whyatt argued would “go far towards providing every citizen with a means of redress in the field of administrative law as complete and effective as he has, for centuries, enjoyed in the realm of common law.”³¹

Underlying this was a concern not only for the rights of the citizen, but also for the conduct of the business of the administration in a manner that was both effective and in keeping with fundamental constitutional principles – described variously as requiring “judicial habits of mind”³² or the inculcation of “administrative morality.”³³ This, it was thought, required the introduction of ‘judicialised’ ways of thinking into the administration itself. For W. A. Robson, one of the keenest advocates of this view, one of the most significant constitutional developments of the Twentieth Century was the “placing by Parliament of a large and increasing number of judicial functions... in the hands of the great departments of State, or under the jurisdiction of tribunals controlled directly or indirectly, or appointed by executive ministers of government.”³⁴

Far from posing a threat to the British constitution, these multifarious statutory jurisdictions, if suitably reformed, could provide a forum for the redress of grievances more suited to an age of increasing collective control over broad areas of economic activity and social policy. What mattered was that public powers were met with the development of judicial technique and attitudes on the part of administrators, something which Robson thought could be accomplished, “only by the introduction of specific institutional reforms and procedural safeguards in the machinery of adjudication”³⁵ Robson’s work is not short on specific proposals as to the form such institutions should take. Of greater importance to Robson’s juristic contribution, however, was the overall goal of ensuring that discretionary powers were exercised by those with judicial habits of mind.

Robson was not alone. Lord Reid, the author of a series of judgments from *Burmah Oil* to *Anisminic* that would reshape administrative law, had provided a foretaste of the dynamic potential of the common law to re-work itself in the face of what, writing extra-judicially, he called an “impenetrable maze of distinctions and qualifications which destroy certainty”.³⁶ But while

³¹ Whyatt (n 28) para 69.

³² WA Robson, *Justice and Administrative Law: A Study of the British Constitution* (1st ed, Macmillan and Co 1928) 327

³³ JDB Mitchell, ‘Law, Democracy and Political Institutions’ in Mauro Cappelletti (ed), *New Perspectives for a Common Law of Europe* (Sijthoff 1978) 361, 373; JDB Mitchell, ‘The State of Public Law in the United Kingdom’ (1966) 15 *International and Comparative Law Quarterly* 133, 147

³⁴ Robson, *Justice and Administrative Law* (n 32) 90

³⁵ WA Robson, *Justice and Administrative Law* (2nd ed, Stevens and Sons 1947) 333

³⁶ Lord Reid, ‘The Judge as Law Maker’ (1973) 12 *Journal of the Society of Public Teachers of Law* 22, 24

Reid was constrained by the nature of judicial office, another celebrated common lawyer, F. H. Lawson, in evidence to the Franks Committee, put forward a radical and unrestrained vision of how the common law might provide ‘external control’ over the discretionary judgments of administrators. A very great deal of the traditional jurisdiction of King’s Bench, he pointed out, related to what would today be considered public law.³⁷ Lawson proposed accordingly that “there should be no limit whatever to the jurisdiction of the Courts”, save perhaps a *de minimis* exception,³⁸ although he fully expected that the Courts would adopt a sliding scale of review, so that while there might be a strong “presumption of legality” where the conduct of Ministers were in question, the jurisdiction itself must necessarily be unlimited.³⁹ Judicial control of the administration was nothing to be feared, either for the volume of litigation that might ensue, or for the threat of judicialisation of the administration. The character of the courts meant that, as Lawson put it in oral testimony, judges would “not be tempted to interfere a great deal and will look upon it as their business to check abuses.”⁴⁰

The same underlying concern motivated the work of even those who took the (at first blush) seemingly incompatible view that the courts were ill-equipped to deal with administrative appeals. These critics did not, in general, disagree with the diagnosis of the problem but only with the institutional solutions proposed. J. D. B. Mitchell, for example, thought that the Ombudsman “fit so uneasily with the British doctrine of ministerial responsibility as to be irreconcilable with it.”⁴¹ Control by the ordinary courts, too, had numerous defects: courts were excessively concerned with procedural defects rather than substantive merits; remedies hindered efficient administration without actually redressing the wrongs done to citizens; and the law’s concern with technical distinctions of executive or quasi-judicial powers meant that important powers escaped judicial control, while in other cases decisions were overturned though no injustice was done. The problem with all of this, Mitchell argued, was that “it has prevented the courts from developing and applying any general concept of administrative morality.”⁴²

³⁷ FH Lawson, ‘What is wrong with our administrative law?’ in FH Lawson (ed), *Many Laws: Selected Essays Volume 1* (North-Holland Publishing Company 1977) 285

³⁸ Committee on Administrative Tribunals and Inquiries, *Minutes of Evidence Taken Before the Committee on Administrative Tribunals and Inquiries: Ninth and Tenth Days* (, HMSO 1956) 355

³⁹ Lawson (n 37) 284

⁴⁰ Administrative Tribunals and Inquiries, *Minutes of Evidence Taken Before the Committee on Administrative Tribunals and Inquiries: Ninth and Tenth Days* (n 38) 347. Like many others of his time, Lawson thought the development of the system of criminal appeals, where judges had broad powers of review but had developed systems to ensure that they did not interfere with the merits, demonstrated that they would be able to do the same in exercising substantive review over administrative action.

⁴¹ JDB Mitchell, ‘The Irrelevance of the Ombudsman Proposals’ in DC Rowatt (ed), *The Ombudsman: Citizen’s Defender* (Allen & Unwin 1968) 280.

⁴² JDB Mitchell, ‘The Causes and Effects of the Absence of a System of Public Law in

Before 1688, the Privy Councils of Scotland and England had operated what Mitchell regarded as an embryonic form of administrative jurisdiction. Mitchell (in a memorandum jointly signed with J. A. G. Griffith) now wrote to Lord Shackleton, Lord Privy Seal and first Minister for the Civil Service proposing that the Privy Council should be reconstituted along the lines of the French *Conseil d'État*.⁴³ This idea, too, had surprisingly broad support. Dicey had in his later years come to question whether the ordinary courts might not, after all, be “the best body for adjudicating on the offences or the errors of civil servants”, speculating that a better solution might be something analogous to the *Conseil d'État*, a “body of men who combined official experience with legal knowledge and who were independent of the government of the day.”⁴⁴ Lawson, similarly, suggested a court in which recently-retired permanent heads of department would sit as administrative judges along with justices of the Queen’s Bench Division.⁴⁵ HWR Wade had mooted the idea in his evidence to the Franks Inquiry,⁴⁶ and Sir Leslie Scarman had written in favour of the idea, in an article in *New Society*.⁴⁷ In 1966, the Inns of Court Conservative and Unionist Society put forward a detailed case for what they termed an “Administrative Commission” within the Privy Council, as an alternative to an Ombudsman scheme, which they thought would provide insufficient protection for individual rights.⁴⁸

1.2.2 The private interest

The view that administrative law must provide an adjudication on the merits of discretionary judgments – that, as Robson put it, “some form of appeal from the substance of a decision is required in the more important cases”⁴⁹ – was closely linked to a view that the purpose of administrative law was to set standards of mediation between the public interest and private interests. Whilst procedure, natural justice and legality had their place in achieving such a mediation, the consensus was that, ultimately, the source of most complaints was that the individual⁵⁰ felt hard-used by the state. The rule

the United Kingdom’ [1965] Public Law 95, 113.

