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## Administrative Justice in the United Kingdom

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# Administrative Justice in the United Kingdom

Gordon Anthony \*

## INTRODUCTION

One of the better-known features of UK administrative law, at least when viewed from a comparative perspective, is its relative youth as an organised system of principles centred upon the rule of law.<sup>1</sup> Traditionally, much scholarly interest in that system has focused upon judicial review as a means for mediating relations between individuals and the state (and as between state bodies themselves), where the courts have famously developed new grounds for reviewing the actions and inactions of public authorities.<sup>2</sup> However, while doctrinal developments remain the primary concern of much scholarship in the UK, recent years have also seen a growing academic interest in “administrative justice” as a framework for analysing relations between individuals and the state.<sup>3</sup> Although the term “administrative justice” does not lend itself to singular definition – a point that is returned to below – it is generally associated with a more holistic approach to citizen redress that regards judicial review as but one mechanism among (many) others that include tribunals, ombudsmen, and alternative dispute resolution.<sup>4</sup> The nature of this shift has been seen not just in an increased use of empirically grounded studies in administrative justice<sup>5</sup>, but also in a restatement of the values that are said to condition exercises of public power.<sup>6</sup> Administrative justice has thus absorbed the values of legality, fairness and rationality that have historically defined judicial review whilst also making links to values that are more readily associated with governance studies – transparency, accountability, input participation, efficiency, and so on.

The corresponding purposes of this article are modest: to explain in more detail how and why the language of administrative justice has become more prominent in recent years; to identify some of the primary mechanisms of administrative justice and how they interact with one another; and to note some of the challenges that administrative justice faces in an era of government austerity. This last point is perhaps the most telling of those to be made, as reduced government spending on the mechanisms that facilitate administrative justice inevitably has the potential to hollow out the very values that are said to infuse administrative justice. This prospect has since given rise to a number of applications for judicial review in which challenges have been made either to the fact of changes in funding or to institutional failures that have resulted from a reduced capacity to provide services to

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<sup>1</sup> See J Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law*, Oxford University Press, 2000.

<sup>2</sup> For a seminal account see H Woolf et al, *De Smith’s Judicial Review*, Sweet and Maxwell, London, 7<sup>th</sup> ed, 2013.

<sup>3</sup> An important contribution is M Partington, ‘Restructuring administrative justice? The redress of citizens’ grievances’ (1999) 52 *Current Legal Problems* 173, discussed below.

<sup>4</sup> See generally M Adler (eds), *Administrative Justice in Context*, Hart Publishing, Oxford, 2010.

<sup>5</sup> See, eg, S Halliday, *Judicial Review and Compliance with Administrative Law*, Hart Publishing, Oxford, 2004 and R Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication*, Hart Publishing, Oxford, 2011.

<sup>6</sup> C Harlow and R Rawlings, *Law and Administration*, Cambridge University Press, 3<sup>rd</sup> ed, 2009, p 483.

the public.<sup>7</sup> While not all of the cases have succeeded – the principles of judicial review of course provide for judicial restraint where that is deemed appropriate – they have revealed in sharp form the tension that can exist between some of the normative and practical dimensions to administrative justice. They have, at the same time, also revealed something of an irony about the role that judicial review now plays within administrative justice: while judicial review remains the primary barometer of the legality of government choices, access to it can be affected by reduced government spending in the important social area of legal aid.<sup>8</sup>

The analysis begins with a short section that traces the emergence of administrative justice as a field of study and which considers one of the primary ways in which it may be defined. There then follows a section that provides an overview of consultation requirements in UK law, of the functions of the office of the Parliamentary Ombudsman, and of the roles that are played by tribunals and judicial review. Although an overview of such mechanisms can only ever offer a partial insight into their significance, the purpose of this section is to give examples of some of the ways in which the values of legality, accountability, participation and so on take form in UK law. The final substantive section returns to the matter of austerity and administrative justice, while the conclusion offers some summative points about the role and relevance of administrative justice.

### TOWARDS “ADMINISTRATIVE JUSTICE”

The historically dominant position that judicial review has occupied in scholarship reflects nothing more than the fact that it has defined many important developments in both the constitutional and administrative law of the UK.<sup>9</sup> Even before the current judicial review procedure was introduced by statute law in the late 1970s/early 1980s<sup>10</sup>, the courts had already drawn upon the common law to identify key elements of, what Garner termed, a “coherent system of administrative procedure”.<sup>11</sup> Central to that procedure were requirements of fairness and a prohibition on the abuse of power, and the judges also took steps to safeguard their supervisory jurisdiction in the face of apparently clear legislative overrides on access to the courts.<sup>12</sup> However, while such case law arguably introduced a nascent public/private divide into UK law, it was with the procedural reforms of the late 1970s/early 1980s that that divide assumed a fundamental importance.<sup>13</sup> In some of its earliest rulings under the new procedure, the House of Lords (now Supreme Court) variously held that public law rights and interests could be vindicated only by way of application for judicial review<sup>14</sup>; that the new rules on standing were intended to avoid technical distinctions that had previously governed access to remedies<sup>15</sup>; and that the grounds for judicial review were fluid and open to change.<sup>16</sup> While the requirement that individuals vindicate their rights and interests exclusively through the judicial

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<sup>7</sup> E.g., *R (Unison) v Lord Chancellor* [2014] EWHC 4198 (Admin), [2015] 2 CMLR 4 at 111, and *Re Martin’s Application* [2012] NIQB 89, discussed below.

<sup>8</sup> For some issues see *IS v The Director of Legal Aid Casework* [2015] EWHC 1965 (Admin).

<sup>9</sup> See generally W Wade and CF Forsyth, *Administrative Law*, Oxford University Press, 11<sup>th</sup> ed, 2014.

<sup>10</sup> For the position in England and Wales see Wade and Forsyth, n 9 above, ch 18. For Northern Ireland, see G Anthony, *Judicial Review in Northern Ireland*, Hart Publishing, Oxford, 2<sup>nd</sup> ed, 2014, ch 3; and, for Scotland, see C Himsworth, ‘Judicial Review in Scotland’ in M Supperstone *et al* (eds), *Judicial Review*, Lexis Nexis, London, 5<sup>th</sup> ed, 2014, pp 865-929.

