# The animators of administrative law: challenging the “monopoly” of law’s application

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## *Abstract*

*This article makes two novel contributions to public law by looking beyond legal judgments and doctrinal analysis in developing socio-legal understandings of administrative discretion. To begin, it sets up administrative decision-makers as the “animators” of administrative law and as central subjects in understanding how administrative law is brought to life.*

*The first contribution is to draw on semi-structured interviews with frontline officials to present novel understandings of discretion and control of discretionary power. The second contribution is to develop two themes through which we can theorise on administrative discretion at first instance: (i) institutional bureaucratic culture; and (ii) dissonant decision making. In doing so, pathways to closing knowledge gaps are illuminated, and constructive dialogues between administrators and legal scholars on how administrative law is really brought to life are developed.*

***Key words:*** *administrative decision-making; control of discretionary power; administrative law; administrative justice; socio-legal research.*

Public law has an epistemological problem. The field prioritises and reinforces doctrinal and theoretical knowledge in a way that ignores much of the real-world action and application of law. This article situates administrative decision-makers as central actors in how public law operates beyond the courts and as important collaborators in developing novel understandings of public law. Thomas opines that there is a need for a pluralistic approach to the study of administrative law and “other forms of administrative law in action that exist outside the courts and the range of purposes they serve”.[[1]](#footnote-1) Daly notes that for public lawyers to remain relevant and influential we must embrace a plurality of principles, sources and methodologies, recognising that there are “a variety of ways of looking at the world”.[[2]](#footnote-2) There is a significant body of work that seeks to provide a fuller account of administrative law in context, particularly from the field of administrative justice,[[3]](#footnote-3) but it is also important to theorise on how these understandings can contribute to public law theory. As Tomlinson observes:

[M]ainstream public law scholarship in the UK often relies on a thin, legalistic account of decision-making, i.e. that public law empowers decision-makers, often through granting them discretion of some kind, and also controls them through law (with emphasis usually put on judicial review as the mechanism of control). Such accounts are, however, insufficient to capture such a significant and complicated relationship and there is therefore a need to understand better the sociological reality of public law in this context.[[4]](#footnote-4)

This concern is directly addressed in this article through a socio-legal approach to public law research on the exercise of discretion from within the administrative state. Legal scholarship on control of discretionary power is dominated by doctrinal and theoretical methodologies. While such scholarship is rigorous, relevant, and insightful on the internal logics of public law,[[5]](#footnote-5) the predominance of such methodologies contributes to the “thin, legalistic account” that is divorced from the reality of how discretion is exercised by decision-makers. The research outlined herein employs a socio-legal methodology, drawing on administrative justice frameworks in theoretically grounding the focus on first instance decision making, and uses qualitative research to investigate lived experience understandings of discretion based on how administrative decision-makers understand and explain their own work practices. Thus, it is a response to calls for a more pluralistic public law research agenda that enhances the study of judicial review by challenging the “juristic orthodoxy of law as a homogeneous social institution”.[[6]](#footnote-6) It is also part of a growing emphasis on public law outside the courts – for example Murray on the role of administrative decision-makers and citizens in the interpretation of unwritten constitutional principles,[[7]](#footnote-7) and Webb on delegated powers and administrative decision-making.[[8]](#footnote-8)

### **Methodology**

The exercise of administrative discretion and reasonableness review of administrative action are the legal hooks from which the qualitative research hangs. The relevant tests and intensity of review have been a concern of public law scholars for decades.[[9]](#footnote-9) To date, legal researchers have focused heavily on the limits of administrative action, without close examination of the lived reality of making first instance decisions. As Martin observes: “[w]ithin this corpus of work, frontline decision-makers are not forgotten, but necessarily fade into the background of the analysis as legal issues are isolated and enveloped in their relevant bodies law.”[[10]](#footnote-10) By contrast to legal approaches, sociological research in the field in the Irish context focuses heavily on the understanding of decision-makers themselves, without a deep examination of the legal framework.[[11]](#footnote-11)

Martin tentatively sketches out three of many possible lines of inquiry into frontline decision-making that may be pursued by socio-legal scholars of administrative law or administrative justice.[[12]](#footnote-12) This research project closely follows the first classification he offers – as lawyers we are different to other social scientists in that we tend to foreground the law making us well place to ask and answer questions such as “[h]ow do administrative law standards, legislative duties, formal procedures, and informal rules actually interact on the frontline?”[[13]](#footnote-13) Socio-legal inquiry allows researchers to look at legal problems as social problems. It provides a framework for a different way of understanding the relationship between law as lived, and law as written about, and expands the toolkit of legal researchers exponentially.

