JUDICIAL REVIEW AND ADMINISTRATIVE JUSTICE[[1]](#footnote-1)

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# I. INTRODUCTION

It is something of a peculiarity that, while judicial review is a major focus of administrative law scholarship, it is only of minor concern in administrative justice scholarship. Nor is the neglect one-sided. Administrative justice has played little, if any, role in theorisation about judicial review. Although scholars of judicial review have considered its relationship with different approaches to deference (Harlow & Rawlings, 1997), or with political thinking on constitutionalism, justice, and the proper role of the state (Loughlin, 2000), relatively little attention has been paid in recent times to its relationship with the pursuit of just administration.

What is it in the distinction between ‘law’ and ‘justice’ that triggers a significant shift of attention? The answer to this seemingly lofty question turns out to be rather mundane and lies simply in the use of these terms within the legal academy. Administrative law scholars tend to self-define (by implication, at least) according to the area of legal doctrine they work on and thus judicial review forms a core aspect of their enquiry. Administrative *justice*, which does not correspond to any doctrinal category or any established evaluative framework, fits less readily within this conception of the field. Yet, from the perspective of administrative justice scholarship, the questions that run through the terrain of public law doctrine and public law theory are fundamentally related to administrative justice. That administrative law scholarship pays somewhat limited attention to administrative justice when asking what factors should shape or limit the court’s reach in considering the legality of governmental administration or what basic values, goals, and commitments should underpin the court’s decision-making processes, appears to be both a significant omission and a missed opportunity for productive dialogue.

Administrative justice scholars, in contrast, tend to self-define according to the branch of the justice system that they concern themselves with. In theory, therefore, the framework for administrative justice scholarship includes the full range of “mechanisms by which individuals can seek to resolve their disputes with administrative agencies…” (Thomas, 2011: 1). Yet, while judicial review is clearly one of those mechanisms sitting at the apex of the administrative justice system, most scholars have developed their research agendas in response to the empirical insight that the vast majority of administrative decisions are challenged elsewhere (Genn, 1994; Partington, 1999; Thomas 2011). The result is to conceptualise the field in a way that emphasises its distinctiveness and separateness from court-centred justice: Adler, for example, when introducing his collection of essays on the subject of administrative justice, *contrasts* it with civil justice and criminal justice (Adler 2010: 1). The focus, in consequence, is on alternative fora for the resolution of grievances: internal reviews, complaints processes, tribunals, etc. For most users, these are the only parts of the system they will ever encounter.

The resulting scholarship has produced significant insights on the realities of administrative justice for private persons (and notwithstanding the traditional use of ‘individual’ in the literature, it is worth remembering that administrative justice is frequently sought by juristic persons who are not individuals, such as companies, societies, and associations). Nevertheless, the relative neglect of judicial review is, perhaps, to be regretted, particularly in relation to administrative justice theory. Administrative justice theory has tended to focus on the meaning of ‘just’ decision-making. Inspired by the pioneering work of Mashaw (1983), it has developed various ‘models’ or ‘ideal types’ of justice as it relates to public decision-making (e.g., Adler, 2010; Halliday & Scott, 2010; Kagan, 2010). Much of this is focused on decision-making at the frontlines of administrative agencies, occasionally broadening its focus to encompass the administrative justice system as a whole (see, e.g., Thomson, 1999; Mullen, 2010; Buck et al, 2011). Such work is valuable, of course, not least because so many administrative decisions go unchallenged despite a sense of grievance on the private person’s part (Cowan and Halliday, 2003). The small amount (in relative terms) of administrative justice work that does focus on judicial review has been largely empirical, examining, for example, the extent of its use (e.g., Sunkin 1987; Hadfield & Weaver, 1995; Mullen et al, 1996; Sunkin & Bondy, 2008), or its impact on public administration (e.g., Mullen et al, 1996; Halliday 2004; Platt et al, 2010). Work with more theoretical ambitions, such as Galligan (1996), is exceptional and has not been taken up more broadly.

It is in the spirit of reviving dialogue between the literature on administrative *law* and the literature on administrative *justice* that we approach the topic of the relationship between judicial review and administrative justice. What is the proper role for the court in relation to administrative justice, and what role should administrative justice play in shaping the manner in which the courts exercise their powers of review? That question, and its implications for applied and theoretical work in the two fields, are the focuses of this essay. It is important to stress that in considering that question, we do not seek to provide a single substantive answer which is valid in all times and for all domains. The focus of our enquiry, rather, is on the range of potential answers to the questions, their underpinning rationales, and the situations and domains in which they come into particular focus. As this suggests, our starting point is that we should expect variety in the answers to these questions, and our ambition is twofold: firstly, at a theoretical level, to describe this variety and impose some kind of order on it by bringing different approaches and answers within a shared frame of reference; and secondly, to discuss how administrative law and administrative justice as practical domains can work effectively and productively with this underpinning variety.