<sup>11</sup> JF Garner, ‘Administrative Law – A Step Forward?’ (1968) 31 *Modern Law Review* 446.

<sup>12</sup> *Ridge v Baldwin* [1964] AC 40; *Padfield v Minister of Agriculture* [1968] AC 997; *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

<sup>13</sup> Although not in Scotland: see *West v Secretary of State for Scotland* 1992 SC 385.

<sup>14</sup> *O’Reilly v Mackman* [1983] 2 AC 237.

<sup>15</sup> *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

<sup>16</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411, Lord Diplock.

review procedure proved to be unduly rigid – its effects were subsequently relaxed<sup>17</sup> – the approach to standing and to the grounds for review provided the basis for far-reaching development of the law. The standing rules thus came to be read liberally and in a way that facilitated applications for judicial review not just by individuals but also by pressure groups<sup>18</sup>, while the grounds for review expanded on the basis of both the common law and in the light of European influences.<sup>19</sup>

The scholarly move away from studying judicial review primarily within its doctrinal parameters was prompted by a number of factors. One was an awareness that developments in relation to standing and so on tended to happen in “high profile judicial review” cases that often raised matters of considerable political importance involving central government Ministers.<sup>20</sup> The point here was not that the cases were wholly exceptional – they typically contained important statements about the rule of law principle that operates at the heart of administrative law – but rather that they were factually very different from the vast majority of cases that were heard by way of application for judicial review. Empirical research conducted in the 1990s, in particular, established that judicial review cases tended to concentrate in areas such as prisons, immigration and housing, and academic interest was drawn to the question whether judicial review had any discernible impact on the quality of bureaucratic decision-making in those areas.<sup>21</sup> While this gave rise to inevitable definitional and methodological challenges – notably how to identify and measure impact<sup>22</sup> – it marked a clear shift away from a positivist scholarly tradition towards one that was more socio-legal in nature.<sup>23</sup> The corresponding aim of the new scholarship was to fill in “gaps in our empirical knowledge” and to “consider the significance of those gaps” as part of wider debates about the role of judicial review in the UK.<sup>24</sup>

Another factor that prompted the change in approach was the reality that, for the vast majority of individuals, their interactions with the administrative state occurred in *fora* other than the High Court that hears applications for judicial review. At its most obvious, this was a point about the role of specialist tribunals that were established by statute and given an adjudicatory function in areas such as social security, mental health, and education.<sup>25</sup> Although the decisions of tribunals were (and are) subject either to a right of appeal or to judicial review – the current structures are outlined below – tribunals were intended to give individuals access to a system of justice that was more efficient and informed than that which would be provided by the ordinary courts.<sup>26</sup> Moreover, even before individuals could have recourse to tribunals and/or the courts, there could be an expectation

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<sup>17</sup> *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624. See too, more recently, *Ruddy v Chief Constable of Strathclyde* [2012] UKSC 57, 2013 SC (UKSC) 126.

<sup>18</sup> See, eg, *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386 and *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2012] EWHC 2579 (Admin), [2012] ACD 109. But note that the position is more restrictive where cases fall under section 7 the Human Rights Act 1998: see, eg, *Re The Committee on the Administration of Justice's Application* [2005] NIQB 25.

<sup>19</sup> P Craig, *Administrative Law*, Sweet and Maxwell, London, 7<sup>th</sup> ed, 2012, chs 12-23.

<sup>20</sup> The phrase is Peter Cane's: see 'Understanding Judicial Review and its Impact' in M Hertogh and S Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*, Cambridge University Press, 2004, p 15 at p 18.

<sup>21</sup> See, perhaps most famously, the Public Law Project's *Judicial Review in Perspective: An Investigation of Trends in the Use and Operation of the Judicial Review Procedure in England and Wales* (London, 1993).

<sup>22</sup> See further Cane n 20 above.

<sup>23</sup> On which shift see further, eg, C Hunter (eds), *Integrating Socio-Legal Studies into the Law Curriculum*, Palgrave Macmillan, 2012.

<sup>24</sup> M Sunkin and G Richardson, 'Judicial review: questions of impact' (1996) *Public Law* 79.

<sup>25</sup> See further Wade and Forsyth, n 9 above, ch 23.

<sup>26</sup> See the *Report of the Committee on Administrative Tribunals and Enquiries*, 1957, Cmnd 218 (the so-called “Franks Report”).

that they would first engage in attempts at alternative dispute resolution or that they would avail themselves of mechanisms for “internal” reviews of contested decisions.<sup>27</sup> Such requirements, which have been said to have become “*de rigueur*” in recent years<sup>28</sup>, were intended to deal with disputes at their source and in a way that allowed individuals to participate more directly in any reconsideration of a decision that affected them.<sup>29</sup> Outside of such pre-action and court-based remedies, there remained the possibility of recourse to a number of other mechanisms for raising grievances, notably commissions, ombudsmen, and inquiries.<sup>30</sup>

The argument that these mechanisms should be viewed holistically – and from the perspective of “administrative justice” – was made by a number of commentators who included Martin Partington.<sup>31</sup> For Partington, administrative justice was a concept that, while admittedly difficult to define, embraced “the whole range of decision-taking from first decision to final appeal, not simply those processes that can be labelled ‘adjudicative’”.<sup>32</sup> Partington’s concern here was that, if attention were to be given only “to what happens at stages after the initial decision has been taken”, this “would be to ignore the fundamental challenge of administrative justice, to get the decision right first time round”.<sup>33</sup> Of course, this begs the anterior question of how to ensure that decisions can be “right the first time round”, and Partington noted the importance of key values and principles such as participation, transparency, fairness, efficiency, consistency, rationality, equality, and choice and consultation.<sup>34</sup> While other commentators have rightly cautioned that the out-workings of such values are crucially affected by matters of institutional culture<sup>35</sup>, Partington’s approach posited a continuum along which the values of participation and so on could be protected at any time from administration through to adjudication. On this reading, administrative justice might fairly be described as, “the overall system by which decisions of an administrative or executive nature are made in relation to particular persons including (a) the procedure for making such decisions, (b) the law under which such decisions are made and (c) the systems for resolving disputes and airing grievances in relation to such decisions”.<sup>36</sup>

It is important to note that Partington accepted that there is no set definition of administrative justice and that his contribution was made with that point very much in mind.<sup>37</sup> His definition does, however, still offer a useful framework for analysing the role of the various mechanisms of administrative justice, albeit that two comments might be made about his approach. The first concerns the difference between “administrative justice” and “administrative law”, as the

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<sup>27</sup> On alternative dispute resolution see S Boyron, ‘The rise of mediation in administrative law disputes: experiences from England, France and Germany’ [2006] *Public Law* 320. For an example of internal review see Freedom of Information Act 2000, ss 45 and 50(2)(a), as read with the Government issued Code of Practice at <https://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice>.