⁴³ See BA 17/31, Memorandum by Griffith and Mitchell, undated, c. 1968. (“Mitchell Memorandum”)

⁴⁴ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan 1915) xlv111

⁴⁵ Lawson (n 37) 286

⁴⁶ Committee on Administrative Tribunals and Inquiries, *Minutes of Evidence Taken Before the Committee on Administrative Tribunals and Inquiries: Thirteenth and Fourteenth Days* (, HMSO 1956) 551-553

⁴⁷ L Scarman, ‘A New Court’ *New Society* (London, 5 June 1969) 1

⁴⁸ Inns of Court Conservative and Unionist Society, *Let Right be Done* (, Conservative Political Centre 1966) ; a civil servant’s critique can be found in M Smith, ‘Thoughts on a British *Conseil d'Etat*’ [1967] Public Administration 23.

⁴⁹ Robson, *Justice and Administrative Law* (n 35) 409–10

⁵⁰ It is worth noting that much of the debate in the period under study treated the problem as if it were almost exclusively concerned with individual citizens—and, specifically,

of law mandated the development of broad principles not just as to how decisions should be made, but also as to the appropriate balance between the rights of individuals and the requirements of efficient administration.

It is critical to note that the emphasis was on “striking a balance”,⁵¹ rather than on the simplistic protection of private interests against government encroachment. On this issue, Robson again set the tone. “The aim of a sound body of administrative law”, he wrote, “should be neither to disappoint the reasonable expectations of the possessors of private rights, nor cripple the free activities of the individual, nor yet again to enable the executive tyranny to masquerade under a colourable imitation of judicial sanction.”⁵² What was needed was “a body imbued with the judicial spirit which will weigh the reasonable needs of the Executive against the interests of the citizen.”⁵³ At the same time, there was a similarly broad consensus that while an imbalance of power between the citizen and the state was the fundamental problem, the point of reform was not, as Goodfellow put it, to “suddenly tip the constitutional balance against the state and in favour of the citizen.”⁵⁴ It was detrimental to effective administration if orders were set aside where there was no substantive injustice, or where the harm might have been cured by a less destructive remedy.

For the authors of the Whyatt report, the underlying principle was one of impartial adjudication of disputes between citizens and administrators: an Ombudsman “should, in fact, be regarded neither as simply the ‘watchdog’ of the public nor the apologist of the administration, but as the independent upholder of the highest standards of efficient and fair administration.”⁵⁵ Asked in cross-examination before the Franks Committee whether a right of appeal from an administrative tribunal would be in the interest of the individual or the state Lawson replied, “I think it could be in both the interests of the public and of the private person.”⁵⁶ Maintaining administrative integrity and speed of decision-making was as much of a concern to reformers as protecting private rights, and the two were not at odds with one another. “A reconciliation of these objectives”, wrote Mitchell, “is possible, but is beyond the reach of present systems in this country which frequently satisfy

as the Whyatt report put it, with “the little man... the little farmer with four acres and a cow” rather than persons with substantial resources Whyatt (n 28) xiii.

⁵¹ Mitchell, ‘The Causes and Effects of the Absence of a System of Public Law in the United Kingdom’ (n 42) 102

⁵² Robson, *Justice and Administrative Law* (n 35) 516

⁵³ Committee on Administrative Tribunals and Inquiries, *Minutes of Evidence Taken Before the Committee on Administrative Tribunals and Inquiries: Eleventh and Twelfth Days* (, HMSO 1956) 494

⁵⁴ Goodfellow (n 26) 11.

⁵⁵ Whyatt (n 28) para 162

⁵⁶ Administrative Tribunals and Inquiries, *Minutes of Evidence Taken Before the Committee on Administrative Tribunals and Inquiries: Ninth and Tenth Days* (n 38) 350

neither demand,”⁵⁷

1.2.3 The place of policy

Thirdly, and finally, there was broad agreement that the bounds of this system must be set in a way that avoided interfering with decisions that were truly matters of policy, whilst at the same time encompassing decisions that were merely questions of law or fact dressed up as policy. While it was taken as a given that policy-making should not be subject to judicial interference, the reformers had a fairly precise understanding of what was meant by ‘policy’. Not every exercise of discretion was a matter of policy, nor did policy encompass all substantive norms. Lawson considered the view that courts do not interfere in policy decisions to be “undoubtedly sound”, but nonetheless argued (citing Griffith and Street in support) that, “[t]he real question with regard to policy relates to the boundary between questions of policy and questions of fact.”⁵⁸ For Mitchell, “the root of the whole present malaise is the fact that we have lost any real idea of what is a political decision, and by extending the concept unreasonably... we have brought great trouble on ourselves.”⁵⁹ In other words, while the machinery of administrative justice, however created, should not concern themselves with the sort of matters that were regularly discussed in Parliament, the concept of policy should not be expanded to effectively include the whole of executive decision-making. In particular, it did not have the meaning which it would later acquire, equating it with the administrator’s view of the merits.⁶⁰

Robson’s views provide a good illustration as to the prevailing view of policy. Robson said that the distinction between policy and law was “doubtful”, and argued that “one can distinguish ‘policy’ from ‘law’ only in theory”.⁶¹ He proposed that when constituting an administrative tribunal, the Minister should prepare a Letter of Reference, or Instructions, which formulated and openly declared the policy that the tribunal should follow.⁶² Others went to the extent of arguing that safeguarding policy actually *required* the courts to embrace substantive principles. If substantive principles were not explicitly embraced, the argument went, the less desirable alternative would be a distortion of the law as judges sought to attack decisions of policy by “subterfuge”, as Lawson thought had happened in *Board of Education v Rice*,⁶³ where “various judges offended at what appeared to be

⁵⁷ Mitchell Memorandum, p. 9.

⁵⁸ Administrative Tribunals and Inquiries, *Minutes of Evidence Taken Before the Committee on Administrative Tribunals and Inquiries: Ninth and Tenth Days* (n 38) 333

⁵⁹ Mitchell Memorandum, p. 12.

⁶⁰ See the discussion in section 3, below

⁶¹ Robson, *Justice and Administrative Law* (n 35) 333.

⁶² Robson, *Justice and Administrative Law* (n 32) 306-308

⁶³ *Board of Education v Rice* [1911] AC 179 (HL)

a most unfair decision, decided that the wrong question had been asked and the right question had not, though anyone reading the case would have the greatest difficulty in ascertaining what they thought to be the right question.”⁶⁴ In other words, if administrative justice required that the exercise of discretion were to be reviewed on the merits, then it equally required that the basis of such review should be articulated explicitly in doctrine and principle. The reformers would simply not have recognised the modern orthodoxy that courts are only concerned with how a decision is reached, rather than with its substantive merits.⁶⁵ The law, as the reformers understood it, was capable of developing doctrines that embraced the substance of a decision, so that a strict opposition between legality and correctness was nonsensical.