The views of administrative decision-makers cannot explain the full range of normative influences that impact administrative discretion.[[14]](#footnote-14) Nor can they account for all aspects of how discretion is exercised by an institution or within an institution. Yet this is not the intended aim of this article. Instead, it represents a different way of knowing about discretion based on the subjective views of people working within the system, as an alternative reality to the descriptions of discretion we see detailed in judgments of the superior courts or public law textbooks. There is not necessarily coherence to be found in this approach, as would be more typical of black letter work. As Cahill O’Callaghan and Mulcahy explain:

The interpretivist epistemological foundation of qualitative research emphasizes lived experience and understanding the social world through the subjective lens of participants. Large numbers of cases are not required, because research time is devoted to seeking out smaller but deeper or ‘thicker’ datasets. The ontological position of qualitative research is founded on a constructivist approach, which recognizes the role of both the researcher and the researched in the social construction of society. This recognition of multiple realities, co-production of data, and inter-subjectivity underpins a concept of reliability that requires a transparent research process but not one that is necessarily reproducible.[[15]](#footnote-15)

The research design sought to understand the lived experience of decision-makers, and considerable time was spent building a small but deep data set to provide in-depth understandings from decision-makers on the frontlines of administration. Eight semi-structured interviews with frontline officials in the Irish public service were carried out to support the socio-legal work outlined below. The sample is comprised of decision-makers in the International Protection Office of the Department of Justice (IPO), and Workplace Relations Commission (WRC). These bodies were selected following doctrinal review of judgments of the superior courts, analysis of the relevant statutes underpinning the bodies,[[16]](#footnote-16) and negotiations with gatekeepers. A more detailed contextualisation of the decision-making frameworks within which the interview participants work is outlined below. The key inclusion criteria were that participants must be first instance decision-makers in Irish public bodies who exercised discretion on decisions relating to individual rights, and whose decisions may be subject to judicial review. As the recruitment materials set out:

[t]he purpose of this study is to examine how administrative decision-makers in Irish public bodies understand the controls (or legal limits) on their discretionary powers. The aim of this research is to illuminate new perspectives on administrative law by researching the law in action or in other words, the law as brought to life by administrative decision-makers.

Ethical approval from the University College Cork Social Research Ethics Committee was secured for this work, and eight interviews were conducted via Microsoft Teams across the last quarter of 2022. The transcripts were anonymised and coded through a combination of deductive and inductive coding. Each decision-maker was given a number (DM1, DM2, etc.) and references to data that might risk anonymity was removed. Settling on the adequacy of the sample size was done based on engagement with scholarship on qualitative sampling and on-going process of ensuring saturation.[[17]](#footnote-17) As Hennink and Kaiser note:

Sample sizes in qualitative research are guided by data adequacy, so an effective sample size is less about numbers (n’s) and more about the ability of data to provide a rich and nuanced account of the phenomenon studied. Ultimately, determining and justifying sample sizes for qualitative research cannot be detached from the study characteristics that influence saturation.[[18]](#footnote-18)

The study is not presented as a universal study of discretion on the frontlines or an in-depth account of discretionary decision-making in the IPO or WRC, and should not be read in that way. Instead it is offered as an epistemological challenge to how we know what we know about administrative discretion and as a novel way in to theorising on control of discretionary power. In keeping with the socio-legal positioning of the underlying research, this article takes a holistic approach to fleshing out understandings of discretion by weaving together the empirical, doctrinal, and socio-legal work in the three substantive sections that follow: (i) the animators of administrative law – reviewing literature on administrative law and socio-legal studies in making the case for investigating how first instance decision-makers bring administrative law to life; (ii) exploring administrative discretion at first instance – presenting qualitative data on how first instance decision-makers understand and describe their discretionary powers; and (iii) thematic analysis – of how administrative discretion is exercised in context.

## The animators of administrative law

### Expanding on the “Anatomy” of Administrative Law

Nason describes how in *The Anatomy of Administrative Law* Bell pulls apart the complex network of rules, conventions, statutory schemes and values that make up administrative law.[[19]](#footnote-19) Capturing the reality of how judicial review has developed over time, Bell reminds us that “the ‘grounds of review’ are not the product of conscientious design, nor were they created at a single moment in history”.[[20]](#footnote-20) The lack of design intentionality when it comes to the development of administrative law has also been captured by Davis’ work where he outlines how English judges neglected their role as “architects” of administrative law, instead restraining their actions to “the tasks of bricklayer”.[[21]](#footnote-21)

How then do people working within the administrative state understand the limits or controls on their power, in circumstances where there has been no clearly designed framework, and the reality of day-to-day decision-making is messy, variable, and alive. Whereas Bell focuses on the “anatomy”of administrative law, this article focuses on the “animators”of administrative law. This idea of “animation” is a motif throughout the article and encapsulates the notion that administrative law is lived and brought to life by administrators, therefore increased attention should be placed on their perspectives and understandings of law. In adopting this approach, this article responds to the challenge Thomas sets up for the field:

[T]he challenge for administrative law scholars is to reassess their priorities by widening their focus to include administrative institutions, how they make and implement policy, their effectiveness, how they are held to account, and what institutional designs of administration are appropriate.[[22]](#footnote-22)

What can perspectives of decision-makers contribute to the study of judicial review? McCrudden observes that “[l]egal rules are not self-enforcing, in other words; they must be mobilised”.[[23]](#footnote-23) Similarly, Halliday and Scott note, “[i]f discretion is ubiquitous within public administration, this begs the question of what shapes the decision-making of public officials.”[[24]](#footnote-24) A good starting point is to ask them.