Our analysis reveals four basic ‘ideal types’ of the role of judicial review in relation to administrative justice. As with all ideal types, these are abstracted from the empirical reality of real-world phenomena, and their purpose is to illustrate variation in an exaggerated and, thus, particularly clear way. These ideal types, however, are not merely theoretical or analytical constructs. They represent, rather, a set of resources that can be invoked when thinking about the range of responses the judiciary might take to particular disputes and, thus, the response that is most appropriate for the judiciary to take; about the role of administrative justice as a concept in shaping the manner in which the courts use their power of judicial review; and about the role that courts play in embedding an institutional propensity to just administration within the state.

This chapter proceeds as follows: in the next section we set out the analytical scheme that, we believe, captures the basic structure of the ways in which judicial review and administrative justice might interact. By combining two dimensions – a set of contrasting perspectives on the nature of society and the nature of law – we can construct four ideal types regarding the basic role of judicial review in relation to administrative justice. Although ideal types do not accurately describe the real world, they are a means of analysing and better understanding the real world. In the two sections that follow, therefore, we relate them to actual theories and systems of public law. We begin by relating the ideal types to the real world by discussing the practical contribution they envisage the judiciary making to just administration. We then move, in the final substantive section, to examine how our framework gives us a better lens with which to consider how judicial review should position itself in relation to the administration, suggesting that our ideal types offer a set of resources that may be applied to differing administrative justice contexts and challenges. The chapter then briefly concludes.

# II. THE ANALYTICAL SCHEME

It is a truism to note that comparison lies at the heart of understanding difference. This is true not just of the social sciences but also law, where research depends not just on macro-social comparisons as in comparative law but more broadly on the basic doctrinal methodology of comparing key features of cases. The process of comparison requires setting up analytical constructs which draw out characteristic features of whatever is being compared: e.g., a legal system, a line of case law, a culture, or a tradition of thought. Importantly, these analytical constructs do not attempt to describe the full complexity of the thing being compared. Rather, their primary role is to highlight the key features or dimensions underlying social phenomena, and their construction entails the artificial simplification and reduction to archetypes of phenomena that are complex and exhibit considerable internal variation.

As prior work has demonstrated, this means that a significant proportion of the analytical concepts used in generalising scholarship are ‘ideal types’ in the sense developed by Max Weber, and this is true as much of law as the social sciences (Sheehan & Arvind, 2015: 490-492). Ideal types are ‘exaggerated or one-sided depictions that emphasise particular aspects of what is obviously a richer and more complicated reality’, as Kronman puts it (1983: 7), and their utility lies in the possibility they create, of using generic concepts to analyse ‘historically unique configurations’ (Weber, 1969: 93). One of the insights of Weber’s work is that ideal types can be formed by *combining* key dimensions, and the polar positions on these dimensions. Such was also the method of the British anthropologist, Mary Douglas, in developing her notion of four ‘cultural biases’ (Douglas 1982: 2), representing different combinations of the polar positions of two basic dimensions of cultural life. This basic analytical method has inspired a great deal of research that captures the different ways in which people approach the world in general, or particular issues and topics, including law and legality (e.g., Halliday & Scott, 2010; Lodge & Stirton, 2010; Halliday & Morgan, 2013; Arvind & Steele 2020).

It is on this approach that the present chapter relies in developing its account of the different ways in which the relationship between judicial review and administrative justice might be framed and articulated. Our conviction is that, underlying such variation are differences of perspective on two fundamental issues: (1) the nature of a polity; and (2) the character of administrative law. Indeed, the contrasting perspectives on these two issues represent an extension of the core ideas of Douglas’ cultural theory. Douglas argued that two basic dimensions of sociality underpin cultural variation: the extent to which social life is animated and constrained, firstly, by the sense of being part of a collective entity beyond oneself (the ‘group’ dimension) and, secondly, by the value that is placed upon, or pressure is felt from rules, roles and prescriptions (the ‘grid’ dimension). Our concern is narrower than Douglas’. We seek to study not society as such, but a specific aspect of it, namely, the relationship between the formal institutions by which it is administered, and the individuals, groups, and entities that constitute it. Administrative justice and administrative law are both concerned with how this relationship might be mediated, and the purpose of our analytical scheme is to represent different perspectives on the forms and purposes that mediation might take. We use the idea of a ‘polity’ as a way of capturing both the formal institutions that do the administering and the social units who are subject to administration, and from the two dimensions identified by Douglas derive two more specific dimensions, focused on the nature of the polity (group) and the character of administrative law (grid).

## The Nature of the polity: defining the ‘group’ dimension

In relation to understandings of the nature of the polity, we might contrast two extreme positions: the first envisaging it as a field of contestation, where questions of its purpose, goals, and priorities are inherently the subject of disagreement; and the second envisaging it as a unit where a common and shared understanding of the good exists or is capable of being developed, and which is in consequence capable of reaching a consensus on shared goals and purposes and, thus, on shared priorities and actions.

From the perspective of the first extreme position, society as a single cohesive unit does not exist. The polity is primarily a space where the conflicts that arise from the coexistence of smaller subgroups with multitudinous and disparate needs and interests are resolved. There is no image of the good life that society as a whole might enjoy or benefit from. The legitimate purpose of the state, therefore, is to provide shared institutions that minimise conflict within the common space and secure peaceful, though potentially atomistic, co-existence.