<sup>28</sup> P Birkinshaw, ‘Grievances, Remedies and the State – Revisited and Re-appraised’ in Adler (eds) n 4 above, p 353.

<sup>29</sup> But compare D Cowan and S Halliday (ed), *The Appeal of Internal Review: Law, Administrative Justice and the (non-) Emergence of Disputes*, Hart Publishing, Oxford, 2004.

<sup>30</sup> See further T Mullen, ‘A Holistic Approach to Administrative Justice’ in Adler (eds) n 4 above, p 383.

<sup>31</sup> N 3 above, and, eg, M Harris and M Partington (ed), *Administrative Justice in the 21<sup>st</sup> Century*, Hart Publishing, Oxford, 1999. See also, eg, M Adler, ‘A Socio-Legal Approach to Administrative Justice’ (2003) 25 *Law and Policy* 323.

<sup>32</sup> N 3 above at 176.

<sup>33</sup> N 3 above at 178.

<sup>34</sup> See also R Thomas, ‘Administrative justice, better decisions, and organisational learning’ [2015] *Public Law* 111.

<sup>35</sup> On which idea see S Halliday and C Scott, ‘A Cultural Analysis of Administrative Justice’ in Adler (eds) n 4 above, p 183, and references therein.

<sup>36</sup> Tribunals, Courts and Enforcement Act 2007, Sch 17, para 13; since repealed by Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013/2042, Sch 1, para 36.

<sup>37</sup> N 3 above at 174. For some of the different approaches to the concept see the contributions in Harris and Partington (ed) n 31 above. See, also, the website of the UK Administrative Justice Institute at <http://ukaji.org/>.

above description of administrative justice would plainly suggest a large degree of overlap with the body of (administrative) law that regulates the exercise and non-exercise of power by public bodies.<sup>38</sup> On this point, Partington himself acknowledged the extent of overlap but suggested that the difference was ultimately to be found in administrative law's primary focus on judicial review as compared to administrative justice's interest in "a much wider variety of activity and values than simply the work of the higher courts".<sup>39</sup> Whether this is where the real dividing line between the two is to be found may, however, be doubted, particularly given Peter Cane's analysis of the difference between the two. In his seminal book on administrative law, Cane suggests that administrative justice is, in some respects, "narrower" than administrative law because of its "focus on the making of decisions about individuals". While Cane also accepts that administrative justice's focus upon individual engagement at the administrative stage perhaps lies beyond traditional understandings of administrative law, he notes that administrative law continues to regulate areas of very real significance that apparently do not come within the ambit of administrative justice. As he writes: "One of the most significant aspects of public administration is the making of legal rules (secondary legislation) and the development of general policies (soft law), and administrative law has quite a lot to say about bureaucratic law-making and policy-making".<sup>40</sup>

The second comment concerns the values and principles that exist across Partington's administration-adjudication continuum. It has already noted in the introduction that these values and principles represent something of an amalgam of those that have historically been found in judicial review and in governance studies. While it is inevitable that some of the values and principles will have much greater import at different stages on the continuum, the passage of time may well have resulted with judicial review absorbing and mobilising some of governance's values at the adjudication end of the spectrum. An example here may be transparency, which, for some, has entered the lexicon of more traditional public law scholarship.<sup>41</sup>

## ADMINISTRATIVE JUSTICE – SOME MECHANISMS

Turning to some of the primary mechanisms that underlie the workings of administrative justice, there are four that fall for consideration in this article: consultation requirements; the Parliamentary Ombudsman; tribunals; and judicial review. As will become apparent below, these examples have been chosen because they reveal something about the nature of the administration-adjudication continuum, as well as about the manner in which the various mechanisms for redress link together. They also reveal something about how disputes might be solved at source before recourse is had to more formal mechanisms: to take judicial review as an example, there is a well-established pre-action protocol that must be observed in almost all cases before proceedings can be brought in the High Court.

### ***Consultation***

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<sup>38</sup> For some of the possible definitions see Harlow and Rawlings, n 6 above, ch 1, and Craig, n 19 above, ch 1.

<sup>39</sup> N 3 above at 175.

<sup>40</sup> *Administrative Law*, Clarendon Press, Oxford, 5<sup>th</sup> ed, 2011, pp 18-19.

<sup>41</sup> See C Howell, 'Is There a General Principle Requiring Transparency about How Decisions Will be Taken?' [2011] 16 *Judicial Review* 322.

Consultation requirements in the UK are underpinned both by traditional common law principles of fairness – sometimes also referred to as the rules of natural justice – and by a more recent emphasis on participation as a value that should inform decision-making. Certainly, the common law has long been synonymous with the right to a fair hearing, which, while historically linked to a more narrow protection of rights and interests, now potentially applies whenever “(anyone) decides anything”.<sup>42</sup> This broadening of the scope of application of the rules of fairness has been one part of the doctrinal narrative that has emerged around judicial review, where the courts have noted the importance of hearing rights even in the difficult context of national security cases.<sup>43</sup> However, it is also true that consultation requirements are not the sole preserve of the common law, as they can be imposed by a statute that delegates a power of decision to a public decision-maker.<sup>44</sup> They can also feature at the level of what might be termed “soft law”, viz where government bodies decide that best practice in any event requires that they should actively to seek to ascertain the views of those who will be affected by a decision that is to be taken.<sup>45</sup>