Despite the disagreements as to *where* responsibility for control of administration should lie, therefore, there was substantive agreement as to *what* responsibility for control of administration should encompass. The central task of administrative redress was mediating conflicts between the public interest and private interests and, through doing so, to develop principles of good administration. Naturally, there were differences of detail. Could the Court of Queen’s Bench, suitably reorganised, provide appropriate external control, or would this new task require the creation of some new court? Was this even a job for a court, or was some other institutional form— administrative tribunals, or the Scandinavian ombudsman—better suited to inculcating what Robson variously called ‘the judicial temper’ or ‘the spirit of justice’ (among other phrases) within the expanding administrative role? Could such new adjudicative institutions, however constituted, be left to develop the necessary doctrines by themselves, or did this require the support of a legislative scaffold? But these were seen as secondary considerations, pertaining to how the goal of a forum for resolving grievances between the citizen and the state could be realised in practice, rather than of the character of the task to which such a forum would be devoted.

Our intention here is not to suggest that the view presented here was the only view in currency. As is well known, prominent political and intellectual figures in the inter-war period argued that socialism would require a fundamental restructuring of powers in favour of the executive and administration. Stafford Cripps proposed delegating vast amounts of legislative power to the executive, and completely excluding all judicial control over ministerial orders with Parliament having the sole right to challenge orders.⁶⁶ Parliament itself would be reorganised away from the task of legislation: the bulk of its work would be done in its standing committees, whose task would be

⁶⁴ Lawson (n 37) 283

⁶⁵ See e.g. Irvine of Lairg, ‘Judges and Decision-Makers’ [1996] PL 59, 60.

⁶⁶ Stafford Cripps, ‘Can Socialism Come by Constitutional Methods?’ in C Addison et al (ed), *Problems of a Socialist Government* (Victor Gollancz 1933) 54

to supervise the functions of the Government in particular areas.⁶⁷ Harold Laski went further, and thought that the government “would have to take vast powers, and legislate under them by ordinance and decree”, in a manner that excluded even *Parliamentary* control by suspending “the classic formulae of normal opposition.”⁶⁸ Nevertheless, these thinkers were outside the mainstream even of left-wing thought. The view we have outlined encompassed, in whole or in part, the views of such diverse thinkers as C.K. Allen, Lord Denning, A. V. Dicey, F. H. Lawson, J.D.B. Mitchell, W.A. Robson and H. W. R. Wade, among others, not to mention organisations as diverse as The Society of Individual Freedom, the Conservative and Unionist barristers, and JUSTICE. An approach that commanded support amongst such a broad range of jurists, including not just individuals espousing a very diverse range of political and jurisprudential positions but also most of the leading commentators of the day, in our view is far more representative of mainstream thought, and merits the label of an ‘orthodoxy.’

What, then, happened to this legal orthodoxy? What caused this seeming consensus to falter, and disappear so thoroughly not just from the landscape of law reform but also from legal memory? Why and how did we come to have a system of administrative law that is so fundamentally different in virtually every respect from what jurists in the 1950s and 1960s would have envisaged? As we will show in the remainder of this article, the present shape of the law is the unintended outcome of actions that were undertaken with the best of intentions, and with the participation of leading judges. But to appreciate this, we must first turn to the views of an important group of whom little account is taken in histories of judicial review, but who were its primary targets—namely, the administrators themselves.

2 The view from the administration

Unsurprisingly, the bureaucracy dissented from the jurists’ diagnosis of the problems posed by the administrative state. This is not because they were sanguine. Although there were a few exceptions, such as the Treasury official who in the 1920s declared grievances against the administration to be “a well-recognised form of hallucination”, attributable to “a fairly well-recognised class of semi-lunatics,”⁶⁹ the civil service on the whole was as troubled as jurists by the issue and by its impact on public perceptions of civil servants. The 1950s and 60s, accordingly, saw a number of official reviews of administrative processes and practices in parallel with the independent reviews which we have examined above. Yet unlike the independent reviews, the official reviews eschewed just about any substantive question, concentrating instead on narrower matters of procedure.

⁶⁷ Cripps (n 66) 56-59

⁶⁸ Harold Laski, *Democracy in Crisis* (University of North Carolina Press 1935) 87

⁶⁹ T 162/428, Fass to Brown, 16 October 1924.

The archival record demonstrates quite unambiguously that this narrowness was the result of concerted action by permanent officials within the departments. Two themes were constant in the departmental responses. The first was the insistence that any legal remedy against administrative action should be narrow. Of particular concern was the possibility of reviewing day-to-day discretion, or decisions of policy, and fear that these could be subject to judicialised rules of law. The second was the insistence that the proper forum for questioning these was Parliament—in particular, through ministerial responsibility and the institution of the parliamentary question.

In taking this stand, officials did not underestimate the nature or extent of the problems highlighted by the reformers. Permanent officials in the departments were sensitive both to constitutional principle and to “the continuing alienation of the individual from the Government”, and agreed that the a system devoted to the public interest must “respond to individual grievances.”⁷⁰ Following the Crichton Down affair, an internal Treasury memo considered establishing a committee headed by Sir Thomas Padmore, a permanent secretary to the Treasury who dealt with personnel and staff management, to study what might be done to address the public perception that “Ministers and civil servants are judges in their own cause.”⁷¹ Sir Edward Bridges, the head of the Home Civil Service, approvingly cited Dicey and put together a memorandum which informed a series of meetings to consider a broad range of questions in relation to which action might be taken.⁷² The civil servants’ objection was, rather, with the proposed solution. Their principal concern was the suggestion that the exercise of administrative discretion would be subject to rules of law setting limits on what the administration could or could not do. This, they felt, would destroy administrative discretion, which of its nature was not capable of control by law. Equally, they worried about the damage to other pillars of administration. The sacrosanct nature of communications between civil servants and ministers seemed to be incompatible with broader discovery. And they feared that civil servants would become more pliable, and less able to stand up to ministers in an extreme government.

The reaction of the civil service to the proposal to set up the Franks Committee is a good example. In 1955, in the aftermath of the Crichton Down affair, the Conservative party’s election manifesto promised to set up a “strong advisory committee” to look into “the machinery of tribunals, of public enquiries and of departmental decisions affecting individual interests and property.” The aim was to ensure that “a just balance should be struck, and seen to be struck, between the interests of the individual and

⁷⁰ BA 17/452, Mountfield to Caulcott, 12 November 1971

⁷¹ T 222/671, Memo to Milner Barry, 28 July 1954

⁷² T 222/671, The Civil Service and the Public, 26 July 1954.

those of the community” in the normal exercise by the government of its powers.⁷³ This troubled the permanent officials. In a memo circulated to other permanent secretaries, Bridges described this commitment as “very alarming,” because it might lead to the creation of a new tribunal whose jurisdiction would extend to departmental decisions generally.⁷⁴ He convened a meeting of a small number of senior officials to discuss the advice which should be given to a future Conservative government on this pledge. Were such a tribunal to be created, the meeting decided, the effect would be that “innumerable cases affecting individuals would be removed from the responsibility of departmental Ministers”, ranging from exchange control cases to “the eligibility of cattle for deficiency payments.” Calling decisions of this kind into question would seriously impair the functioning of the machinery of government, and would detract from resolving what the meeting saw as the main issue – “the improvement of the machinery of tribunals and public enquiries.” The advice that should be given to Conservative ministers should they be elected, it was decided, would be to “modify” the manifesto commitment to enquire into “the machinery of department decisions”. The way of doing this was to suggest that such an enquiry would “go to the root of the relationship between Parliament and the Executive”—if put this way, it was thought, Ministers would “readily appreciate that the subject was better left alone.”⁷⁵