The perspective of the second extreme position on the nature of the polity stresses some form of substantive common good. Society, despite being made up of many different groups and individual members, is ultimately conceived of as a unit – or at least an inchoate unit – in itself. It has a set of needs and interests that are shared by all its members. Society as a whole will benefit from the realisation of the common good. In this context, the proper purpose of the state is to promote and protect the common good, whatever it may be.

The contrast between these extreme positions might be framed as the difference between ‘conflict’ and ‘consensus’ perspectives on society (Banakar and Travers, 2013) or, as we prefer, ‘discord’ and ‘concord’ perspectives. Up-group, there is inherently more room for the law and courts to take an active shaping role vis-à-vis the administration: the law can and should represent the matters on which there is a consensus in society. Down-group, the law has a lesser role, confined to areas where the field of contestation can be addressed through argumentation (Fuller, 1978) or which are occupied by established ground-rules that govern the game of contestation and prevent discord spilling over into open conflict.

## The Character of Administrative Law: defining the grid dimension

In relation to understandings of the character of administrative law, we might similarly contrast two extreme positions: the first seeing administrative law as having only an instrumental remit, limited to examining matters of administrative process; the second seeing administrative law as having non-instrumental capacity, with the ability to intervene in the substance of administrative justice.

From the first extreme perspective, a stress is placed on the distinctiveness of legality when compared to politics and administration. As in Weber’s formal rationality, the emphasis is on the legal system’s systemic autonomy and immunity to external pressures (Trubek, 1972:729). Judicial review has a particular job to do, one that marks itself out from the roles of the legislature and the executive. There is, in other words, a strict division of labour within the constitution. Each key constitutional actor enjoys separate powers and must clearly operate within them. The role of the court is to police those boundaries, including the task of self-limiting, avoiding judicial incursion into the executive sphere. So, whereas it is the task of government to implement policy from start to finish, the court must restrict itself to reviewing the processes of implementation after the event. And in doing so, it must hold back from interfering in matters of substance. The key task of administrative law is to engage with *how* institutional actors operate, rather than whether the outcomes of those operations are good or bad. The focus on formal considerations serves to exclude ‘irrelevant substantive noise’ (Shamir, 1993: 47) by ‘screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account’ (Schauer: 1988, 510).

By way of contrast, from the contrasting extreme perspective, the conception of administrative law is more expansive and flexible. A loosening – or abandonment, even – of the separation of powers permits the courts greater freedom of movement to intervene substantively in matters of government. Law can be a direct instrument of governance, rather than merely an external check. As a result, down-grid, there is greater room for the courts to deploy concepts and ideas that relate to substantive policies, positions, and goals. Up-grid, in contrast, the courts are more focused on setting out principles governing the manner in which, and conditions subject to which, substantive policies, positions, and goals are selected, but not directly involving themselves in the actual process of defining or selecting them. Following Weber, the contrast between these extreme perspectives might be framed as the difference between ‘formal’ and ‘substantive’ legality.

By combining the above two dimensions, we produce four ideal types as follows:

**Figure 1: Four ideal types of society**

In the next section, we consider how, from these perspectives on law and society, one might envisage the role that judicial review should play in relation to the justice of government administration.

# III. ADMINISTRATIVE JUSTICE THROUGH THE COURTS: CONNECTING IDEAL TYPES TO THE REAL WORLD

The four perspectives on law and the polity discussed in the previous section generate, in turn, four ideal typical understandings of the role of judicial review in relation to administrative justice. The first, which we term the *advisory and hortatory function*, envisages judicial review offering guidance and advice to government about administrative process. The second, which we term the *protective and vindicatory function*, protects private persons from unwarranted governmental interference with liberty. The third, the *mediatory and supervisory function*, co-ordinates more productive relations amongst key actors who may have competing interests and perspectives. The fourth, the *enforcing and policing function*, polices and enforces the will of Parliament. Figure 2 indicates how these relate to the four quadrants discussed in the previous section:

**Figure 2: Four understandings of the role of judicial review**

In what follows, we discuss each of these in turn, drawing out their implications for real-world aspects of judicial review doctrine, practice and scholarship.

## The Upper Right Quadrant: An Advisory and Hortatory Function

The upper right-hand quadrant combines a formal conception of law with a shared vision of the common good. The formal conception of law constrains judicial review from engaging directly with the common good, but the existence of that shared vision means that courts can and should offer leadership in administrative justice through the development of formal ideas that enhance the administration’s propensity to contribute to the common good. The paramount contribution of judicial review to the justice of public administration is thus *advisory* and *hortatory*. The court *exhorts* key actors to conduct themselves in ways that will promote the common good, but it does not regard itself as part of the system that generates those ideas of the common good. The advice it offers deals, accordingly, with how policies, purposes, and goals should be generated, what factors should be weighed in the balance, and so on; but not with what the policies, purposes, and goals should actually be. The court’s primary mode of engagement with other actors in the administrative justice domain is simply to offer advice, counsel and encouragement, something akin to King’s notion of the courts “prodding [them] into action” (King, 2018), and using the backward-facing task of dispute resolution to contribute to a forward-facing agenda.