The rationale for fair hearing rights/consultation and participation in decision-making has been considered in two recent rulings of the UK Supreme Court. The first was *Re Reilly’s Application*, which concerned the elements of the right to a fair hearing when prisoners come before a panel of Parole Commissioners.<sup>46</sup> In considering the principles and values that illuminate the common law, Lord Reed stated that “[T]here is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information that is properly tested”.<sup>47</sup> His Lordship also noted the imperative of avoiding “the sense of injustice which the person who is the subject of the decision will otherwise feel”, where he added that “justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken”.<sup>48</sup> His Lordship concluded his comments by linking procedural fairness to the rule of law: “Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions”.<sup>49</sup>

The second case was *R (Moseley) v Haringey London Borough Council*, where the issue was whether the respondent authority had been in breach of a statutory duty to consult in relation to council tax schemes.<sup>50</sup> In finding that the respondent authority had been in breach of that duty, Lord Wilson noted that the duty to consult can be sourced in either statute law or the common law and that, in the latter instance, “the search for the demands of fairness ... is often illuminated by the

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<sup>42</sup> *Board of Education v Rice* [1911] AC 179, 182, Lord Loreburn. See further P Leyland and G Anthony, *Textbook on Administrative Law*, Oxford University Press, 7<sup>th</sup> ed, 2013, ch 17.

<sup>43</sup> Eg, *HM Treasury v Ahmed* [2010] UKSC 2 & 5, [2010] 2 AC 534 (albeit as read in the light of the the Terrorist Asset-Freezing Act [Temporary Provisions] Act 2010 and the Terrorist Asset-Freezing Act 2010) and *Bank Mellat v HM Treasury* [2013] UKSC 38 & 39, [2014] AC 700.

<sup>44</sup> See further Leyland and Anthony, n 42 above, ch 16.

<sup>45</sup> See [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/255180/Consultation-Principles-Oct-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf).

<sup>46</sup> [2013] UKSC, [2014] AC 1115.

<sup>47</sup> [2013] UKSC, [2014] AC 1115, 1149, para 67.

<sup>48</sup> [2013] UKSC, [2014] AC 1115, 1149, para 68.

<sup>49</sup> [2013] UKSC, [2014] AC 1115, 1150, para 71.

<sup>50</sup> [2014] UKSC 56, [2014] 1 WLR 3947.

doctrine of legitimate expectation”.<sup>51</sup> Drawing upon Lord Reed’s earlier comments in *Reilly*, his Lordship reiterated that consultation can enhance the quality of decision-making and engender a deeper sense of justice, where he noted a further purpose of consultation as that which is “reflective of the democratic principle at the heart of our society”.<sup>52</sup> Lord Reed, in *Moseley*, likewise spoke of the need for “meaningful public participation” through the medium of consultation, where his Lordship focused on the importance of the statutory context to the case before him.<sup>53</sup>

Such *dicta* suggest that the language of participation is now infusing the courts’ approach to consultation, where a crucial link is made to a wider democratic ideal within public law more generally. But does this necessarily mean that the common law rules and so on will always allow individuals to participate in decision-making processes in the manner that is envisaged by the literature on administrative justice? At one level, the answer to this question can only be in the positive, as there will be many cases in which citizen involvement in decision-making is demanded and in which judicial protection of that involvement will be guaranteed. However, there are, at the same time, some limitations to the common law approach, and it is these that reveal some of the differences between administrative law and administrative justice such as were commented upon above. The point here is that the common law approach has its origins in an unavoidably adjudicative model whereby the focus will typically be placed upon the presentation of evidence and reasoned argument on behalf of the individual.<sup>54</sup> While that model will, again, be suitable for many decision-making processes, it may not be one that is suited to all, for instance those that are concerned with the initial allocation of benefits to vulnerable persons who come from a position of social need and who may not be able fully to project their own interests. It thus here that is sometimes said that a shift in institutional culture may be required so that consultation can become associated more with managerial and customer interests and less with a decision-making model that places parties in inevitable opposition to one another.<sup>55</sup>

### ***The Parliamentary Ombudsman***

The office of the Parliamentary Ombudsman in turn provides one of the best-known examples of how individuals can raise grievances outside the judicial process, where the primary value that is at work is accountability in respect of exercises and non-exercises of public power.<sup>56</sup> Historically, the term “the Ombudsman” has very much been synonymous with the work of that office, although there are now many other ombudsmen that work within the public and private sectors.<sup>57</sup> The office of the Parliamentary Ombudsman itself was created under the Parliamentary Commissioner Act 1967 and it is empowered to investigate complaints of “maladministration” that are made in relation to a wide range of central government departments and associated bodies<sup>58</sup> (complaints are made through Members of the Westminster Parliament and may be made by any member of the public, including a corporation<sup>59</sup>). The threshold concept of “maladministration” is not defined in the legislation,

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<sup>51</sup> [2014] UKSC 56, [2014] 1 WLR 3947, 3956, para 23.

<sup>52</sup> [2014] UKSC 56, [2014] 1 WLR 3947, 3957, para 24.

<sup>53</sup> [2014] UKSC 56, [2014] 1 WLR 3947, 3962, para 39.

<sup>54</sup> See further Craig, n 19 above, at pp 380-383.

<sup>55</sup> *Ibid*, citing, among others, Jerry Mashaw’s seminal work, *Bureaucratic Justice*, Yale University Press, 1983.

<sup>56</sup> See further M Elliott, ‘Ombudsmen, Tribunals, Inquiries: Re-fashioning Accountability Beyond the Courts’ in N Bamforth and P Leyland (ed), *Accountability in the Contemporary Constitution*, Oxford University Press, 2013, p 233.

<sup>57</sup> See further Harlow and Rawlings, n 6 above at pp 480-483, writing about “ombudsmania”.

<sup>58</sup> Parliamentary Commissioner Act 1967, s 4 and Sch 2.

