Article

Reconstructing judicial review for the advancement of justice and good governance

by Sarah Nason

In *Reconstructing Judicial Review* (Hart Publishing, 2016) I examine theories of judicial review against empirical evidence and moral argument. I was particularly concerned to challenge the accuracy and normative value of the reformation or constitutionalisation theories. It was not my explicit intention to develop a new theory of judicial review, but through criticism of existing accounts and the collection of original empirical data, a new theory emerged; this is of judicial review for the advancement of justice and good governance. In the book I develop and utilise a unique methodology combining empirical evidence and moral argument to construct this new understanding. Having analysed social practice and considered its justification I am now concerned with adjustments to better achieve those justificatory purposes. My aim here is to sketch some features of judicial review for the advancement of justice and good governance focusing on how it might help condition future reforms.

HISTORICAL BACKGROUND

My theory of judicial review for the advancement of justice and good governance has historical pedigree. Others have argued that the writs once issued through the King's Bench (ancestors of contemporary judicial review applications) were primarily concerned with doing justice in the public interest where no other remedies were available or appropriate in relation to both public and private powers (Dawn Oliver, *Common Law Values and the Public-Private Divide* (Cambridge University Press, 1999) 43-7). In R v Baker (1762) Lord Mansfield concluded that mandamus:

> *ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one . . . Within the last century, it has been liberally interposed for the benefit of the subject and the advancement of justice. . . If there be a right, and no other remedy, this should not be denied* (3 Burr 1265, 1267).

AT Carter defines the early King's Bench jurisdiction as being "to take cognisance of everything not parcelled out to the other courts" (*History of English Legal Institutions* (Butterworths 1906) 85). Recently an experienced barrister described judicial review to me as a "gravy boat" of miscellaneous injustices. I argue that what appeared (and sometimes continues to appear) as a hotchpotch caseload is comprised of cases that are linked by the need to resolve conflicting interpretations of public law values, most specifically legitimate constitutional authority, individual justice (proportionate justice especially) and professional expertise in public decision-making (aligned to institutional expertise). The common law's evolving interpretation of these values helps to answer the question: how must political and legal power be exercised in order to justifiably lay claim to our allegiance?

THEORY AND METHODS

In debating theories of judicial review a stalemate has been reached that the judiciary has significant, though not necessarily absolute, responsibility for articulating concrete contours of the rule of law and that these contours can be used as a guide to develop grounds of review as well as to justify the practice. This has the evident weakness of masking disagreement over the rule of law itself alongside other public law values. There seems to be little consensus as to how a judge should go about crafting grounds of review from rule of law values. Some argue that the mission to protect the rule of law risks translating it directly into a ground of review. This lack of conceptual clarity can be damaging to the administration of justice. It has led to calls for more attention to doctrinal consistency and certainty, and less emphasis on constitutional values that may be too abstract to form grounds of argument in real cases. In *Reconstructing Judicial Review* I argue that values are central to understanding the practice, but that these must be understood as part of an evolving constructive dialogue with empirical facts. Contemporary theories do not fully account for the social practice of judicial review in England and Wales as it currently operates, this is because they pay little more than lip-service to the facts of that practice.

EMPIRICAL DISENCHANTMENT

Recent reforms to judicial review have restricted claimant and intervener recovery of costs, weakened interest group litigation, and made payment of legal aid dependent upon permission success in most cases, all in the name of increasing the efficiency of state bureaucracy and staving off vexatious claims. These reforms fail to appreciate the plurality of purposes served by judicial review and the polarised debate between legal and political constitutionalism at the theoretical level has not helped.