A concrete example of how formal constraints can promote the common good without aiming directly at it is offered by Bentham (1990: 88-102)*.* Bentham argues that in order to protect members of the public against misuse of the power of arrest, rather than provide a right against wrongful arrest, it would be better to establish formal criteria regarding, for example, the circumstances to which the power of arrest would attach, forms and registers in which particulars should be entered, and so on. The notion of judicial review having an advisory and hortatory function in relation to administrative justice seems to be latent within much empirical research on the impact of judicial review on government administration. Studies that explore “administrative law’s hortatory effect” (Loveland, 1996: 280), “judicial review’s capacity as a regulator of administrative behaviour” (Halliday, 2004: 4), or judicial review’s ability “to influence the future behaviour of respondent authorities” (Richardson and Machin, 2000: 494), proceed from a starting point that presumes the value to society of a public sector that respects and adheres to legal principles of good administration (see Cane, 2004).

The development of ideas of procedural fairness – the projection and development of judicial standards of process onto the administrative world – may be considered the central example of this function. Given the association between procedural fairness and the dignity of the subjects of public administration (Mashaw, 1981), the judicial development of these principles may be regarded as a valuable and particular contribution to society’s common good by a range of perspectives on what the wider common good entails. Within this function, the conception of administrative justice thus encompasses the familiar one of procedural fairness, but it also extends to broader ideas of policy-making fairness.

The doctrine of estoppel in Indian administrative law provides a second illustration of the hortatory function. The Indian Supreme Court has linked the doctrine to the principle that

The Government cannot be heard to say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of ‘honesty and good faith’. In fact the Government should be held to a high “standard of rectangular rectitude while dealing with its citizens”… If the Government wants to preserve its freedom of executive action from being hampered or restricted, the Government should not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it.[[2]](#footnote-2)

This link between good government, the incidences of citizenship, and the legal standards to which administrative officials are expected to adhere presents perhaps the strongest form which the advisory and hortatory function can take. But the function can also be exercised in a more pragmatic way. The eighteenth century case of *Leach v Money*, which concerned the powers of the nascent administrative branch in relation to searches and seizures, provides an example. In that case, Lord Mansfield not only set out why the claimed powers could not be exercised purely by administrative officials, but also detailed how warrants should be framed in terms of clarity and specificity, and what type of discretion they could and could not give administrative officers.[[3]](#footnote-3) As this highlights, the process of institutional dialogue between courts and administrators, in which courts communicate standards to administrators whilst also leaving the actual formulation of substantive policy based on those standards to administrators, is the most distinctive feature of the hortatory function.

## The Lower Left Quadrant: A Protective and Vindicatory Function

In the diagonally opposite quadrant, the conception of the polity is negative. Society as a unit does not exist, and there is no image of the good life that society as a whole might enjoy or benefit from. At the same time, however, the distinctiveness of legality that we saw in the upper-right quadrant has disappeared: law can and does concern itself with matters of substance, and its actions and ambitions can and do overlap with other actors in the administrative justice domain. From this perspective, the aspiration for judicial review is that it contributes positively and substantively to the vision of maximum freedom within the polity. Judicial review is thus committed to a substantive legal policy of maximum freedom of manoeuvre for the individuals and groups that co-exist in a shared space, and it may be invoked where this cherished freedom of manoeuvre is curtailed or threatened by government. It does not matter if the court’s functions overlap with those of other constitutional actors, so long as the substantive vision is supported. Where goals and purposes are contested, justice lies in ensuring that administrative institutions do not arrogate to themselves the power of privileging one vision of what those purposes and principles should be over others.

Judicial review, accordingly, operates flexibly and creatively to maintain the conditions whereby individuals and groups can pursue their respective separate senses of the good life, and creates ground rules which permit different senses and visions of the good life to co-exist and compete for control of political institutions without that contestation descending into degenerative conflict. The principal contribution of judicial review to the justice of public administration, then, is its ability to be *protective* and *vindicatory*. Its primary mode of engagement with key public actors is proscriptive and prescriptive, determining what private autonomy actually entails and instructing them to halt and reverse public infringements of private autonomy, and setting limits on the ability of administrative authorities to infringe autonomy by circumscribing or reading down seemingly expansive powers that have the potential to impinge on private persons’ freedom of manoeuvre.

The vindicatory function is captured well by the protection of individual rights. As Sir John Laws has noted, affirming the correspondence between the notion of rights and a discord view of society: “the language of rights is not the language of morality but of conflict” (1996: 626). The fundamental rights discovered within the English common law as part of what is sometimes called ‘common law constitutionalism’ (e.g., Allan, 2011) offer an example. The English courts, on the basis of their interpretation of the common law, have upheld basic rights in order to protect private persons from governmental excess. In the case of *Witham*,[[4]](#footnote-4) for example, which concerned the liability of those on low income for court fees, the court asserted a common law right of unimpeded access to a court. The case of *Simms*,[[5]](#footnote-5) which concerned the lawfulness of a prison policy which prohibited prisoners from being interviewed by journalists, likewise offers another example of the court’s vindicatory function. As Allan argues, “the right of free speech, in the form of access to a journalist, was affirmed at common law as an important safeguard of personal liberty…” (2011: 159). Here, the corresponding conception of administrative justice is that one that stresses the protection of liberty from, and vindication of rights against, excessive administration.