The Permanent Secretaries’ plan was ultimately successful. The Franks Committee’s terms of reference were deliberately restricted to situations where an appeal or review before a final decision was taken was already provided. The effect was to exclude the larger part of the field of public administration including, ironically, the grievance at the heart of the Crichton Down affair itself. So successful was their rhetoric that a decade later, when the question of the narrowness of the Franks Committee’s terms of reference arose in internal discussions, it was the point as to Parliamentary sovereignty, rather than the protection of administrative discretion, that was remembered as being the reason for the narrow reference.⁷⁶

But the civil service’s use of the doctrine of Parliamentary sovereignty was not entirely cynical. Whilst there was an element of calculation in portraying the proposal in this light, it also reflected a strongly held constitutional position, which saw in Parliament a forum to settle grievances of citizens against the government, with MPs playing the role of expert

⁷³ Conservative and Unionist Party, *United for Peace and Progress* (Conservative Political Centre 1955) 22

⁷⁴ CAB 21/4470, Bridges to Brook, 18 May 1955

⁷⁵ CAB 21/4470, Note of a meeting on 23 May 1955, p. 4

⁷⁶ Briefing notes for ministers from the end of the decade typically justify the narrowness of the terms of reference on the basis that doing otherwise would “interfere unduly with the responsibility of the executive and its answerability to Parliament.” LCO 2/8438, Draft reply to Parliamentary question, supplementary note 2, 11 June 1959.

champions of righteous causes, and saw Parliamentary processes as flexible and nuanced in dealing with the complex questions of policy-making and discretion that such causes often raised. Constitutional principles such as ministerial responsibility, it was thought, gave this process force and effect. Parliamentary questions, in particular, were seen as being an extremely effective form of redress. Shortly after the release of *The Rule of Law*,⁷⁷ which had prompted the Conservative manifesto commitment, C.W.B. Rankin, a permanent official in the Lord Chancellor's Department, wrote a memo strongly criticising the publication for giving "insufficient weight... to the power of the P[arliamentary] Q[uestion]." Everyone with any experience of administration, he went on, "knows what nervousness is engendered in Ministers and officials alike by PQs... and how often administrative action and practice are modified as a result of PQs."⁷⁸

The same view also played a major role in the Douglas-Home government's rejection in 1962 of the Whyatt report's proposal for an ombudsman, over and above the issue of its interference with efficient administration.⁷⁹ The ombudsman, it was argued, was necessary in Sweden because Sweden lacked a principle of ministerial control of the civil services, and of Parliamentary control over ministers through the institution of the Parliamentary Question.⁸⁰ To endow an administrative official with similar powers would interfere with a fundamental aspect of the British constitution. When a change of government resulted in the ombudsman being accepted, this nonetheless led to the institution of the MP filter—a restriction that was controversial at the time, but which was ultimately accepted on the basis that the ombudsman would function best if structured so as to be embedded within the system of parliamentary accountability, rather than sitting outside it as a quasi-judicial figure.⁸¹ Feelings on this ran strong. When the final bill went to the Legislation Committee, they proposed amending the title to read "The Parliamentary Commissioner for Administration (Ombudsman) Bill" to reflect its origins. Sir Laurence Helsby, who had succeeded Bridges, objected strongly (and successfully). The grounding of the Commissioner in Parliament, and in the British constitutional form of accountability must not, he argued, be diluted by adding a reference to an 'ombudsman'.⁸²

The bureaucracy's opposition to the legal review of administrative acts did not mean, therefore, that they wanted to leave aggrieved persons remediless. Their belief was instead that legalised, to say nothing of judicialised,

⁷⁷ Inns of Court Conservative and Unionist Society, *The Rule of Law* (n 27).

⁷⁸ LCO 2/4722, Criticism of report at first reading, undated c. April 1955

⁷⁹ The administration would later press to introduce a further filter. This was not taken further only because of a feeling that such a suggestion would be counter-productive. BA 17/452, Note of a meeting on 6 December 1971.

⁸⁰ LCO 2/8441, Report of the Committee of Officials

⁸¹ CAB 130/216, Minutes of a meeting of ministers, 1 February 1965

⁸² PREM 13/1557, Helmsby to Mitchell, 2 February 1966.

remedies were inappropriate. The reaction to the Goodfellow report, discussed above, illustrates this well. There was agreement with the thrust of the “entirely reasonable and right” principles put forward in the report. But more would be lost than gained were the principles to be turned into an “enforceable system of administrative law”.⁸³ A code of administrative conduct was needed, but it must be one that was applied by “administrative means” rather than “legal procedure”.⁸⁴ And even this carried dangers. Civil servants worried that publicising the principles might lead to people using it as a yardstick to decide that they had been badly treated, and to creating a new category of cases for the Parliamentary Commissioner, where departments would be vulnerable.⁸⁵ The result would be to create “yet another obstacle to [civil servants] getting on with their jobs.”⁸⁶ Sir Denis Dobson, Permanent Secretary to the Lord Chancellor’s Department, similarly thought that if the principles were widely applied, they “would lead to administrative chaos.”⁸⁷ Whatever their merits in the abstract, therefore, the very act of introducing a code based on the principles drafted by Justice would be seriously disruptive.⁸⁸ The correct forum was Parliament, and the correct legal principle was ministerial responsibility, because that did not seek to reduce complicated questions to matters of rules. Nor could tribunals fill the role, because they functioned best when they were dealing with clear rules.⁸⁹ Administrators were not alone in holding this view. Warren Evans, who had played a role in the 1971 Report, thought that an Administrative Division should focus on procedural guarantees, and should not interfere with the exercise of administrative discretion. The report went too far in the direction of the latter.⁹⁰

This, then, was what was at stake in the debate between the reforming jurists on the one hand, and the bureaucracy and its supporters on the other. At its heart was a disagreement about what types of administrative action could or should be controlled, and how. It was taken as a given by all sides that some of the action taken would have to be internal to the administration—for example, improving the quality of the civil service, the focus of the Fulton Report⁹¹—and that others, such as compliance with statutory requirements should be enforced by the courts. Beyond this, however, there were a range of questions to which the answer was far from clear. What values should the reviewing body be aiming to secure? What

⁸³ BA 17/452, Allison to Caulcott, 3 August 1971

⁸⁴ BA 17/452, Caulcott to Cooper, 4 August 1971

⁸⁵ BA 17/452, Duke to Watson, 17 August 1971

⁸⁶ BA 17/452, Morrison to Gilbraith, 27 August 1971

⁸⁷ BA 17/452, Dobson to Armstrong, 25 October 1971

⁸⁸ BA 17/452, Stevens to Mountfield, 1 November 1971

⁸⁹ LCO 2/8441, Report of the Committee of Officials.

⁹⁰ BA 17/452, Note: “Justice” and Administrative Law, 21 July 1971

⁹¹ Lord Fulton (Chairman) *Report of the Committee on the Civil Service* (Cmnd 3638, HMSO, 1968).

factors ought it to consider and be swayed by, and what ought it to ignore? Where should the bounds of its jurisdiction lie? Should the resolution of some issues be left to purely administrative processes?