The relationship between law and administration has been considered in a number of significant Supreme Court decisions in Ireland over the past 15 years.[[25]](#footnote-25) In *Zalewski v Adjudication Officer & Ors*[[26]](#footnote-26)the Irish Supreme Court reflected on the competence and training of first instance decision-makers. The case considered many points of public law,[[27]](#footnote-27) but the most relevant for this discussion concerns the applicant’s complaint that there was no requirement for adjudicators to have legal qualifications, training, or experience. The applicant claimed that this practice was incompatible with the state’s duty to protect and vindicate his personal rights under Article 40.3 of Bunreacht na hÉireann (the Constitution of Ireland).[[28]](#footnote-28) O’Donnell J rejected the contention that bodies like the WRC “must be staffed by people with formal legal training and sufficient legal experience to be appointed judges”. He noted that:

[C]ourts and lawyers do not have a monopoly on fact-finding, or even the law’s application, and cannot claim infallibility in either respect. If it were otherwise, there would be no need for an appellate system.[[29]](#footnote-29)

There is a perceptible realism in O’Donnell J’s judgment here on how law is translated into action, or animated, outside the courts. He rejects any artificial notion of law’s application being a preserve of courts and lawyers – there is no monopoly on the law’s application. Yet, his judgment raises further questions about law’s application outside the courts, and the appropriate level of skill or expertise we ought to expect of decision-makers. First instance decision-makers have considerable powers in exercising discretion in activating systems for how discretion is exercised at street-level, however it does not necessarily follow that decision-makers must be lawyers or professionals to meet a certain standard of administration. In fact, Lipsky’s work uncovers some of the negative aspects of professionalising street-level bureaucracy, describing how:

[A]lthough there are both theoretical and practical reasons for looking to professional development as a way to improve street-level bureaucrat’s performance, the record of professions suggests that the model they provide in practice is not necessarily an auspicious one for increasing responsiveness to clients.[[30]](#footnote-30)

Hickey notes that *Zalewski* revives a provision of the Irish Constitution “that envisages the dispersal of authority in respect of legal questions beyond *judges and courts*”.[[31]](#footnote-31) Donson et al. caution that implementing *Zalewski* on the frontlines of administration is a considerable challenge in circumstances where qualifications, expertise and levels of independence of administrative decision-makers vary across different bodies.[[32]](#footnote-32) There is a balance to be struck – as animators of administrative law administrative decision-makers are legal actors, but they are not judicial actors. Development of work in this area must proceed cautiously to ensure the field does not “judicialise” administrative decision-making or move towards a legalistic approach to administrative decision-making.[[33]](#footnote-33)

### Administrative discretion at first instance

First instance decision-makers are the people tasked with determining claims or grievances referred to the state for resolution for the first time. Public law scholarship of course pays a lot of attention to appeals or judicial review, but first instance is where most administrative decisions are made and remain.[[34]](#footnote-34) As Raso observes “the largest set of decisions that affect individuals’ rights are made by administrative officials at and behind the front lines of executive agencies”.[[35]](#footnote-35) Since the 1980s, socio-legal researchers have been drawing on Mashaw’s work in building modes of understanding and theorising on “internal” administrative law.[[36]](#footnote-36) In particular much of this research has involved refinement of the models of administrative justice,[[37]](#footnote-37) in-depth analysis of particular areas of administration[[38]](#footnote-38) and emerging phenomena[[39]](#footnote-39), and more recently introducing a focus on how the public perceives the justice inherent in administrative decision-making.[[40]](#footnote-40) Yet, there has been remarkably limited research that cuts across judicial review and administrative justice with Arvind et al. describing the lack of research intersecting administrative law and administrative justice as “a missed opportunity for productive dialogue”.[[41]](#footnote-41) Halliday notes that studying administrative law from the perspectives of public officials “could add significant depth of analysis”.[[42]](#footnote-42) As with any research method, there are limitations to researching administrative law through socio-legal and empirical methods. The contextual and relational nature of this type of research must be stated. As Mulcahy and Tsalapatanis note:

Critics of socio-legal empiricism tend to conceptualise the goals and aims of empirical work as static, rarely reflecting on the everyday dynamics of conducting research or the many ways in which relationships in the field are constantly being re-configured and negotiated. The complexity of obtaining access to research sites and people, gaining credibility and developing working relationships can mean that the relationship between researchers and the policy audience can be fluid, as well as highly context and time specific.[[43]](#footnote-43)

There are practical limitations including access to participants, negotiation with gatekeepers, ethical considerations and ensuring adequate sampling. There are also limitations to what socio-legal research can contribute to theory. As Samuel outlines:

But the point to make here is that the external viewpoint can provide only a certain insight into epistemological issues in law. It cannot explain the actual workings of the internal movement within legal knowledge models any more than sociological accounts of the development of motor vehicles can fully explain the workings of the internal combustion engine.[[44]](#footnote-44)

What follows is not an authoritative empirical account of discretionary power in the administrative state. Instead it is a novel framing through which we can understand how some decision-makers understand the relationship between their work and law, the institutional environment within which they work, and subjective viewpoints from within the administrative state. The value of these insights is to provide a lived experience basis from which to challenge the doctrinal orthodoxy, and illuminate the role of first instance decision-makers in how public power is exercised and understood.