Whilst there has been major growth in asylum and immigration litigation, the number of ordinary (non-asylum and immigration civil judicial reviews) had remained at approximately 2,000 claims per annum since at least 1996. There has since been a significant reduction from 2,100 in 2013–14 to 1,732 in 2014–15, likely due to the reforms noted above. The caseload then increased to 1,840 in 2015–16 (data years run from and including 1 May in any given year to and including 30 May in any given year, see *Reconstructing Judicial Review*, chs 2 and 4 for methodology). However, in the calendar year 2016 it was down to just 1,605 (from Ministry of Justice Civil Justice Statistics 2016). Such is an example of what Harlow and Rawlings label the "secret dimension" of judicial review, "the expansion of parameters runs alongside a large-scale exclusion of people" (*Law and Administration*, 3rd edn (Cambridge University Press, 2009) 669). More recently Tom Hickman brands this "public law's disgrace", concluding that the majority of the population cannot bring judicial review claims, largely due to costs regimes and procedural quirks ("Public Law's Disgrace", UK Const L Blog (9 Feb 2017), available at https://ukconstitutionallaw.org/).

It is, however, important to note that judicial review is about more than caseloads and case law. Given the proportion of legal issues raised with practitioners that do not make it as far as an issued claim and high rates of withdrawal and settlement both pre and post permission, it seems that the Administrative Court may not be the central locus of judicial review litigation. The resolution of most disputes takes place outside court and the threat of judicial review is just one tool in achieving this resolution. It is the symbolic nature of issuing an application, rather than the practical impact of a judgment, that seems most significant. Whatever the specific role of the Administrative Court, the broader social practice of judicial review seems largely concerned with resolving individual claimant grievances outside court. Given the major recent reduction in issued claims, there is a pressing need for a contemporary re-examination of paths to resolution of potential, but not actualised, judicial review claims.

In *Reconstructing Judicial Review* (chs 4 and 5) I examine the increased desire by government to enumerate, sometimes by statute and sometimes by executive measures, specific and limited grounds on which public power may be challenged. Most often political interference takes the form of additional procedural hurdles and circumscribed remedies designed, at least in part, to avoid the breadth, flexibility and potential wider consequences of the inherent supervisory jurisdiction.

One-third of the Administrative Court's caseload is made up of various types of statutory appeals, the number of which has been increasing in recent years. Whilst these procedures can offer proportionate dispute resolution in cases turning on the interpretation of specialist law and policy (such as in planning law, professional discipline or extradition), it can be argued that the authority of judicial review is weakened if its use is limited by the availability of statutory procedures that may address individual grievances, but which do not perform the associated constitutionally symbolic purposes.

Whilst research identifies the value added by Administrative Court judicial review in terms of wider positive consequences for the administration of justice and good governance even in claims initially appearing to turn on their own facts, it does not tell us what qualifies any particular own fact claim for resolution via judicial review (Bondy, Platt and Sunkin, *The Value and Effects of Judicial Review: the Nature of Claims, their Outcomes and Consequences* (PLP, LSE, University of Essex, 2016). Peter Cane has described the distinction between lower level appeal (and review) in other courts and tribunals and higher court judicial review as a divide between Lexus and Lada justice ("Judicial Review in the Age of Tribunals" [2009] *Public Law* 492, 487), but we do not seem to have any specific ex ante criteria for accessing the premium brand. My analysis suggests that the criteria include some distinct or extreme sense of injustice beyond mere legal error. The proportion of judicial review applications having broader connotations in terms of the exposition of legal principles, constitutional values or wider public interest has increased in recent years, to roughly 58 per cent in 2015–16 (data from *Reconstructing Judicial Review* ch 4). Such data can be conceptualised in different ways. One can argue that the increased prominence of "higher level" cases alongside an overall reduction in caseload sees judicial review re-balancing to its ancestral role of addressing extreme injustices. But the question remains whether the general public has sufficient access to hold the administrative state to account?

Just under half the Administrative Court's caseload still concerns a small set of topics, such as town and country planning, housing, and professional discipline, primarily involving individual grievances against routine administrative decision-makers. Are we to conclude that judicial review in these individual instances is increasingly the preserve of those who can afford to bring non legally-aided proceedings?