<sup>59</sup> Parliamentary Commissioner Act 1967, ss 5-6.

although it is generally taken to embrace “bias, neglect, inattention, delay, incompetence, ineptitude, arbitrariness and so on”.<sup>60</sup> When investigating complaints, the Ombudsman enjoys significant powers of enquiry – for instance, in accessing information<sup>61</sup> – albeit there are also some important limits to the office’s powers. These include a statutory requirement that maladministration should result in “injustice” before the Ombudsman can make adverse findings,<sup>62</sup> as well as a rule whereby investigations cannot be carried out when a complainant has, or had, a means of legal redress in the courts or tribunals.<sup>63</sup> This latter rule has inevitably given rise to litigation, and there have been cases in which the Ombudsman has been held to have acted *ultra vires* by proceeding with an investigation when the affected individual had an alternative means of legal redress.<sup>64</sup> However, the limiting effect of this rule must also be seen in the light of the Ombudsman’s discretion to investigate a complaint where he/she is satisfied that, in the particular circumstances, it is not reasonable to expect the remedy to be, or to have been, invoked.<sup>65</sup> It is further significant that, whatever the formal legal position, there have been several – and in some cases celebrated – instances of overlap between the Ombudsman and the courts.<sup>66</sup>

The principal remedy that is open to the Ombudsman is the publication of a report that recommends that the investigated department take one or several courses of action.<sup>67</sup> The Ombudsman does not, as such, have power to force a body to quash a decision, or change its practices and/or pay compensation, although the government department will often act on the recommendation. Moreover, where a public body is minded to reject a finding of fact on the part of the Ombudsman, case law has established that it may only do so for “cogent reasons”. Where no such reasons exist, it may be that the public body will have acted in a manner that is irrational in public law terms and that its decision may be quashed by way of an application for judicial review.<sup>68</sup>

The above model is generally regarded as having been successful in ensuring a heightened degree of accountability, and some of the other areas in which the model has been adopted include local government, policing, prisons, and pensions.<sup>69</sup> While the detail of each specific complaints system will depend upon the terms of its underlying statute (or agreement, for those other ombudsmen that operate in the private sector<sup>70</sup>), it is axiomatic that the ombudsman system offers a means of redress to individuals that is both low cost and potentially very effective in outcome. As against that, it is also the case that all public sector ombudsmen depend upon public funding to carry out their work, and austerity measures and limited resources are inevitably having some impact on the functioning of offices. The significance of this point will be returned to below, where the example of the Police Ombudsman for Northern Ireland will be used to illustrate the tensions that now exist within the wider system of administrative justice.

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<sup>60</sup> The so-called “Crossman catalogue”. On the open-ended nature of the catalogue see *R v Local Commissioner for Administration, ex p Bradford MCC* [1979] QB 287.

<sup>61</sup> Parliamentary Commissioner Act 1967, ss 8-9.

<sup>62</sup> Parliamentary Commissioner Act 1967, s 5(1)(a). And see, by analogy, *R v Local Commissioner for Administration, ex p Eastleigh Borough Council* [1988] QB 855; *Re Sherrie’s Application* [2013] NICA 18; and *Re JR 55’s Application* [2014] NICA 11.

<sup>63</sup> Parliamentary Commissioner Act 1967, s 5(2).

<sup>64</sup> See, by analogy, *R v Commissioner for Local Administration, ex p Croydon London Borough Council* [1989] 1 All ER 1033.

<sup>65</sup> s 5(2).

<sup>66</sup> See, perhaps most famously, *Congreve v Home Office* [1976] 1 All ER 697, commented upon in Wade and Forsyth, n 9 above, pp 76-77.

<sup>67</sup> Reports are published on-line and can be accessed at <http://www.ombudsman.org.uk/>.

<sup>68</sup> *R (Bradley) v Secretary of State for Work and Pensions* [2009] EWCA Civ 36, [2009] QB 14. See also *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin).

<sup>69</sup> See Leyland and Anthony, n 42 above, at pp 147-8.

<sup>70</sup> Harlow and Rawlings, n 6 above, p 481.

## **Tribunals**

It has already been noted above that tribunals perform an adjudicatory role in a wide range of areas and that they have historically been intended to provide individuals with effective and efficient means of redress before specialist decision-makers. The greater part of the modern tribunal system is now governed by the Tribunals, Courts and Enforcement Act 2007, which established a two-tier structure within which First-tier tribunals in specific areas make decisions that may, with permission, be the subject of an appeal on a point of law to an Upper Tribunal and thereafter, and again only with permission, to the Court of Appeal (although appeals are not possible in cases in which the Upper Tribunal refuses permission to bring an appeal to the Court of Appeal, a point which is returned to below).<sup>71</sup> The reforms that were made by the Act of 2007 were fundamental in their nature and changed the tribunal system in ways that have been said to amount to “a complete reordering of administrative justice”.<sup>72</sup> For instance, the two-tier structure served to streamline appeals and give greater coherence to a system that had previously been piecemeal in nature and in which rights of appeal were variously available on a point of law and/or a point of fact, on a point of law only, or not at all (in which circumstance judicial review was available as a remedy). Another change was to mark out the tribunal system as independent from the government departments who make decisions that might be subject to adjudication: while tribunals had previously been closely aligned to government departments – they were therefore sometimes called “administrative tribunals” – the 2007 Act noted the independence of tribunal members as a constitutional imperative.<sup>73</sup>

The streamlining of appeal structures is the development that is of most immediate interest in the present context, as it includes linkages to anterior internal review mechanisms, as well as an overlap with the workings of judicial review. The linkages to internal review mechanisms are found in sections 9 and 10 of the Act of 2007, which enable either the First-tier Tribunal or the Upper Tribunal, respectively, to review one of its own decisions with a view to changing it. This review mechanism may be triggered either by the Tribunal acting on its own initiative or by a person who has a right of appeal against the decision, and it can lead the Tribunal to correct accidental errors, to amend the reasons that have been given in support of a decision, or to set a decision aside. Plainly, the last option is that which would ordinarily be preferred by the person with the right of appeal, although an amended statement of reasons may also give greater clarity and legitimacy to a decision. In either instance, the Act of 2007 provides that a decision can be subject to internal review only once and that it will thereafter become a matter for an appeal on a point of law to the Upper Tribunal or Court of Appeal, as appropriate, and with permission.<sup>74</sup>