## The Lower Right Quadrant: A Mediatory and Supervisory Function

In the lower right quadrant, as with the upper right quadrant, society is conceived positively as possessing a substantive shared account of the common good, but this conception is qualified by the perception that a polity characterised by concord does not create itself. It is part of the purpose of the state to define, realise and protect this common good, which inevitably involves the handling of tensions, where the interests or preferences of private persons, communities, and public bodies pull in different directions. However, whereas the upper right quadrant places weight on the separateness of law and politics, the lower right, like the lower left quadrant, denies the specialness of law. Law, like politics, can be concerned with matters of substance. The courts are concerned not just with promoting but also with developing the common good and should move beyond formalistic procedural distinctions that may inhibit their effectiveness in so doing. Judicial review thus takes an active and substantive role in developing and furthering the vision of the common good by managing tensions and mediating conflicting interests and preferences within the polity, supporting the development of compromise and co-operation, and offering frameworks for enduring and productive relations. At times, this may require courts to take on an intrusive and invasive role, such as assuming continuing oversight of a course of reconciliatory action. Thus, in the lower right quadrant, the principal contribution of judicial review to administrative justice is its *mediatory* and *supervisory* function.

The doctrine of proportionality in European law, now received into UK law in relation to human rights jurisprudence, offers an example of the courts performing a mediatory function. Amongst the doctrines of public law, the proportionality doctrine is a particularly good example of the Janus-faced character of administrative law (Craig, 2017), attempting as it does a form of reconciliation between competing and incommensurable interests (Endicott, 2014). Facing one way, it seeks to respect the expertise and preferences of government in deciding how to promote the public good; facing the other, it tries to minimise the impact of such public action on the interests of the private person affected. In doing so, it instantiates a key feature of the mediatory function in which the court is directly involved in balancing the interests of private persons against the interests of government, unlike the hortatory view where the court merely sets out principles to which the government should have regard when taking action which could impinge on the interests of private persons.

Article 89 of the Norwegian constitution provides a second example of a legal provision that seeks to give concrete effect to the mediatory and supervisory function of the courts. The article provides that courts have a ‘power and duty’ to review whether giving effect to a decision taken in exercise of public authority would ‘contravene the Constitution or the law of the land’. It is important to note that the courts are not the main source of external redress against administrative decisions in Norway: specialised tribunals are. In a typical year, around 30,000 cases are heard by specialised tribunals, as against only 1,000 in judicial review and 1,500 through the ombudsman system (Difi, 2014: 8—9). The provision’s emphasis on giving effect to a decision structures the judicial role, stressing that the focus of the courts is intended to be on ‘concrete control’, in the sense of considering the actual application of the law in a specific case, rather than the ‘abstract control’, commonly associated with constitutional courts on the continental model, where the focus is on considering the general validity or legality of a law (Storinget, 2016: 2). This is canonically a task associated with the supervisory and mediatory function.

We might also detect broader mediatory ambitions for judicial review in some mid-20th century reform thinking about administrative justice, particularly amongst those influenced by the realist conviction that the judicial review of administrative decisions is itself inevitably an act of administration (Mitchell, 1966: 142). As two of the authors have noted elsewhere, such realism, combined with an optimism about the capacity of the courts to contribute positively to the betterment of society, led many mid-20th century jurists to advocate developing a common law of public administration which would speak directly to the balance between public purposes and private interests, and through mediating conflicts reconcile the tensions between them (Arvind and Stirton, 2017: 90-91).

Alternatively, such a concern with substance can be seen not just in terms of legal principles, but also in terms of remedies – in some jurisdictions, at least. In the USA, for example, the use of structural reform injunctions run deep into matters of substance. Here, a defendant institution is ordered to bring about forms of structural change, supervised by a court-appointed ‘special master’, and required to report back to the court on progress (King, 2018). The jurisdiction can last for years (Feeley, 2004). As Feeley has noted, the courts’ use of special masters:

make[s] mince meat of the separation of powers … [J]udges incorporated the defendant institutions into the policy-making process – working closely with them and requiring them to submit detailed plans for realising the court’s general orders… (2004: 224)

What we see here is the court performing a supervisory function, overseeing the process of substantive structural reforms that reconcile private and public interests. Judicial review, freed from concerns about the particularity and isolation of judicial power, may legitimately get its hands dirty in the business of promoting effective substantive policy. Indeed, the conception of administrative justice here is one that stresses the balance, effectiveness and sustainability of social policy.