Access to judicial review is patchy outside London and measures to regionalise the Administrative Court have been weakened by later procedural and costs reforms. This is

evidenced by comparatively low and decreasing levels of claims per head of resident population outside Greater London and the south east of England. The market for public law legal services is shrinking, especially outside southern England. The majority of solicitors issuing judicial review claims in the Administrative Court issue only one claim in any given year, and the majority of barristers they instruct also appear only once per annum. Though the data suggest that judicial review performs a range of functions, any demarcation between discrete specialisms of administrative, constitutional and human rights law is not reproduced at the level of legal practice, nor is it likely to be given the tiny number of cases involved. Judicial review practice is not highly individuated, nor is it a "lucrative industry". Indeed more than 30 per cent of applicants in ordinary civil claims are now unrepresented.

There is some evidence of a two-tier jurisdiction: one tier (primarily based in London) comprising a largely constitutionalised court determining high-profile cases involving elite decision-makers such as high-ranking members of central government, dealing with claims of national public interest and ensuring consistency across tribunalised, devolved, national and international legal regimes; another (local) tier primarily concerned with issues of importance to local communities and routine individual grievance (street-level bureaucratic) applications often issued by litigants in person. The picture seems to be one in which the Royal Courts of Justice in London are the apex for generating complex public law doctrines and for creating the kind of constitutionalism characteristic of the reformation. Findings about the activities of solicitors and barristers and the topics of largely local litigant in person litigation reinforce this division. The non-constitutionalised half of judicial review concerns individual grievances or own fact claims that are often non-complex and mainly issued in person or by local non-specialist solicitors; in these circumstances traditional ultra vires, private rights and some versions of political constitutionalism may provide the better explanation of social practice.

Common law constitutionalism and the reformation tend to focus only on specifically legal values evident in higher-level constitutional claims. Whilst private rights-inspired political constitutionalism may give more prominence to the role of judicial review in resolving individual grievances, this account does not capture how the Administrative Court addresses these claims and their significance to the broader advancement of individual justice. Empirical scholars and theorists alike have stressed the importance of judicial review in mediating value conflicts and providing a sense of individualised administrative justice. My analysis of case law suggests that value conflicts are as evident in street-level bureaucratic individual grievance claims as they are in higher-level constitutional or public importance cases. Judicial review for the advancement of justice and good governance recognises that the practice is concerned with mediating conflicts among a wide range of values, some more legally flavoured and others more administratively favoured (good governance especially).

FROM VALUES TO GROUNDS AND DOCTRINE

On analysing 482 substantive judicial review judgments I conclude that existing accounts of the doctrinal grounds of review, most notably the current fixation with incrementally grading substantive review, do not fit with how judges decide cases at the coal face. I argue for a simplified taxonomy of grounds peeled off from judicial practice. This eschews fine conceptual demarcation, but is sufficiently concrete to provide pegs for organising arguments. The new taxonomy includes; mistake, ordinary common law statutory interpretation, procedural impropriety, discretionary impropriety, breach of human rights or equality duties and significant public interest or constitutional importance (*Reconstructing Judicial Review,* chs 6 and 7).

The mistake ground is developed from the roughly 14 per cent of cases where the defendant's decision was obviously wrong, regardless of whether the mistake was of logic, law or fact.

Procedural impropriety continues to be a useful category despite the unclear boundary between procedure and substance, largely because ordinary citizens can distinguish concepts, such as a fair hearing, bias and the need for some degree of consultation, from the decision itself in a useful (if not absolute) manner. Procedural fairness is recognised as having elastic qualities, not "engraved on tablets of stone" (*Lloyd v McMahon* [1987] AC 625,702 (Lord Bridge)). It is already understood as an interpretive concept the meaning of which is dependent upon social context.