Reformers thought that the rule of law required some recognisably legal means of recourse: redress could not simply be a matter of grace, as it would be if it were left to purely internal mechanisms. It must be a matter of right, which would require “bringing the state under the law”.⁹² The administration, in contrast, opposed judicialisation on the basis of the judiciary’s institutional capacity, of the executive’s institutional efficiency, and Parliament’s institutional role. The law, they said, must respect the integrity of the administrative process and the need for autonomy in the exercise of discretion. Decisions would sometimes be harsh to individuals, but this was also the case with tribunals or the courts. The fallacy of the reformers, as Harold Kent and Coldstream put it in an initial response to the Whyatt report, was “in the assumption that, contrary to all experience, life is just” and the assumption that the unfairness in the operation of the civil service was any worse than that in any other sector of life.⁹³

3 The Law Commission and the Law Lord

In 1965, matters began to come to a head. The newly-formed Law Commission in its First Programme noted the need for “a proper balance to be struck” between the rule of law and “the administrative techniques of a highly developed industrial society.”⁹⁴ But it added, “This is a very complicated problem upon which the Commission requires further time for study before making specific proposals.”⁹⁵ In 1967, following a seminar at All Souls College, it issued a consultation paper, tentatively proposing a very broad review on this topic.⁹⁶

The consultation made no recommendations as to the shape of the reforms. Nevertheless, the departments reacted sharply. An interdepartmental committee was formed to co-ordinate responses, with a view to forestalling any wider review. After internal discussions, the Permanent Secretary (until 1968) in the Lord Chancellor’s office, Sir George Coldstream put it to Mr. Justice Scarman, the head of the Law Commission, that the inquiry contemplated was not something the Law Commission could undertake. To do it properly would require a Royal Commission. Coldstream’s

⁹² LCO 2/3358, Graham-Harrison to Fisher, 13 October 1927.

⁹³ LCO 2/8439, Report by ‘Justice’ on ‘The Citizen and the Administration’, 3 November 1961

⁹⁴ Law Commission, *Law Commissions Act 1965: First Programme of the Law Commission*, Law Com No. 1, 1965, para 5.

⁹⁵ *Ibid.*

⁹⁶ Law Commission, *Exploratory Working Paper on Administrative Law*, Law Com PWP No 13, 1967.

intent, apparently, was to persuade the Law Commission to abandon the project. Scarman was seemingly receptive to the argument, but not, as it transpired, in the manner Coldstream thought. The report it issued in 1969 described an inquiry into administrative law to be “so vital an issue that it calls for the judgment of a body which includes members with legal, administrative and political experience.”⁹⁷ The report accordingly “envisage[d] an inquiry by a Royal Commission or by a committee of comparable status.”⁹⁸

Scarman was careful not to publicly favour any particular outcome but support for a radical review was strong, and even its opponents in the Civil Service conceded the strength of the arguments for it. In a Departmental meeting, Lord Shackleton “agreed with the line that the discussion was taking,” (i.e., unenthusiastic), but nonetheless “wondered [whether] there might still not be case for a thorough study by, for example, a Royal Commission.”⁹⁹ Lord Gardiner, the Lord Chancellor, was receptive to the need for a fundamental review, and was keen on instructing the Law Commission to at the very least conduct a wide-ranging review of remedies, if creating a Royal Commission proved difficult.

Yet no such review took place. As one of us has discussed in more detail elsewhere,¹⁰⁰ the archival record suggests that an important reason was the intervention of Lord Diplock, who had just been elevated to the House of Lords. Diplock’s views on administrative law had long been of interest to the administration. His name had come up in 1955 when the membership of the Franks Committee was being chosen: officials in the Lord Chancellor’s Office considered that he would be “fair-minded” even if he was inclined to be somewhat “agin’ the government”,¹⁰¹ unlike others who were rejected for being too “left-wing”.¹⁰² Ultimately, his name appears to have been struck off the list by a senior cabinet member.¹⁰³ In 1969, Diplock had helped to organise an Anglo-American judicial exchange on administrative law. He now sent a report on that exchange to Lord Gardiner, where he expressly argued against any wider review of the type the Law Commission had recommended. The only topic that needed to be explored, he said, was simplifying the procedure associated with administrative redress.¹⁰⁴

The background to Diplock’s recommendation was the Quartet of decisions of the House of Lords in the 1960s, which dismantled legal doctrines that stood in the way of judicial scrutiny of administrative decisions. Diplock

⁹⁷ Law Commission, *Administrative Law*, Law Com No. 20, 1969, para 10.

⁹⁸ *Ibid.*

⁹⁹ BA 17/261, Note of a meeting to discuss Administrative Law, 5 June 1969.

¹⁰⁰ Arvind (n 10)

¹⁰¹ LCO 2/4722, Dobson to Coldstream, 7 June 1955

¹⁰² See e.g. the remarks on R.M. Jackson in LCO 2/4722, Kent to Coldstream, 6 July 1965

¹⁰³ CAB 124/2848, Administrative Tribunals, 15 July 1965

¹⁰⁴ BA 17/261, Administrative Law: Anglo-American Judicial Exchange, 21 October 1969 (“Diplock memo”).

praised the general trend, arguing that the most appropriate way forward was to let judges continue to direct its development. Any wide-ranging review of the sort the Law Commission contemplated would simply get in the way. Yet to this he added one very significant qualification. In Diplock's view, the principal problem with the US approach to reviewing administrative action, which otherwise had much to contribute to the development of English law, was that it led the courts to substitute their views on policy for those of the administrative decision maker. There was, he argued, a genuine danger that the direction in which 'jurisdiction' was developing would, taken together with the power to review the record, lead to similar developments in England: a judge who called for and examined the record might be tempted to intervene because the conclusion lacked sufficient support. But the English courts could avoid problem if they handled the development of judicial review sensitively.

Diplock's report had its intended effect. Lord Gardiner directed the Law Commission to examine only the issue of procedure, precisely as Diplock had suggested. No equivalent to the Conseil d'État was ever created, and whilst ombudsmen and tribunals play an important role within the administrative justice system, they did not displace the courts. Judicial review expanded dramatically—in no small part under the guidance of Lord Diplock—but based on a far narrower approach to judicial oversight of the exercise of administrative discretion than any of the other approaches that were suggested in the 1960s. The ultimate denouement, however, was paradoxical for, as we will see, the very features that made this new approach seem so attractive in its early stages are also at the heart of much that makes judicial review so controversial today. Whilst Diplock's memo seemed, in principle, to understand the importance and relevance of questions of institutional capacity, his concern was not respect for the integrity of the administrative process. Rather, his concern was to reduce challenges to questions which he thought the common law could answer, while suppressing doctrines that could, potentially, have invited judges to look into the substance of the decision.

4 The shape of administrative law

Lord Diplock's report suggested a form of review that was dramatically different from anything the reformers envisaged. Most fundamentally, it was concerned neither with the task of reviewing the rightness of a decision, nor with the balance between public and private interests on which the decision was based. Following a distinction noted in the Anglo-American exchange organised by Diplock, this approach can be seen as at once extending the *availability* of judicial review, while limiting its *scope*.¹⁰⁵ And, when read

¹⁰⁵ JF Garner and AR Galbraith, *Judicial control of the administrative process* (Ditchley Foundation 1969) 27ff. This is exemplified in the *Fleet Street Casuals* case where Diplock,

in the light of Diplock's report, the judicial decisions of the House of Lords through the 1970s and 1980s—a period in which it is generally taken to have been dominated by Diplock—can be seen as having fundamentally limited the direction of development of the common law in ways that echo the concerns raised in the report. Three points, in particular, characterise the approach that emerged in this period: a *definition* of legality that focuses exclusively on public interests (at the expense of the private interest), an approach to *assessing* legality that is textual rather than purposive, and a narrowing of the *materials* that courts review in assessing the legality of a decision.