## The Upper Left Quadrant: An Enforcing and Policing Function

Moving upwards and leftwards, we encounter a quadrant which, like the lower left, sees society in negative terms. Society is a space of mere co-existence, replete with the risks of conflict and tension. Unlike the lower left quadrant, however, this quadrant retains a strong sense of the separateness of the legal and political. The maintenance of order in a discord society lies firmly within the terrain of politics. Parliament is thus the appropriate constitutional actor for responding substantively to the ever-changing demands of individuals and groups, and the Executive is the appropriate actor for implementing the will of Parliament. Judicial review thus has a limited and non-substantive role to play in enforcing the will of Parliament on the Executive and policing the constitutional division of labour between the three organs of the state, including itself. The principal contribution of judicial review to administrative justice is, accordingly, an *enforcing* and *policing* function. Although this function may be considered essential to a constitutional separation of powers, it renders the role of judicial review rather minimal and largely negative: the court looks to the legislature to furnish the meaning of administrative justice and plays its part by imposing that legislative will on the Executive. The conception of administrative justice here stresses the centrality of vires or mandate and the importance of working within authorised powers: all parties must stick to their allotted tasks.

The enforcing and policing function is often invoked negatively. Such was Lord Denning’s characterisation of mid-Twentieth century English administrative law, which he railed against:

The Government Department which requisitions my house, or compulsorily acquires my land, does not exercise a judicial function. It is exercising a statutory power and performing an administrative function. Once the power is exercised the legal position is transformed… New rights and duties are thus brought into being by the exercise of the power: and once it is exercised the courts must enforce them. But over the power itself the courts have little control… All that the courts can do is to see that the powers are not exceeded or abused. (Denning, 1949: 100)

But positive deployments of this conception are also seen in the law. Consider, for example, Lord Diplock’s criticisms of his fellow judges in the ‘Fares Fair’ case. Whereas the other judges in that case had limited the importance of statutory construction to the issue of vires, Lord Diplock asserted that the intention of Parliament in enacting the legislation was also relevant to the review of administrative discretion: ‘the question of discretion is, in my view, inseparable from the question of construction.’[[6]](#footnote-6)

Australian administrative law, where there is an entrenched constitutional separation of judicial power, presents an even clearer instance of a policing and enforcing approach to judicial review. Although, as Roux notes, the force of ‘strict legalism’ within Australian law is not dependent on the consistent deployment of a particular set of reasoning methods, it is nonetheless very clearly the “legitimating ideology underpinning the contemporary Australian JR regime” (Roux, 2018: 134). As the High Court noted in the case of *Lam*,[[7]](#footnote-7) for example:

In Australia, the existence of a written federal constitution, with separation of the judicial power, necessarily presents a frame of reference which differs from both the English and other European systems … An aspect of the rule of law under the *Constitution* is that the role or function of Ch III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.

This negative and minimal role of judicial review in relation to administrative justice may also gain traction amongst those who share the realist conviction that judicial review, irrespective of the story it may tell of itself, is unavoidably involved in matters of substance. When combined with a scepticism about the capacity of the courts to contribute positively to the betterment of society (or, indeed, about there even being a settled societal purpose to which anyone might seek to contribute), the realist conviction may lead some to advocate a minimalist role for judicial review. As JAG Griffiths once put it, the function of the court should be limited to ‘excess of jurisdiction, breach of the rules of natural justice, bad faith, and the absence of any evidence to support the exercise of the powers’ (quoted in Loughlin, 1992).

# IV. ADMINISTRATIVE JUSTICE AND JURISTIC METHOD: TOWARDS RESPONSIVE JUDICIAL REVIEW

Our purpose in this chapter has been to make two points: firstly, that judicial review can make a contribution to infusing justice into governmental administration; and secondly, that using administrative justice as a framework to think about judicial review can make a significant contribution to our understanding of judicial review itself. The foregoing discussion has demonstrated the potential for the first of these. As the previous section has discussed, the *hortatory* and *advisory* function of judicial review can make a useful contribution to administrative justice by enabling the court to reshape governmental processes to avoid procedural deficiencies, whilst at the same time retaining an element of caution, perhaps on grounds of democratic legitimacy, that checks the courts from going too far in intervening in the administrative arena. The *protective* and *vindicatory* function of judicial review may be useful in situations where just administration requires reining back governmental overreach: for example, where collective needs have to an extent blinded government as to the impact on private persons, or where public policy programmes end up having unintended and unanticipated negative impacts on private persons. The *mediatory* and *supervisory* function of judicial review contribute to administrative justice by using the judiciary to nudge key actors out of ingrained patterns of thought or action and bring them into dialogue with others about change, for example in cases of executive incapacity or recalcitrance (King, 2018). Finally, the *policing* and *enforcing* role of judicial review contributes to administrative justice in particularly sensitive policy environments where the legitimacy of the court could easily be threatened by perceptions of judicial overreach. Here, by doing no more than ensuring that administrative processes and outcomes comply with the policy underlying legislation, particularly where policy initiatives are new and largely untested within the administration, the court can avoid sitting in judgment over policy whilst at the same time contributing to its consistent implementation. As Posner has suggested, the pragmatic thing for a court to do, at times, may be to retreat into formalism (Posner, 2004).