*Discretion is everywhere and everyday*

Lipsky outlines how street-level bureaucrats “exercise wide discretion in decisions about citizens with whom they interact.”[[45]](#footnote-45) Frontline decision-makers have a range of decisions open to them. They are asked to exercise discretion in determining claims or grievances on behalf and under the authority of the state. As Hertogh observes, “they do the hard, dirty and sometimes dangerous work of the state.”[[46]](#footnote-46) Hertogh notes that “[t]ypical features of these ‘street-level bureaucrats’ or ‘front-line officials’ in welfare departments, lower courts, legal service offices, and other agencies is that they work directly with the public and that they have wide discretion over the dispensation of benefits or the allocation of public sanctions.”[[47]](#footnote-47) At the same time, discretionary decision-making does not take place in a vacuum. It is shaped by a complex network of intersecting political, legal, social and behavioural phenomena that relate to how modern bureaucracy is operationalised:

Policy comes alive in the daily practice of street-level bureaucracy. It is here that, despite detailed rules and regulations, reality is shown to be far more complex and varied than legislators had ever dreamed.[[48]](#footnote-48)

Administrative discretion is a site of “everyday” public law.[[49]](#footnote-49) Social security scholarship has demonstrated the central role discretion plays in how people experience the welfare state.[[50]](#footnote-50) Fitzpatrick et al. detail how the exercise of discretion in frontline social security decision-making – and in particular the conditionality relating to employment and benefit sanctions – has a role to play in the number of people falling into destitution.[[51]](#footnote-51) Meers shows how application forms can constrain or fetter how discretion is exercised through the design of application forms in the context of the Discretionary Housing Payment scheme.[[52]](#footnote-52) Similarly, Gulland’s empirical research on the Employment and Support Allowance found that there was a view among welfare rights advisers that medical assessors were ticking boxes on a computerized form “without adding any explanation for their assessment and that this led to a computerized calculation of the number of points awarded and ultimately to a refusal of benefit”.[[53]](#footnote-53) Meers argues that the delegation of discretionary decision-making for social security provision down to local authorities was a tactic of the government to avoid the ‘blame’ for benefit reductions.[[54]](#footnote-54)

Socio-legal research more broadly across different areas of administration engages with administrative discretion. Soubine’s empirical study of discretion in the Crown Prosecution Service points to an account of prosecutorial decision-making as “discretionary by nature and impossible to regulate”.[[55]](#footnote-55) Halliday’s ethnographic study of homelessness law administration notes that “[i]ndividual officer discretion was used to disadvantage certain types of applicant, employing ethnic stereotyping in this process”.[[56]](#footnote-56) These are all rather negative examples of administrative discretion in action. It is also important to remind ourselves that discretionary decision-making is one of the enablers of effective public administration – “[c]rucial to the art of public administration is the discretionary leeway that civil servants have in implementing policy and enforcing regulations.”[[57]](#footnote-57) How decision-makers understand their own power within administrative systems is important in part due to the hierarchal structure of government departments.[[58]](#footnote-58) Some of the decision-makers interviewed for this study saw themselves as unimportant actors within the system. They did not see themselves has having any great deal of discretion. Some were even surprised I had wanted to interview them due to their perceived juniority. One interviewee reported that they did not think they would be told if one of their cases was appealed, but that someone more senior might be informed:

DM2: No, I wouldn’t be told about that. I would imagine somebody in the building would be told, somebody probably higher up than myself and just for their own kind of statistics and stuff, more so than anything else. But I wouldn’t necessarily find out about it.

By drawing attention to how administrative law is understood by first instance decision-makers, a whole host of questions on the reception of legal knowledge into public bodies arise. How much ought a decision-maker know about the law? What do we expect of decision-makers in respect of legal tests? Is the ‘ask’ too great, are the expectations too high? Lord Bingham’s *obiter* in *R. (Begum) v. Denbigh High School* is particularly relevant here:

The fact that the decision-maker is allowed an area of judgment in imposing requirements which may have the effect of restricting the right does not entitle a court to say that a justifiable and proportionate restriction should be struck down because the decision-maker did not approach the question in the structured way in which a judge might have done. Head teachers and governors cannot be expected to make such decisions with textbooks on human rights law at their elbows.[[59]](#footnote-59)