To begin with the first of these, whereas the earlier debate had conceived of legality in terms of striking the right balance between individual interests and the public interest, the modern focus is on the scope and limits of the discretion that had been conferred on an administrator. The result is a reorientation of judicial review away from the mediatory issues that had been the primary focus of the debate throughout the period leading up to the 1960s, and towards a new and entirely 'public' task—namely, that of enforcing public duties. As we have seen, mediating between private interests and the public interest was central to virtually every reform effort in the twentieth century. It was at the heart of the debates surrounding the Crown Proceedings Act. It led to the discretion/maladministration duality which so vexed Coldstream and Kent when it appeared in the Whyatt report. It was the primary impetus behind the proposals to create an ombudsman and a new system of tribunals, and behind J. D. B. Mitchell's proposal for a new, reinvigorated Privy Council, fashioned after the Conseil d'État. Against this light, a peculiar feature of the system of judicial review that emerged is that, as Sir Harry Woolf argued in his Hamlyn lectures, the private interest matters only to the competence to bring an action: once standing has been established, it has little, if any, role to play in relation to the substance of the challenge.¹⁰⁶

The implications of this shift are considerable. Its effect, in Woolf's words, is to make the primary purpose of judicial review "enforcing public duties on behalf of the public as a whole".¹⁰⁷ If it upholds individual interests, it does so tangentially "as part of the process of ensuring that public bodies do not act unlawfully and do perform their public duties." Woolf argued that this was a good thing, because the wider public who have an interest in effective public programmes are not represented in an action. Yet it represents a radical departure from the manner in which the problem was

unlike his fellow Law Lords, thought the National Federation should be afforded standing, but saw nothing actionable in the decision of Commissioners. *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Business Ltd* (n 1) 644.

¹⁰⁶ Harry Woolf, *Protection of the Public* (Stevens & Sons 1990).

¹⁰⁷ *ibid* 34.

conceptualised for much of the twentieth century – and, indeed, from the way in which the parties themselves conceive of the nature of the dispute they have taken to court. Private interests become, in this orientation, at most an incidental concern. As we saw earlier, the reformers saw no fundamental conflict between advancing the public interest and mediating between public and private interests. And in keeping with this perspective, earlier discussions of prerogative remedies emphasised the protection of individual interests as much as enforcing the public interest. These extraordinary remedies were available, Keir and Lawson wrote in their influential text, even though “no civil wrong has been committed: there has been no contract to break and no right of anyone has been infringed. And yet it may be obvious that the subject’s *interests* have been adversely affected by unlawful control on the part of the authority.”¹⁰⁸ Not only was the Diplockian understanding a departure from the academics of his day, it also turned on their head the original understanding of authorities like *Shaw* which on their face are entirely consistent with the ‘mediatory’ conception of public law, and indeed had been understood in precisely this way by Keir and Lawson, amongst others.

This departure also extends to the manner in which legality is *assessed*. A central feature in judicial review is that the scope and limits of the power conferred upon the administrative body in question are construed in a process that is primarily textual. On the one hand, administrative law is supposedly derived from constitutional principle. A notable feature of Lord Reid’s decisions in the Quartet is the way that common law and statute are woven into a seamless whole, drawing on common law principles to infer the extent of Parliament’s intent to over-ride individual interests or confer statutory immunities on public bodies. In contrast, the jurisprudence of the 1970s and 1980s, and particularly decisions delivered by Lord Diplock, abandon such “common law constitutionalism” (to use a phrase which only later became fashionable) in favour of a close reading of the applicable statutory framework. General principles of administrative law—where they exist at all—are to be found within the legal framework established by Parliament, rather than having any separate existence in common law.

In *Bromley LBC v Greater London Council* (the “Fares Fair” case),¹⁰⁹ for example, Diplock criticised the approach of his fellow judges of “limiting consideration of the construction of the statute” only to considerations of *vires* and not to review of discretion. Diplock saw it, “the question of discretion is, in my view, inseparable from the question of construction.” Here the key question for Diplock is this: taken as a whole, what questions did the statutory scheme leave open to the authority? While agreeing with

¹⁰⁸ DL Keir and FH Lawson, *Cases in Constitutional Law* (4th ed, Clarendon Press 1954) 253

¹⁰⁹ *Bromley LBC v Greater London Council* [1983] AC 768 (HL).

the majority that GLC failed its fiduciary duty to rate-payers, his approach was quite different, deriving the existence of such a duty from the statutory framework under which the GLC provided passenger transport services.

Similar reasoning can be found in *Tameside*.¹¹⁰ The statutory framework, he argued, gave the LEA responsibility “for the actual provision of public education services”, while the Secretary of State’s functions were “supervisory only”.¹¹¹ The scheme of the Act thus left Tameside with a broad, almost untrammelled discretion, subject only to the Secretary of State’s power, predicated on a finding that the LEA had acted or intended to act unreasonably, to issue directions to the LEA. Such a finding was a matter for the Secretary of State, with the court’s power of review confined to the question of whether the Secretary of State had “. . . taken consideration of the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider. . . .”¹¹²

There is a close affinity with the *Wednesbury* formulation of Lord Greene—for whom Diplock had acted as Secretary to the Master of the Rolls in the 1940s¹¹³—and the purpose is the same: to divert judicial scrutiny away from any consideration of the merits of the decision. A contrast may be drawn with *Padfield*.¹¹⁴ Lord Reid had rejected the suggestion—accepted by Lord Diplock in the Court of Appeal—that the Minister need only direct himself to the relevant question. For Reid, “Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter for the Court”.¹¹⁵ On Reid’s analysis, the power was part of a scheme intended to limit how far individuals’ interests may be subordinated to the public interest, and for the Minister to refuse to activate such safeguards out of political convenience was to frustrate the public interest. Diplock’s approach turns this on its head, by reading express provisions as to the protection of private interests in purely textual terms.

Just as cases like *Fare’s Fair* and *Tameside* sought to reduce the review of discretion to the question of statutory construction, a similar thrust to subsume the rules of natural justice under the principle of *ultra vires* can arguably be seen in Diplock’s famous articulation of the grounds of judicial review in *GCHQ*. Diplock favoured the term procedural impropriety “. . . because susceptibility to judicial review under this head covers also

¹¹⁰ *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 (HL)

¹¹¹ *ibid* 1063.

¹¹² *ibid*, 1065

¹¹³ S Sedley and G Le Quesne, ‘Diplock, (William John) Kenneth, Baron’ in *Oxford Dictionary of National Biography* .

¹¹⁴ *Padfield* (n 6)

¹¹⁵ *ibid* 1080

failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”¹¹⁶ While this might seem like an exercise in taxonomy without practical importance, the effect of this move is apparent in *Bushell v. Secretary of State for the Environment*.¹¹⁷ Here, Diplock eschews the traditional term “natural justice”, because this “may suggest that the only prototype is to be found in procedures followed by English courts of law”, proceeding instead on the basis of the statutory framework precisely as he did with the issue of abuse of discretion in *Fare’s Fair*. Diplock found that “in the absence of any rules made under the Tribunals and Inquiries Act 1971, the only requirement of the Highways Act 1959, as to the procedure to be followed at a local inquiry. . . is that it must be fair to all those who have an interest in the decision. . . whether they have been represented at the inquiry or not.”¹¹⁸ Again, the effect is to limit the inquiry largely to the statutory framework, in a manner that effectively robs the law of any unifying or overarching constitutional principles.