In this final section, we turn to the second of the contributions this chapter sought to make, namely, that the analytical scheme we have presented here helps reframe the argument around the tasks, role, and limits of judicial review, and of the courts vis-à-vis the administration more generally. As we discuss here, reframing judicial review as being about just administration helps us move away from the limitations that have led debates about judicial review to take the form of a clash of styles in which little substantive progress is made. In particular, it creates a way of viewing the judiciary’s relationship to the other branches as being inherently co-operative and collaborative rather than confrontational, and which sees judiciary, administration, and legislature as sharing a common task of infusing the conduct of administrative affairs with a spirit of justice.

Debates around judicial review within administrative law present approaches to the role of the courts as if they embody incommensurable paradigms, grounded in different theories of institutional legitimacy and different exemplars of the ideal working of institutions. From this point of view there is always one, and only one, paradigm that will be correct, and setting the role and limits of judicial review entails no more than choosing the right paradigm. The task of scholarship, accordingly, is to uncover the normative, theoretical, and evaluative assumptions of each paradigm; examine their correspondence to reality; scrutinise the appositeness of the exemplars each paradigm presents; and critique the appropriateness of the outcomes and relationships they produce. Such a process is necessarily a zero-sum game which can only conclude with the victory of one paradigm over its competitors.

Viewing judicial review through the lens of administrative justice, in contrast, presents a radically different picture of the role of judicial review. Reality is a good deal messier than a typology based on ideal types might suggest, and although the four ideal typical accounts we have discussed above present four different conceptions of the role of the judiciary in making governmental administration more just, the needs of any real-world system of administration cannot be and will not be met through a system of judicial review that engages in the single-minded pursuit of only one of these ends. No one approach can by itself serve to make governmental administration more just. Rather, each of the four plays a different role in relation to administrative justice, and all four are necessary parts of the legal toolbox. What is needed, accordingly, is the ability to see them as complementary rather than as alternatives, with the delivery of administrative justice depending on courts having the ability to draw on – and, where necessary, combine – all four approaches.

There are strong parallels between this more pragmatic conception of judicial review and Karl Llewellyn’s account of juristic method, which have important implications for how we assess the role of the courts vis-à-vis the administration. In his work on juristic method, Llewellyn (1940) classified the tasks of any legal system into four fundamental ‘law-jobs’. The task of juristic method was to devise techniques for using legal tools to ‘law-job ends’, and for their ‘ongoing upkeep and improvement’ (Llewellyn, 1940: 1392). Llewellyn’s description of the four law-jobs maps closely onto the four functions of judicial review discussed in this chapter. He saw them as closely intertwined rather than sharply distinct, and his account therefore makes an excellent starting point for working out how the four approaches to judicial review might be woven together in administrative law practice.

The first of Llewellyn’s law-jobs, which he termed the ‘adjustment of the trouble-case’ (Llewellyn, 1940: 1375-1376), maps closely on to the enforcing and policing function of judicial review. The task of law here is to undertake ‘garage-repair work’ in relation to tensions which might build up ‘potential towards explosion’. The activities involved here represent no high principle, and the outcome may well be that ‘what Big Fist wants, he gets’. Legal rules ‘form a quasi-world of their own’, and what matters is not their content but simply that they prevent the group from exploding or dribbling into disintegration. This law-job, however, does not subsist in isolation. In developed legal cultures, it closely coheres with a second law-job, which he terms ‘channelling’ and which maps onto the protective and vindicatory function. This law-job is particularly salient in areas of patent or latent conflict of interest, and it operates to produce and maintain ‘a going order instead of a disordered series of collisions’ through delineating and actively protecting a substantial domain of ‘free play and leeway’ (ibid: 1376). The third law-job, which he terms ‘the say’, corresponds closely to the hortatory and advisory function. The focus here is on settling ‘what procedures must be gone through in order to legitimatize a decision and give it standing’, and ‘what the limits are on any person’s authority.’ Its focus is on allocation of powers rather than rights, and on procedure rather than substance (ibid: 1383), but – crucially – it operates in tandem with the other law-jobs. The fourth and final law-job relates to ‘net drive’, as Llewellyn termed it, and it corresponds to the mediatory and supervisory function. Its focus is on the ‘whither’: on shaping the direction of enterprise and the choice of one direction over another in a society with its own variety of living unity (ibid: 1387). This does not in practice represent a distinct law job as much as it represents ‘the whole net effect of the other three, as performed.’

These four law-jobs are not alternatives. All jobs need doing, and all need representing in institutional machinery. Institutional machinery, however, faces two dangers: the danger of ideological hardening (in which institutional ways ‘crystallize upon their own premises’ and through their dogmatic adherence to past ways of functioning lose track of their living function) and institutional atrophy (in which institutional fetters grow so weak that the institutions are ‘turned to service of their own staff rather than of the people’) (ibid: 1392). A focus on the interrelationship between the law-jobs, and a juristic method centred on using tools to achieve them, is a key way of avoiding these dangers.