In responding to such objections, it is important to reflect on the functions of judicial review, and how administrative law is applied outside the courts. Several of the decision-makers interviewed described themselves in legalistic terms, noting that they were “creatures of statute” and “bound by all decisions of higher courts”. Judicial review does not just exist within the world of judicial review – it is translated or animated into real world interpretations and applications. Donson and O’Donovan describe the “under-defined relationship between administrative law and administrative justice”[[60]](#footnote-60) noting that this deficiency in the scholarship is unwelcome. They argue that “[j]udicial review, for example, should not merely be perceived as an internally sovereign logic belonging only to lawyers, but must be connected to, and must itself be seeking connection with, actual administrative contexts and broader constitutional dilemmas”.[[61]](#footnote-61) Arvind et al. develop an analytical scheme for considering the different functions of judicial review.[[62]](#footnote-62) They identify four understandings of the role of judicial review in relation to administrative justice: an advisory and hortatory function; a protective and vindicatory function; a mediatory and supervisory function: and an enforcing and policing function.[[63]](#footnote-63) Judicial review operates and is understood in many different ways at the same time, and with different perspectives on its role and function hence the importance of developing analytical frameworks within which to explore and hold this plurality.

## Exploring administrative discretion at first instance

Martin observes that “the value-laden concepts of legitimacy and procedural fairness, in particular, have served as bridges between the empirical and normative in contemporary criminal justice research”.[[64]](#footnote-64) In a parallel line of “value-laden” inquiry,[[65]](#footnote-65) this article positions the exercise of administrative discretion as a bridge between the empirical and normative in contemporary public law research. How to control administrators’ powers is both a legal challenge and social challenge in that it involves trying to get a cohort of people to act in a certain way:

The nature of the challenge for the legal system has been to recognise that while administrators perform legitimate social functions, they also exercise powers which may adversely affect the interests of the individual citizen and therefore need to be subject to legal supervision.[[66]](#footnote-66)

Lord Cooke argues that as administrative law is so focused on defining the boundaries of discretion that it could be renamed the “law of public discretions”.[[67]](#footnote-67) Brady, writing in relation to proportionality review, asks who is “doing” the proportionality review – is it the decision-maker or the court.[[68]](#footnote-68) In reflecting on the “animation” of administrative law, who does what and why is a central concern.

### Contextualisation of decision-making frameworks

The decision-making frameworks within which the decision makers interviewed for this study operate are not identical but are comparable in that they are places of first instance dispute resolution for claims or grievances, and concern decisions that relate to individual rights. The Workplace Relations Commission (WRC) is a statutory body that was established by the Workplace Relations Act 2015. The WRC provides many services relating to employment matters, industrial relations, and equality law. Section 40 of the Workplace Relations Act 2015 provides for the appointment of adjudication officers (AOs) to hear and determine disputes under the Act. AOs are independent in the performance of their functions.[[69]](#footnote-69) The work of AOs involves case management, holding a hearing, and determining the outcome of a request for dispute resolution. For industrial relations disputes, the AO will issue a recommendation, and for all other cases, the AO will issue a written decision which is binding on the parties. Full-time AOs are appointed at Assistant Principal level in the Irish public service.[[70]](#footnote-70)

An anomaly of the WRC that perhaps needs some further explanation is that the WRC hears equality claims under the Equal Status Acts 1998-2018. The Equal Status Acts prohibit discrimination in the provision of goods, services, education and housing. When the WRC was established, it assumed the functions previously carried out by the Equality Tribunal and Rights Commissioners Service. The name of the WRC has led to misunderstandings about its role in discrimination cases with potential applicants not realising that a discrimination claim does not have to be connected to employment.[[71]](#footnote-71) AOs are first instance decision-makers whose decisions may be appealed to the Labour Court or Circuit Court, depending on from which legislative framework the claim was referred. AOs work within a legal framework that has been under intense scrutiny during and post the Supreme Court challenge in *Zalewski*. During the interviews, decision-makers noted a wide-range of materials they are provided with to support their decision-making work including the following: decision-making checklists; updates on recent case law; the requirement to complete a Certificate in Workplace Adjudication at the National College of Ireland; access to legal research databases; and ongoing training.

The International Protection Office (IPO) is an office within the Immigration Service Delivery function of the Department of Justice.[[72]](#footnote-72) The IPO is responsible for processing applications for international protection under the Internation Protection Act 2015. Employees of the IPO also consider, on behalf of the Minister, whether permission to remain should be granted to unsuccessful applicants.[[73]](#footnote-73) Decision-makers in the IPO therefore make three types of decisions relation to immigration status that involve the exercise of discretion – refugee status, subsidiary protection, and permission to remain. This is done in as part of a single application procedure, as introduced by the International Protection Act 2015. During the interviews, decision-makers noted that they were provided with a wide-range of materials to support their decision-making work including the following: a “physical ring binder” of guidance; “country packs” with suggested questions depending on where an applicant was from; case law updates; and country of origin information to assist report writing. Management in the Department of Justice asked whether there was a preference to recruit frontline first instance decision-makers, or more senior reviewers, or a mix. Due to the focus of the study on first instance decision-making, I elected to recruit first instance decision-makers. These decision-makers operate at Executive Officer and Higher Executive Officer level within the Irish public service. Decisions made by the IPO can be appealed to the International Protection Appeals Tribunal (IPAT).[[74]](#footnote-74)