The overlap with judicial review can occur in two ways. The first is where the Upper Tribunal, a so-called “superior court of record”, can itself exercise a judicial review jurisdiction under the Act of 2007 and grant any of the remedies that would be available were proceedings to be brought by

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<sup>71</sup> 2007 Act, ss 9-14. But note that the tribunal and appeals system as applies throughout the UK as a whole is more complex than this brief statement suggests: see the graph that is available at [https://www.judiciary.gov.uk/wp-content/uploads/2012/05/tribunals\\_chart-01072015.pdf](https://www.judiciary.gov.uk/wp-content/uploads/2012/05/tribunals_chart-01072015.pdf). Note also that there are tribunals that adjudicate within the specific contexts of the Northern Ireland and Scottish legal systems: see, respectively, <https://www.courtsni.gov.uk/en-gb/tribunals/Pages/Tribunals.aspx> and <https://scotcourts.gov.uk/the-courts/the-tribunals/about-scottish-tribunals>.

<sup>72</sup> *R (Cart) v Upper Tribunal* [2010] EWCA Civ 859, [2011] QB 120, 169, para 29, Sedley LJ.

<sup>73</sup> Courts, Tribunals and Enforcement Act 2007, s 1, as read with the Constitutional Reform Act 2005, s 3.

<sup>74</sup> Courts, Tribunals and Enforcement Act 2007, ss 11 & 13. Although on the relationship between appeals on a point of law and errors of fact see *E v Secretary of State for the Home Department* [2004] 2 WLR 1351 and *Jones v First Tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19, [2013] 2 AC 48.

way of application for judicial review in the High Court.<sup>75</sup> Although the Upper Tribunal's jurisdiction in this regard is narrowly drawn under the Act<sup>76</sup> – the vast majority of its work will still come before it by way of appeal – the creation of a judicial review jurisdiction has further sought to consolidate the tribunal system by keeping disputes within its structures where that it is at all possible.<sup>77</sup> The second way in which there can be an overlap with judicial review is where a decision of the Upper Tribunal itself is subject to judicial review in the High Court. This is an esoteric, yet important, point of law that has its context in cases, mentioned above, where the Upper Tribunal refuses an application for permission to bring an appeal to the Court of Appeal (such decisions are said to be “excluded” from any right of appeal to the Court of Appeal and the matter will thereby come to an end under the Act of 2007).<sup>78</sup> In *R (Cart) v Upper Tribunal*<sup>79</sup>, the Supreme Court held that judicial review was available in respect of such refusals but that the High Court should intervene in Upper Tribunal decisions to refuse permission to appeal only in limited circumstances. In making this point, the Supreme Court held that the High Court should intervene solely where the case in which permission to appeal has been refused is one that raises some important question of principle or in which there is some other compelling reason why the matter should be heard. By approaching applications for judicial review in this way, it is understood that the High Court will be able to ensure that the rule of law is maintained without overburdening itself with cases that should, for the most part, be decided within the appellate structures in the Act of 2007.

### **Judicial review**

And what, then, of judicial review and its place in the wider system of administrative justice? Certainly, the above analysis of consultation, Parliamentary Ombudsmen, and tribunals has revealed that it can play a role in each of those areas, whether by developing legal principles (as in *Reilly* and *Moseley*) and/or by providing remedies in the context of decision-making by the Upper Tribunal and the Parliamentary Ombudsman. However, to the extent that this suggests that judicial review is something of a constant within the workings of administrative justice, it says little about the precise nature of the judicial review procedure and the question of when individuals can have recourse to it. Moreover, even where an individual is able to have recourse to the judicial review procedure, there remains the point, made in the studies that were discussed in the first section of this article, that it may have only a limited impact in practice. So, does this mean that judicial review is best understood as one of the lesser parts of the administrative justice machinery, its “high profile” cases notwithstanding?<sup>80</sup> Or does its real significance lie in those high-profile cases and the values and principles that are developed within them?

Taking first the matter of the judicial review procedure, there is a long-established rule that recourse to it cannot be had where an individual has an effective alternative remedy, for instance a

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<sup>75</sup> Ss 15-21. On its status as a superior court of record see s 3(5).

<sup>76</sup> Courts, Tribunals and Enforcement Act 2007, s 18(6), as read with Practice Direction (Upper Tribunal: Judicial Review Jurisdiction) [2009] 1 WLR 327 and Practice Direction (Upper Tribunal: Judicial Review Jurisdiction) (No 2) [2012] 1 WLR 16.

<sup>77</sup> See also, in England and Wales, s 31A of the Senior Courts Act 1981, as inserted by s 19 of the Courts, Tribunals and Enforcement Act 2007.

<sup>78</sup> Ss 13(1) & 8(c).

<sup>79</sup> [2011] UKSC 28, [2012] 1 AC 663. See, too the parallel judgment in respect of Scottish law in *Eba v Advocate General for Scotland* [2011] UKSC 29, [2012] 1 AC 710.

<sup>80</sup> Cane, n 20 above.

claim before a tribunal.<sup>81</sup> This rudimentary requirement reflects the understanding that judicial review is a remedy of last resort and that individuals should instead avail themselves of remedies that have been put in place by, to continue with the example of tribunals, statute (such remedies may also be procedurally advantageous to the individual).<sup>82</sup> Of course, where no such remedy exists, it will be appropriate for an individual to bring an application for judicial review, albeit as subject to practical considerations of costs and the dispute being one that falls within the realm of public law.<sup>83</sup> This latter requirement is one that has given rise to some complexity in the case law not only because of the early procedural rigidity of the public/private divide but also because of uncertainty about the nature of decisions that are taken by, most prominently, private companies performing contracted-out government functions.<sup>84</sup> While the procedural rigidity of the public/private divide has since been relaxed,<sup>85</sup> the question whether a particular decision falls within the realm of public law continues to give rise to occasional difficulties in the case law. Indeed, in some instances, the difficulties have been such that the legislature has had to intervene and override the effects of judgments that have been said to have drawn too narrowly the parameters of public law protections.<sup>86</sup>