The parallels with the current state of judicial review are obvious. Courts face, on the one hand, the danger of legal fossilization in which law becomes inadequate to respond to the needs of administrative justice and, on the other hand, the danger of politicisation, in which legal control over the administration becomes simply a tool for judges to advance their political preferences. Much as Llewellyn envisaged for his four law-jobs, a closer focus on the four functions of judicial review, and on the need for juristic methods that can accommodate and balance all four, can play a significant role in enabling administrative law to be responsive to the needs of administrative justice while also avoiding the dangers inherent in any form of institutional machinery.

This suggests a new agenda for scholarship in administrative law as well as in administrative justice. If judicial review is to be able to respond to the needs of administrative justice not only in matters characterised by concord but also in those characterised by discord, its rules and processes must be able to institutionalise incompatible preferences, and to maximise the potential for collaboration without having to first eliminate conflict (Hood, 1996: 218). This, in turn, requires moving to a model in which the different approaches to the relationship between the judiciary and the administration, and to the role of judicial review in regulating that relationship, are seen as being layered—attached to each other and modifying the ways in which each structures behaviour (Mahoney and Thelen, 2010)—rather than seeking to use one to displace the other. It is the existence of a multiplicity of functions for judicial review, each with its own relationship to administrative justice, that permits the court to be responsive and sensitive to a range of situational needs.

This also requires a new approach to legitimacy, focusing on function and contribution rather than simply structure. Each of the functions discussed above carries with it its own legitimacy narrative for judicial review, but, significantly, they relate to different forms of legitimacy. Political science work draws a distinction between three kinds of legitimacy: ‘input’, ‘throughput’ and ‘output’ (e.g., Schmidt, 2013). Input legitimacy concerns the extent to which the *demos* exercises influence and control over the political process and the development of policy; throughput legitimacy relates to the extent to which procedures conform to normative standards; while output legitimacy relates to the outcomes of governmental action and the quality of benefits that flow from it.

Applying these distinctions to judicial review connects the *hortatory* and *advisory* function of judicial review to ‘throughput’ legitimacy: the advice and exhortations of the court are valued and justified because of the importance of process in administration, and the courts offer leadership through the development of ideas. The *protective* and *vindicatory* function of judicial review relates to output legitimacy, though it is articulated more easily in terms of output *illegitimacy*: the court is justified in halting and reversing government action where it is illegitimate because it infringes on particular rights and liberties. The *mediatory* and *supervisory* function of judicial review similarly relates to output legitimacy: the intervention of the courts is acceptable because of the quality of the substantive benefits it brings. Finally, the *enforcing* and *policing* function of judicial review concerns input legitimacy. The minimal and negative role of the court is justified because it would be illegitimate to breach the separation of powers and for a non-democratic institution to impose itself on the executive: such is the function of the democratically-elected legislature alone.

The practical effect of thinking about judicial review in terms of administrative justice, in other words, is threefold. Firstly, it turns what would otherwise seem a choice between competing paradigms into the heuristic selection of appropriate legal tools. Secondly, it turns what would otherwise seem a Manichean choice between incommensurable dichotomies of right and wrong, or legitimate and illegitimate, into a question of juristic method. Thirdly and finally, it turns the issue of legitimacy from one of institutional structure into one of institutional functioning and the contribution a given institution can make to broader shared goals. These, arguably, present a productive reframing of the judicial role, which has much to offer to scholarship in administrative justice as well as administrative law.

# V. CONCLUSION

The core argument of this chapter is that judicial review can and does have a relationship to administrative justice, and that a focus of this relationship leads us to productively reframe the central concerns of scholarship in administrative justice as well as in administrative law. The outline of this argument is represented in tabular form below:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Conception of AJ stresses … | Contribution to AJ | Corresponding law-job | Legitimacy | Useful When … |
| Hortatory & Advisory | Procedurally just administration | Policymaking processes with a propensity to producing just outcomes  | The Say: allocating authority and arranging procedures to legitimise action | Throughput | Court’s wisdom needs cautious communication |
| Protective & Vindicatory | Minimal interference with personal freedom | Protection of rights and liberties | Channelling: Reorienting conduct and expectations to avoid trouble | Output | There is a tendency to predatory governance, or for collective projects to overreach |
| Mediatory & Supervisory | Balanced, effective and sustainable social policy | Legal policy science | Net Drive: shaping direction towards one ‘Whither’ rather than another | Output | Other actors have stalled or need new patterns of thought, or need support translating points of consensus into practical measures. |
| Policing & Enforcing | Constitutional division of labour | Deference to others | The Adjustment of the Trouble-Case: Doing just enough to avoid group disintegration | Input | Social policy is still bedding in or is too hot to handle, or is so contested that argumentation is not an effective way of resolving matters |

As we can see, the ideal typical functions of judicial review, represented in the far left column, correspond closely to other key features that populate the remainder of our table: the conception of administrative justice; the contribution of judicial review to administrative justice; the law-job it discharges; its legitimacy narrative; and the contexts in which those functions prove particularly useful. Such a flexible and pragmatic approach to judicial review and administrative justice, highlights its value for public administration; and it also points to a new agenda for scholarship in administrative law and administrative justice, and to the need for mutual dialogue between them.

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