While successful in providing unique insight into the reality of frontline decision-making from the perspective of decision-makers themselves, there are limitations to this study. A key difference between WRC AOs and IPO officers is that WRC AOs make decisions fully independently, without anyone else reviewing their decision. IPO officers may have more senior colleagues review their work and recommended changes to reports and decisions. Another limitation relates to the outputs whereby it is not possible to feedback exactly what was said by their employees to either the IPO or WRC, instead in closing the feedback loop each body was sent a summary of overall findings across the sample. It would have been instructive to be able to produce findings that specifically related to a certain institution. On the other hand, some participants mentioned that it made them more comfortable taking part in the study knowing that their comments would not be linked explicitly to a certain body as they felt it provided an extra layer of anonymity. The study was designed to capture data on the education and employment background of decision-makers in order to explore the expertise of administrative decision-makers, as considered by the court in *Zalewski*. However, due to a concern that participants may be identified by reference to education and employment backgrounds, this data was removed during the anonymisation of the interview transcripts. It is hoped that this exploratory study will be generative and lead to new dialogues at the intersection of public law and public administration.

### How decision-makers understand their discretion and controls on it

In reflecting on the discretion they have in carrying out their duties, the decision-makers had very different perspectives[[75]](#footnote-75):

DM1: I think there might be a legal technical meaning and I wouldn’t necessarily have discretion in that sense. But in the everyday sense of the word, quite a lot. I am lucky that I’m allowed to kinda use my own discretion in the everyday sense. Quite a lot… You can use your own reason and common sense

DM2: The decision that I come up with might not be the final decision, but it usually is.

DM3: We are statutorily independent. And so we are assigned, we are delegated cases… and then we run the cases ourselves in terms of decision making and also the process as well.

DM4: I suppose you’re looking at the precedent and the precedent that you could possibly create here. Do you know what I mean? And that would be in the context of using your discretionary powers and you know, again in that context, I would be very mindful of what the case law and particularly what the superior [courts] case law says.

DM5: Yeah, I actually, gosh, I took down a note of some of these and it was amazing, Aisling, when I put my mind to it, the variety [of discretionary power], you know, the array that you don’t actually go around thinking about. You know when you put your mind to a question like that, you don’t actually realise until you jot it down because it’s not something you actively think about… this is a discretionary power.

DM6: Yes. So, I suppose, well, this is obviously very informed by my own background, but my view of discretion is obviously that all power is fettered within a constitutional democracy and there is a frame within which you’re working. So obviously the kind of structural frame really is the prospect of JR and that you’ve kind of amene yourself to all those fair processes and procedures and particularly things around like the duty to give reasons. And you know that you’re making decisions that are intra vires and could be reasonably made… you know that you have directed your mind to the question. And then I suppose at the more at the kind of a lower level than that, how you implement that in practice through things like the rules of evidence… so you’re under the duty to investigate as well and about half of the people who appear in front of us are unrepresented. So, there is a kind of a balancing then of the equality of arms piece that kind of clarifying what somebody’s claim is, and that you’re facilitating them to present their claim as best they can without making their case for them. So, there’s a tightrope you have to walk.

DM7: The only powers we have are those conferred on us by statute. So we have very little discretion in terms of our decision making.

There was also a considerable variance between how decision-maker understood different elements of the controls of discretionary power. For example, some decision-makers were very comfortable with discussions of reasonableness and proportionality with DM6 taking control of the interview during a series of questions on the relevant legal tests:

DM6: Well, let’s take the next two together, like reasonableness and proportionality, are obviously the JR standards.

By contrast other decision-makers were unfamiliar with the concepts:

DM1: Yeah, it’s not something I’m familiar with. It sounds maybe like it has something to do with criminal law. I know you know…

DM2: I don’t think that comes up because I’m not 100% sure what proportionality is.

DM4 gave quite a rather round-about answer to the question on what a reasonableness test involves: “I think, you know, that’s from case law and so I would look at case law for a reasonableness test, particularly newer cases”. Interestingly, DM7 introduced the idea of an objective man on the street: “[s]o for example, well, my understanding of reasonableness is, would the man on the street or person on the street, or so it’s an objective test. So would the individual on the street regard the behaviour as reasonable or not reasonable?”

Other decision-makers were very comfortable describing the nature of reasonableness and proportionality tests:

DM5 (on reasonableness): Have I made my decision in a rational, fair manner? Does it stand to reason? In other words, if somebody looks at the decision from the outside, can they see how I arrived at that decision? And have I given reasons for the decision that I’ve made? Does my decision… does my… the easiest way to put it is does my decision make sense to an outsider looking at it and does it stand? Does it stand up, in other words? It was that I took into account relevant facts that I gave the right weight to the evidence before me.

DM5 (on proportionality): So I understand, again looking at my decision, does my decision correspond to the objective and the effects as to the aims being pursued.

DM7 (on proportionality): We’re making sure that the measure doesn’t go any further than what it needs to do in the circumstances. That would be one part of it.

These examples show the variety of perspectives that can be encountered in the frontlines of administration, and the diverging ways in which public law concepts are animated.