Where the facts of a case fall within the realm of public law and an individual wishes to initiate proceedings, he or she must first observe a pre-action protocol that is meant to facilitate the resolution of disputes at source, save in those cases where an authority does not have the power to change its decision or where the dispute has arisen as an emergency (for instance, in a case concerning health).<sup>87</sup> At the heart of the protocol are requirements about an exchange of letters whereby an individual will identify the decision that he or she wishes to challenge and the public authority will explain whether or not it is willing to change the decision. Should that exchange of letters not result with a resolution of the dispute, proceedings may then be commenced by any person who has a “sufficient interest in the matter to which the application relates” and who has initiated proceedings within (what will usually be) a three-month time-limit (time runs from the date of the decision, not the end of the protocol process).<sup>88</sup> In the event that the High Court considers that there is an arguable case, it will grant leave, or permission, to proceed to a full hearing, at which stage the individual must demonstrate that the public authority has acted unlawfully. Should he or she be able to do so, the High Court may, in its discretion, variously grant a number of quashing, mandatory, and/or declaratory orders, as well as (more exceptionally) damages.<sup>89</sup>

The further question of whether judicial review’s real significance lies in its high-profile cases can perhaps best be answered with reference to the grounds upon which an individual will challenge the lawfulness of a public authority’s actions. Although there have also been some important doctrinal developments in relation to points of procedure – the “sufficient interest” threshold has been interpreted liberally by way of facilitating public interest litigation<sup>90</sup> – the grounds for review have been developed in evermore innovative ways over the past 30 years or so. Central to those

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<sup>81</sup> On the guiding principles see M Belhoff and H Mountfield, ‘There is no Alternative’ [1999] 4 *Judicial Review* 143.

<sup>82</sup> See *Re Kirkpatrick’s Application for Judicial Review* [2003] NIQB 49, especially at paras 40-41.

<sup>83</sup> On costs see, eg, *R (Edwards) v Environment Agency (No 2)* [2013] UKSC 78, [2014] 1 WLR 55.

<sup>84</sup> See Leyland and Anthony, n 42 above, ch 9.

<sup>85</sup> N 17 above.

<sup>86</sup> See, as regards, the reach of the Human Rights Act 1998, *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, as read with s 145 of the Health and Social Care Act 2008.

<sup>87</sup> See further M Fordham, *Judicial Review Handbook*, Hart Publishing, Oxford, 6<sup>th</sup> ed, 2012, Part 19.1.

<sup>88</sup> Senior Courts Act 1981, s 31(3); and Part 54.5 of the Civil Procedure Rules. See further Leyland and Anthony n 42 above, pp 201-210.

<sup>89</sup> Senior Courts Act 1981, s 31(1) & (4). On the discretionary nature of the remedies see C Forsyth, ‘The rock and the sand: jurisdiction and remedial discretion’ [2013] 18 *Judicial Review* 360.

<sup>90</sup> N 18 above.

grounds has been an increasingly robust rule of law doctrine that, while fully cognisant of the importance of the context to any decision and the need for judicial restraint in appropriate cases, emphasises that all forms of public power are ultimately subject to judicial control.<sup>91</sup> This has led the courts to develop a range of procedural and substantive dimensions to the grounds for review and, as noted above, to move towards values that may more readily be associated with the language of governance studies than public law orthodoxy.<sup>92</sup> While it may well be that decision-makers will not be familiar with such doctrines and values as they take decisions on a daily basis – a point that has been made in some of the work on the impact of judicial review<sup>93</sup> – they still establish the outer-markers within which public power may lawfully be exercised. It may therefore be that this is where judicial review's true contribution to administrative justice is to be found and understood: it is able to provide normative reference points for the system as a whole and, in that way, ensure that the system remains grounded in the rule of law.

### ADMINISTRATIVE JUSTICE – SOME CHALLENGES

The final matter to be addressed is that of austerity and its impact upon administrative justice.<sup>94</sup> Plainly, the practical success of the above mechanisms will depend, in large part, on the availability of public monies, whether to support the workings of the judicial and other institutions or to provide legal aid to individuals with limited economic means who may wish to, for instance, initiate judicial review proceedings. However, the reality in the UK, certainly since 2010, has been one in which much public funding for administrative justice has been frozen or reduced, in which some institutions have been abolished, and in which other institutions have had to reassess their spending priorities.<sup>95</sup> This has inevitably led to judicial review challenges to, among other things, institutional failures to discharge statutory duties and to government decisions to modify the funding arrangements that underlie legal proceedings.<sup>96</sup> For the High Court, such challenges have presented constitutionally difficult questions, as government decisions as to the level of public spending on services are typically regarded as political choices that demand judicial self-restraint.<sup>97</sup> Austerity cases have, in that way, engaged the rule of law doctrine in settings that have sometimes been defined not just by the interests of individuals but also by much wider questions of policy.

Two cases can be used to illustrate the nature of the challenge for the High Court and, in turn, for the wider system of administrative justice. The first is *Re Martin's Application*<sup>98</sup>, which was alluded to above and which concerned a delay in the investigative processes of the office of the Police Ombudsman for Northern Ireland. That office was established by section 51 of the Police (Northern Ireland) Act 1998 and is under a range of statutory duties related to the processing of complaints about the actions of officers in the Police Service of Northern Ireland. On the facts of *Martin*, the

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<sup>91</sup> *R (Jackson) v Attorney-General* [2006] 1 AC 262, 304, para 107, Lord Hope.

<sup>92</sup> N 41 above, and text. For some procedural and substantive dimensions see, on legitimate expectations, *R v North and East Devon Heath Authority, ex p Coughlan* [2000] 2 WLR 622.

<sup>93</sup> But compare the government's internal publication, *The Judge Over Your Shoulder*, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/256111/judge.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/256111/judge.pdf).

<sup>94</sup> On austerity see M O'Hara, *Austerity Bites: A journey to the sharp end of cuts in the UK*, Policy Press, 2014.

<sup>95</sup> For abolition see, most prominently, the Public Bodies (Abolition of the Administrative Justice and Tribunals Council) Order 2013, SI 2042/2013. For some current issues see <http://ukaji.org/2015/08/10/whats-new-in-administrative-justice-august-2015/>.