The orthodox terminology of "illegality" was rarely referred to in the sample of cases; the most common categorisation was "unlawful", and this applied to instances where a public decision-maker had misinterpreted their statutory grant of power. Judges applied ordinary principles of common law statutory interpretation that comprise particular forms of rationality, including linguistic or ordinary language rationality, systematic rationality, pragmatic rationality, purposive rationality and moral rationality. The choice to apply one particular conception of rationality above another came down to an assessment of the consequences of that choice in light of the values at stake.

My fifth category, breach of an ECHR-protected right or equality duty, encompasses two species of statutory appeals. It is part of the traditionally flexible nature of the common law that rights claims can be raised in any proceedings. The distinguishing characteristic of the Administrative Court

here is its seniority; for example, it can issue declarations of incompatibility. Determining these claims through the judicial review procedure is also convenient since many claims raising human rights or equality arguments also include ordinary common law claims of purpose and relevant/irrelevant considerations. Structured application of proportionality was rare in the sample judgments. Again in rights-based claims judicial reasoning turned on whether irrelevant considerations had been excluded and relevant considerations addressed.

The most commonly occurring ground was discretionary impropriety. I also refer to this as a failure to take into account relevant considerations and taking into account irrelevant considerations, or lack of sufficient justification. This ground focuses on the quality of the defendant's reasoning and often engages moral argument. Appreciating the probable critique that this tends to abstract value judgements, I also develop an account of non-formal judicial rationality with tools appropriate to contour and constrain the judicial task. This utilises both formal and non-formal reasoning, observation, creativity and systematic critical appraisal, including practical knowledge as well as technical knowledge. This constructivist account of rationality encompasses the view that we can strive towards universal right answers in balancing or reconciling competing interpretations of values, including the parties' competing interpretations of the value of justice in individual claims. However, it does not make success in legal theory, judicial reasoning or in litigation consequent upon conclusively establishing these right answers, but rather on reaching an acceptable counterpoint solution in all the circumstances.

Given concerns raised about the need for constitutionally specialised judges, and evidence of growth in more constitutionally flavoured claims, it is worth recognising a distinct category of claims in which points of contested constitutional principle, and in particular the inter-institutional allocation of powers between branches of state, are more directly at issue. I conclude that this could be along the lines of the "significant" category of claims now utilised in relation to planning judicial reviews.

RECOMMENDATIONS FOR THE ADMINISTRATION OF JUSTICE

The length of judicial review skeleton arguments continues to increase in part due to increasingly complex doctrines, most of which are rarely explicitly relied on in judicial reasoning. The six categories of grounds could be pleaded explicitly on an N461 Claim Form alongside a minimal amount of supporting detail.

These six grounds can form part of a debate about the complexity, coherence and adequacy of current doctrinal proliferation and whether there is value in some codification of a more simplified set of grounds.

The sixth category of constitutional or public interest significance assists in the deployment of more constitutionally specialist judges and could also be used to trigger an expedited procedure. It helps identify how the constitutional significance of judicial review itself develops over time, contributing to our understanding of the nature and content of the UK constitution.

The distinction between higher constitutional and own-fact individual grievance claims should be further explored to assist in reassessing criteria for accessing High Court judicial review. This should be alongside consideration of whether some claims that can currently only be addressed by judicial review would be better diverted into statutory appeals or tribunal processes, and/or whether all species of judicial review need to be determined at High Court (or Upper Tribunal) level. Could the current crisis in access to public law justice be tackled in part by simplified grounds applied in the county courts (in appropriate cases)? Could a twin-track remedial process be developed whereby stronger constitutional remedies are apt to cases with wider systemic significance and individual grievances are fairly addressed by effective personalised remedies, including reconsidering the relevance of monetary remedies outside specifically human-rights based claims.

This should be part of a broader review of how the law holds the administrative state to account, especially given other recent developments such as limiting (or removing) appeal rights, the growth of mandatory internal administrative review, and increasingly weak Parliamentary supervision.

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