Third, and related, was a preoccupation with the extent and nature of the materials coming before the court. “The minimum requirement for effective judicial review of administrative decisions on questions of law,” wrote Diplock in his memo, “is that there should be available to the reviewing court sufficient material to enable it to ascertain whether the decision-making authority has misconstrued the powers conferred upon it by legislation, or has made some other error of law.”¹¹⁹ On the other hand, he argued, if the English courts were given a complete record of proceedings (as was the case under the US “substantial evidence rule”), judges would be tempted to substitute their own views about sound policy for those of the primary decision-maker. Diplock was especially concerned that the development of administrative law on jurisdiction, following *Anisminic* might be used to justify such an expansion of material coming before the court.

The problem with *Anisminic* was that the error of law made by the Foreign Compensation Commission was not disclosed by the record of the tribunal decision, but was instead revealed in a memo which came to light in the course of discovery—this being possible since the action was one for declaration. “If the court was to be enabled to correct” this error, as Diplock put it extra-judicially, “this had to be classified as one which went to jurisdiction.”¹²⁰ Lord Reid had neatly overcome this hurdle, by extending the concept of jurisdiction beyond the straightforward question of whether the

¹¹⁶ *GCHQ* (n 7) 411

¹¹⁷ *Bushell v Secretary of State for the Environment* [1981] AC 75 (HL).

¹¹⁸ *ibid* 75.

¹¹⁹ Diplock memo, p. 3

¹²⁰ Diplock, ‘Judicial Control of the Administrative Process’ (1971) 24 *Current Legal Problems* 1, 13.

decision-maker was entitled to make the decision in question, to encompass situations where although so entitled, “it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity.”¹²¹ The danger, as Diplock saw it, was that this potentially expanded the amount of material coming before the court with the very results that so worried him in his memo.

Diplock’s response to this development was—at the doctrinal level—to re-interpret *Anisminic* as having effectively abolished the very distinction between errors of law that went to jurisdiction and those that did not, In *O’Reilly v Mackman*¹²² Diplock described this distinction as “esoteric”, arguing that *Anisminic* had “liberated English public law from the fetters that the courts had imposed upon themselves” by such a distinction.¹²³ This repeated the view he expressed in *Re Racal*,¹²⁴ where he went so far as to say that “The break-through made by *Anisminic*” was that “the old distinction between errors of law that went to jurisdiction and errors of law that did not was, for practical purposes abolished.”¹²⁵ One consequence of this, Diplock wrote extra-judicially, was that “technicalities as to what constitutes the ‘record’ for the purposes of review no longer matter.”¹²⁶

Much has been written about whether *Anisminic* did or did not intend to abolish this distinction.¹²⁷ Critically, however, the effect of Diplock’s ruling was to severely limit the discovery of departmental material in judicial review cases. Abolishing the distinction also eliminated the need to call for the record, which proved an important step to eliminating discovery more generally. Diplock praised the procedure under Tribunals and Inquiries Act 1958 whereby a brief statement of reasons for the decision was provided. In planning appeals in particular, this information was provided in a “in a form which identifies what was the choice of answer which the Minister treated as being open to him.”¹²⁸ Judges had in such cases been “reasonably successful in developing the necessary self-restraint”.¹²⁹ The problem was that outside the limited class of Ministerial decisions to which the 1958 Act applied, there was no means to compel such a statement.¹³⁰

The procedural reforms of 1977–1981 did not, on the face of things, enact any reform along the lines suggested by Lord Diplock. The revised

¹²¹ *Anisminic* (n 6) 171.

¹²² *O’Reilly v Mackman* [1983] 2 AC 237 (HL).

¹²³ *ibid* 278

¹²⁴ *Re Racal Communications Ltd* [1981] AC 374 (HL).

¹²⁵ *ibid* 383.

¹²⁶ Diplock, ‘Administrative Law: Judicial Review Reviewed’ (1974) 33(2) *The Cambridge Law Journal* 233, 243.

¹²⁷ J Beatson, ‘The Scope of Judicial Review for Error of Law’ [1984] *Oxford Journal of Legal Studies* 22 presents a powerful argument that it did not.

¹²⁸ Diplock, ‘Judicial Control of the Administrative Process’ (n 120) 15–16

¹²⁹ *ibid*, 15.

¹³⁰ *ibid*, 16–17.

judicial procedure contained no specific power to call for such a statement. Instead, Rule 8 of Order 53 made available in judicial review proceedings the same powers to compel production of evidence as applied in ordinary civil cases.¹³¹ Yet modern judicial review practice largely dispenses with such procedures, relying instead on a sworn affidavit as Diplock proposed. This practice is praised by Woolf as an example of cooperation between the departments and the courts.¹³² The limits of the practice can be seen in *GCHQ*, where, counsel for the unions had averred that the national security rationale for the ban on union membership had been an “afterthought”, *i.e.* had been used to justify the decision *ex post facto*. As Griffith notes, the sworn statement of the Cabinet Secretary that national security was involved was taken by the Lords to be conclusive of the issue.¹³³ Moreover, Woolf’s rosy assessment of the co-operation between the departments and the courts in the 1990s seems unduly complacent in the light of Lord Justice Scott’s revelations about the use of Public Interest Immunity certificates to conceal from the courts the extent of the Government’s involvement in Iraq’s arms procurement network.¹³⁴

The rationale behind this trend becomes clear when we put it in the context of Lord Diplock’s stated concerns as to the deplorable effect that viewing the broader record might have on a court. As he stated in his memo, it was precisely such a process that was the first step on the slippery slope that would end with judges routinely setting aside administrative decisions simply because they disagree. Yet it has come at a price that is not trivial. It is ironic that the result is to make the outcome in *Anisminic* itself one that could not be reached today, because the record would not under current practice be examined.

5 Conclusions: The making or unmaking of administrative law?

This, then, is the story of the birth of our modern law of judicial review. It is a story of how, despite an ambitious and broad-based reform movement, the development of the law was channelled along narrow, primarily procedural lines. And it is a story which challenges conventional assumptions about how the common law gets made. As we have shown, the shape of modern administrative law doctrine owes as much to bureaucratic politics, closed-doors discussion, and behind-the-scenes intrigue as it does to the process of continuous, incremental development through which judicial review is usually thought to have emerged. To be sure, a series of key speeches of

¹³¹ The Rules of the Supreme Court (Amendment No. 3) 1977, S.I. 1977 No. 1955 (L. 30).

¹³² Woolf (n 106) 17

¹³³ JAG Griffith, *Judicial Politics Since 1920* (Blackwell 1993) 168.

¹³⁴ The constitutional implications of the Arms to Iraq affair are examined in Adam Tomkins, *The Constitution After Scott* (Clarendon Press 1998).

Lord Diplock articulated the key doctrinal principles on which modern law is built, and to this extent his reputation as the ‘father of administrative law’ is well-deserved. But it is equally true that these principles did not emerge in isolation. It was the bureaucratic lobbying of Coldstream and Kent, and the backdoor intervention of Lord Diplock himself, that created the conditions in which modern judicial review could assume its modern doctrinal shape.