### Discretion and control of discretionary power as complex-liminal-malleable social phenomena

Sandro describes the functional difference between administrative discretion and judicial discretion as “meaningless”:

The point is that this kind of discretion is not ontologically dependent on the level at which it is exercised. This is why the functional distinction is not only meaningless but actually confusing – it suggests the idea that discretion would be different depending on whether it is entrusted to ministers or to judges. But what differs in these cases is not the delegation of decision-making powers or the degree of interpretive leeway, but the political evaluation of how such discretion must be exercised and/or constrained.[[76]](#footnote-76)

Sandro provides a framework to approach the study of discretion by reference to the means of exercising and constraining (or controlling) it. The testimony of first instance decision-makers on the exercise of and controls on their administrative discretion offers legal scholarship a different perspective on long established, and doctrinally tired,[[77]](#footnote-77) public law concepts. This lived experience from the frontlines shows the messiness and lack of coherence that is associated with the reality of law in action. Through a combination of inductive and deductive coding[[78]](#footnote-78) the qualitative data was used to shape descriptors relating to administrative discretion at first instance, based entirely on the views of decision-makers. A complex-liminal-malleable understanding of discretion and control of discretionary power was developed through analysis of the data.

The exercise of administrative discretion is a complex phenomenon, with multiple constructions, applications and contextual considerations. It is revealing of the subject matter that within one group of professional decision-makers, there is such a wide spectrum of understanding. This is a difficult area of law with multiple interpretations and sometimes a lack of conscious awareness of its operation in the delivery of public services on the frontlines. It is an inherently nebulous area of research. As Perry notes “[u]nreasonableness is a notoriously obscure standard. For decades, courts have struggled to explain it clearly”.[[79]](#footnote-79) Harris describes how law is perhaps “the greatest source of complexity” for the system through which social welfare benefits are delivered, noting that “[c]omplex and obscure legal rules could be regarded as part of a broader disconnect between law and the social realm”.[[80]](#footnote-80) A disconnect between law and the social reality of experience can be discerned from this study - the way in which DM1 kept distinguishing between the legal sense of the concepts and the everyday meaning was interesting in this regard. DM1 seemed almost alienated from the complexity of the “legal” meaning and was more comfortable to deal in the “everyday” sense of the words. For the decision-makers who did have more in-depth understandings of the concepts, there were very different ways of describing the concepts that exposed the complex nature of administrative discretion and its controls.

Second, the idea of administrative discretion is in many ways an intermediate and indeterminate concept, located in a space between legislative, executive and judicial power with pushes and pulls coming from all sides. On this basis, administrative discretion can be understood as liminal in nature. Discretion as described by the decision-makers cannot be situated in a singular space or be positioned with any certainty because it occupies many spaces at once. It operates as a nexus of state power whereby legislative, executive and judicial power combine in shaping and directing how discretion is exercised but ultimately, how it will be animated on the frontlines is dependent on the animator/decision-maker. This descriptor can equally be applied to the exercise of judicial discretion, yet we have much more legal literature on the exercise of judicial discretion, despite the fact the exercise of administrative discretion is where the daily encounters between individual and state take place. DM6’s analogy of the exercise of discretion being a “tightrope you have to walk” speaks to the difficulty of positioning. DM6 also makes reference to working within a “structural frame” that is shaped by the “prospect of JR”. However other decision-makers described the framework of administrative discretion by reference to legislation or the day-to-day decisions they made in the course of their work. It is situated at the threshold or interplay of many different ideas and competing interests, occupying many spaces and structures simultaneously.

Third, administrative discretion and control of discretionary power are vague enough to be malleable in nature. They can be adapted or altered while still retaining apparent legitimacy. Administrative discretion and the controls on discretionary power are in essence man-made imaginaries that are adaptable enough to soak up different meanings while retaining the semblance of legitimacy and authority. When asked about how they go about making discretionary decisions, DM4 noted that “I suppose it was an instinct in myself in terms of what was going to work best for the smoothing running of this hearing. Like what’s the best way of having this hearing done that will do justice to the parties... I’d love to say there was some science involved, but there isn’t really. I think it’s on your own gut instinct…”. There is clearly realism to be found in this observation. This speaks to Endicott’s analysis of proportionality as an attempt to “weigh the unweighable” and in making immigration decisions judges “have to throw the scales out the window and just choose”.[[81]](#footnote-81)

Understanding discretion and control of discretionary power as complex-liminal-malleable phenomena comes through accepting incoherency and messiness in how we organise and understand concepts in the borderlands between disciplines. It is an analytical approach within which we can discuss and situate paradoxes between real world experiences and judicial doctrine together at once, representing a generative contribution to public law.

## Thematic analysis

Two themes through which we can understand how administrative law is animated emerged from this research (i) bureaucratic institutional culture; and (ii) dissonant decision making. The thematic analysis that follows was developed again through a combination of inductive and deductive coding, and through engagement with relevant socio-legal literature. Thematic analysis of qualitative data provides for in-depth engagement with the explored phenomena while ensuring structure in outputs and the presentation of data relevant to the research questions.