<sup>96</sup> T Dyke, 'Judicial Review in an Age of Austerity' [2011] 16 *Judicial Review* 202.

<sup>97</sup> *R v Secretary of State for the Environment, ex p Nottinghamshire CC* [1986] AC 240.

<sup>98</sup> [2012] NIQB 89.

Chief Constable of the Police Service of Northern Ireland had referred to the Police Ombudsman his concerns about the conduct of police officers who had been involved in a criminal prosecution in 1991 that had led to the wrongful conviction of the applicant, Mr James Martin. The Police Ombudsman sought to explain that the subsequent delay in investigating the complaint had been caused by the fact that it was one of a growing number of historical cases that had created very real funding pressures within his office as it also tried to investigate contemporary complaints against police officers. This essentially meant that the case reduced to the question whether the Police Ombudsman's delay in performing his statutory duty could be justified for reasons of limited funding, or whether the delay in the case was such as to breach the implicit public law requirement to conduct an investigation within a reasonable time. While the judge who heard the case, Treacy J, acknowledged that the Police Ombudsman would normally enjoy very considerable latitude when making choices about the allocation of resources within his office, he considered that the delay in this case went beyond that which could be deemed acceptable. As the judge expressed the point: "The decided cases make clear that ... (i)t is only if the delay is so excessive as to be regarded as manifestly unreasonable that a claim might be entertained by the court ... I have concluded, against the exceptional background of the present case, that by reason of chronic underfunding at the material time the respondent was disabled from discharging its statutory duty to investigate within a reasonable time".<sup>99</sup>

The second case is *R (Unison) v Lord Chancellor*<sup>100</sup>, which concerned the lawfulness of changes to the fees regime that governs claims in employment tribunals.<sup>101</sup> The new regime required the payment of fees before claims and appeals could be brought in the tribunals, and the applicant, a public sector union, argued that the regime: (a) breached the EU law principle of effectiveness because many individuals would be unable to afford to bring proceedings to vindicate their rights; and (b) discriminated indirectly against women because a majority of claimants in employment cases are women. In dismissing the application for judicial review, the High Court noted that the EU law principle of effectiveness overlaps with the right of access to a court and that that right can be subject to limitation by way of fees so long as the fees do not make it virtually impossible or excessively difficult for individuals to bring proceedings. While the Court accepted, on the evidence before it, that there had been a drop in the number of tribunal claims since the introduction of the new regime, it was of the view that the applicant had not shown that this was because individuals were unable to bring proceedings as opposed to simply electing not to make claims. Moreover, on the matter of discrimination, the Court found that the fuller evidence did not support the applicant's submissions and that, in fact, the fees structures were largely balanced as between the genders. The regime that had been put in place was therefore lawful: it pursued the legitimate objectives of seeking to transfer the costs of tribunals to those who used them whilst making the tribunals more efficient, and it did so though means that were proportionate to those objectives.

*Unison* is on appeal to the Court of Appeal in England and Wales at the time of writing this article, and it may be that that Court will reach different conclusions on the law and evidence before it. However, in the absence of that ruling, the judgment of the High Court remains authoritative and, indeed, indicative of the challenge that the wider administrative justice system faces. As was stated above, the funding of tribunals and so on is largely a political choice that must command the respect of the courts in a legal system that is centred upon not only the rule of law but also its correlate in the separation of powers doctrine. While this does not mean that the courts will never intervene in government choices – *Martin* points to disapproval of at least the consequences of limited funding,

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<sup>99</sup> [2012] NIQB 89, paras 42-43.

<sup>100</sup> [2014] EWHC 4198 (Admin), [2015] 2 CMLR 4 at 111.

<sup>101</sup> The regime was contained in the Courts and Tribunals Fees Remission Order, SI 2013/2302.

and *Unison* of the need to ensure that access to justice does not become impossible<sup>102</sup> – it does mean that the courts will not generally seek to adjudicate on broader questions of policy. The shape of the administrative justice system may, in that sense, rightly be said to be determined as much by politics as it is by law.

## CONCLUSION

This article began by noting that it had three modest objectives: to explain how and why the language of administrative justice has become more prominent in the UK in recent years; to identify some of the primary mechanisms within the system of administrative justice; and to outline some of the challenges that the system faces in an era of austerity. Its resulting analysis of the principles and values that infuse the system, and which exist along its administration-adjudication continuum, has perhaps revealed two key points that should be emphasised by way of conclusion. The first is that, for public lawyers in the UK, administrative justice remains fundamentally concerned with maximising the scope for efficient, informed, and fair public decision-making as affects individuals. While an individual's interests will not, of course, thereby always be paramount – adjudication will typically balance an individual's interests with those of other parties and/or the wider public interest – the clear aspiration is for a system that will facilitate fuller engagement with the individual from the very outset of the decision-making process. If that occurs, it is expected that initial decisions will be taken in a manner that is more efficient, informed, and fair, and that those qualities will aid and define any subsequent complaints and/or adjudicatory processes.

The second point concerns the need for caution when assessing the relative significance of the various mechanisms of administrative justice. As was noted at the beginning of this article, administrative justice emerged as a field of study after a shift towards socio-legal analysis in the 1990s and a growing awareness of the limitations of judicial review both as a remedy and as a tool that influences bureaucratic behaviour. However, this article has also sought to outline the role that judicial review continues to play in administrative justice by establishing the parameters of legality in the modern administrative state and by, for instance, safeguarding fair hearing and participation rights (albeit as determined by an adjudicative model). While that description of judicial review should not be taken to challenge the strength of compelling empirical data about its limitations, it should be taken to embed the point that the remedies that are available to individuals are best viewed holistically and as rooted in the rule of law. In the final analysis, it is that fact which gives administrative justice its relevance in the modern administrative state, even at a time of diminishing public expenditure on its institutions and values.<sup>103</sup>

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<sup>102</sup> And see, eg, *IS v The Director of Legal Aid Casework* [2015] EWHC 1965 (Admin).

<sup>103</sup> For some possible future directions see C Skelcher, 'Reforming the oversight of administrative justice 2010-2014: does the UK need a new Leggatt Report?' [2015] *Public Law* 215.