Yet it is in terms of its consequences of a shift in legal thinking about remedies against the state that the story is most striking, because—by pointing to the intentionally restricted nature of the development of judicial review—it demonstrates the continued failure of the law to provide effective remedies for executive over-reach. In this final, concluding section, we set out what we see as some of the enduring consequences of the peculiar circumstances of the origins of our modern law.

A first point to be made concerns the foundations of the modern law. By the mid-1990s, a Lord Chancellor could, without controversy, describe it (extra-judicially) as “axiomatic of the system of judicial review in this country. . . [that] the court must rule only upon the legality of a decision and not upon its correctness; the court will concern itself with the manner in which a decision is reached rather than with the substantive merits of the decision itself.”¹³⁵ As this quote suggests, modern judicial review is grounded in a judicial philosophy in which—save in exceptional circumstances—only vires in the narrow sense or breach of essential procedural requirements justifies judicial intervention. It was precisely this narrow, vires-based understanding that the reformers of the 1960s sought to challenge, and they did so out of their own concerns with constitutional principle. They were concerned with upholding the rule of law in the face of the growth of the administrative state; but this was not just a matter of resisting the administrative state. As important to them was the salutary impact which they expected the resulting principles of good governance to have on the conduct of administrative business, by providing the same level of guidance that private law provided to the conduct of private business. So fundamentally has the understanding of the British constitution changed in the years since that we today see any judicial engagement with the merits of a discretionary decision as an affront to the proper judicial role.

The mere fact that received understanding of the constitution has changed does not, of course, mean that the change is for the worse. In evaluating the development of judicial review since the 1970s it is worth asking whether, in the light of experience, the abandonment of the approach of the mid-20th century has been a change to the good. Two points suggest that it has not.

Firstly, as the reformers recognised, the defendant in the action—the government department or other public body—does not enjoy any legally

¹³⁵ Irvine of Lairg (n 65) 60.

protected interests of its own: there is only the public interest in it performing its activities effectively. In the modern system, however, the scrutiny to which this public interest is subjected is a strange one. Rather than a contest between the private interest of the applicants and the public interest pursued by the department, as the reformers cogently argued was necessary, what we get is the paradoxical articulation of the public interest by an applicant who is actually seeking to protect a private interest, to which the department which is actually seeking to defend a public interest is constrained to respond with reference to everything save that public interest. The result is an action where pleading can never be more than strategic, and where the principles used to decide the dispute have little to do with the actual nature of the underlying conflict. Within this tortured setup, it is perhaps not surprising that the law has little to say in terms of general, substantive principles of good governance. It allows for very little reading across of principles and duties from one context to another.

The result for our law, as D. G. T. Williams has identified, is that, “Precedent is only sporadically important, and binding precedent is rare. . .”¹³⁶ The frequent repetition of “hallowed statements of principle”, he suggests, gives the appearance of consistency, but is “in truth employed to allow the judges considerable flexibility on a case-by-case basis.”¹³⁷ The underlying problem is that the distinction between merits and process, which has become foundational to the modern approach, is not at all easy draw in particular cases. The result is that the courts are drawn into matters of substance, but lack the doctrinal tools to approach such questions in a principled and methodical way.

One consequence of this is that our administrative law has mostly done a poor job of articulating—except in very vague terms bordering on the vacuous—standards of good administration, which can usefully guide civil servants in the exercise of their public powers. This is a problem for administrators as much for those who seek to challenge official decisions. James points out that the law on judicial review is helpful to administrators in articulating broad constitutional principles, but offers little guidance to administrators tasked with decision-making under broad areas of statutory discretion.¹³⁸ As our analysis has shown, administrators *do* have a conception of the rule of law, and of constitutional propriety more generally, but the modern law structures the judges’ discretion in a way that makes it impossible to engage with this administrative constitutionalism.

This problem, too, was well understood by the reformers, especially

¹³⁶ DGT Williams, ‘The Case-Law of Administrative Law’ (1982) 6 *The Trent Law Journal* 1, 8.

¹³⁷ *ibid*, 10

¹³⁸ S James, ‘The Political and Administrative Consequences of Judicial Review’ (1996) 74(4) *Public Administration* 613, 623. Ironically, he sees a return of substantive principles as one way out of this bind.

Mitchell; yet a consequence of the modern approach is that it has remained unaddressed in modern doctrine. The effect on a department of being subject to a successful judicial review has been likened to being struck by lightning—random, unpredictable and destructive—but the effects in terms of improving the quality of administration are contestable. A large section of the literature on the bureaucratic impact of judicial review is sceptical that judicial review has any impact on administrative decision-making, outside the decision challenged, or at most on the narrow class of decisions to which a specific statutory provision applies.¹³⁹ The work of Maurice Sunkin and his collaborators forms an exception, but it is profoundly significant that the specific decisions they highlighted as having improved the functioning of local authorities related to Part III of the Children Act 1989, one of the few areas of public powers in which the structure of powers and duties conferred by statute *are* in fact articulated in terms of duties to protect private interests, with the result that the law both empowers and compels judges hearing cases in this area to articulate substantive principles about the boundary between public powers and private immunities.¹⁴⁰ The cases under the Children Act 1989 instantiate the type of system that the reformers of the mid-20th century would have envisaged.

This may go some way towards explaining the “very defensive” and “somewhat petulant” tone¹⁴¹ of the (in)famous civil service guide to judicial review for civil servants, *The Judge Over Your Shoulder*. But the rise of human rights challenges, and the extension of human rights jurisprudence into areas which critics of the Human Rights Act regard as far-removed from the concerns of the framers of the European Convention on Human Rights is also readily explicable against this background. Proportionality review explicitly balances the private interest of the applicant against the public interest pursued by the department, and the review is expressly about whether the balance struck by the department was struck in the right place. As such, it is one of the few ways of ‘getting at’ the underlying basis of the dispute, and for the claimant to articulate the true legal need that motivates the challenge, namely, that he or she feels hard done by. The restriction of proportionality review to matters of EU law and human rights arguably therefore goes some way to accounting for the expansionary pressure placed on those bodies of law—which in turn may in part explain why their legitimacy has come under such scrutiny in recent years.

The failure of ordinary domestic law to address such issues is, then, the

¹³⁹ See e.g. Simon Halliday, ‘The influence of judicial review on bureaucratic decision-making’ [2000] Public Law 110

¹⁴⁰ Lucinda Platt, Maurice Sunkin, and Kerman Calvo, ‘The influence of judicial review on bureaucratic decision-making’ (2010) 20 *Journal of Public Administration Research and Theory* i243

¹⁴¹ D Oliver, ‘The Judge Over Your Shoulder’ (1989) 42(3) *Parliamentary Affairs* 302, 316.

biggest failure of the development of modern judicial review, and is arguably part of the reason why the procedural reforms of the previous coalition government were premised on a view of judicial review as damaging to the administration, rather than—in the bigger picture—helpful in structuring administrative decisions. Yet it is hard to see how the proposed restriction of judicial review will alter the position. Just as litigants have turned to human rights arguments to bring their disputes within the terms in which the courts can give a remedy, further efforts to restrict the availability of judicial review may only serve to exercise the ingenuity of litigants and their counsel; which, in turn may increase the uncertainty as to how the principles of judicial review apply. Until the nettle of substantive law reform of administrative law is grasped, the situation is unlikely to change.