### Bureaucratic institutional culture

Institutional culture has significant impact on workplace practices, including the exercising of administrative discretion. It would be trite to argue that the exercise of discretion is an entirely individual activity. As Halliday observes:

In thinking about the reception of legal knowledge into administrative agencies, it is important to recognise from the outset that such agencies are usually quite complex organisations. This is a fact which is often glossed over for the purposes of judicial review litigation… From the court’s perspective, the decision under scrutiny can easily be regarded as having been made by ‘the decision-maker’. The complex bureaucracy, the diverse activities of which produced a final decision-outcome, can be imagined as a single entity. The decision-outcome which is the produce of multiple pre-decisions can be artificially reduced to a single discrete ‘decision’. The social reality, of course, is quite different. The decision-making process is better conceived as a network of bureaucrats exercising discretion, culminating in a final outcome which is highly contingent on the discretion of multiple actors.[[82]](#footnote-82)

Zacka’s on-site ethnographic research had similar findings on the importance of culture, and he describes how a network of colleagues and “everyday conversations among peers” within an office can have a significant bearing on how discretion is exercised, drawing attention to the “important of informal interactions among peers”, and the “dense web of informal relationships and practices whose importance is not sufficiently recognized”.[[83]](#footnote-83) Zacka’s “web” analogy and Halliday’s description of “network of bureaucrats exercising discretion”[[84]](#footnote-84) illustrate the many interconnecting issues that arise when studying the exercise of discretion in context.

The decision-makers in this study described rich and diverse details about the bureaucratic institutional cultures in which they are working. It is within these cultures that administrative law is animated. The interview schedule included a specific series of questions on institutional environment, and a number of open ended questions that led to discussions about culture, place, and their role in the wider institutional setting. DM4 identified the workplace as collegiate, but at the same time noted the individualistic nature of the work:

I think it’s a very supportive environment to work in and you know, but at the end of the day, you know you are the decision-maker, you are independent and it’s your decision at the end of the day. So I would say that it’s both collegiate and supportive. And in terms of you know that you can call a colleague you know to discuss something. But at the end of the day, you are the decision-maker and you’re hearing the case on your own. And so you’re very independent in your function.

As well as emotional challenges, frontline decision-makers experience workload challenges in carrying out their discretionary decision-making functions on behalf of the state. Many spoke of the challenges associated with their work:

DM7: It is an extremely difficult job. You know it is a difficult job. It’s a responsible job.

DM6: I can’t speak for everyone but I think we are all here to do the best we can and we’re always very conscious of, you know, that you are determining rights and obligations.

DM2 noted the positive workplace culture, but also spoke to the challenging and “heavy” nature of the work:

The atmosphere where I work is actually a great atmosphere and the people are really good, like the work itself can be quite heavy going at times. It can be a little bit dark and you’re dealing with people’s life stories, which may or may not be incredibly traumatic for them and for you to experience as well.

Decision-makers reported feeling under pressure to get decisions out:

DM1: I can’t really think of anything I need, except perhaps a little bit more time sometimes in terms of meeting our KPI.

DM7: Time? No, unfortunately Aisling. And there’s only a limited amount of it. You always feel under pressure time wise and particularly to get your decisions out within a certain window and that can be very difficult.

Some decision-makers referred to being glad that the interviews are anonymised as they did not want to their comments to be linked back to them:

DM7: This is a personal opinion and I’m glad it’s anonymised for this reason. I think it’s important that [decision-makers] have sufficient legal knowledge and in my opinion that includes a legal qualification.

DM1: …and obviously I know none of this is going to get back to [public body]…

The interviews provided insight into the sense of pride or worth that the decision-makers observed from their decision-making functions:

DM1: It’s not an everyday sort of job … you’re making decisions that can affect somebody’s life.

DM6: It’s a very positive and supportive atmosphere… there lots of lifelong civil servants.

DM7: There’s definitely an atmosphere within [body] that we’re privileged to do the job that we do, and that there is a great onus on us to do that job correctly.

While it was not possible based on the sample size and research design to produce generalisable findings on the overall nature of the institutional environments the decision-makers work in, it is clear from the quotations detailed above that institutional environment, management practices, workload, colleagues, and systems of administration have a significant bearing in how the decision-makers go about their work. I also got a strong sense of how passionate and motivated the interviewees are about providing a public service, and how challenging it can be making determinations about rights and entitlements based on both subject matter and service demand. It was also possible to discern some differences between how the decision makers described the decision making environment. For example, decision-makers in the WRC described decision-making in much more individualistic terms, whereas decision-makers in the IPO described themselves as part of a wider team and as working under the supervision of more senior staff. This is not necessarily surprising due to differences between the roles as identified above. A point of note here is the lack of empirical research on different decision-making functions across public services. The Irish Law Reform Commission is expected to move to consultation stage soon on a project on “Non-Court Adjudicative Bodies” that will examine the “profusion”[[85]](#footnote-85) of adjudicative bodies across the administrative state.[[86]](#footnote-86) Further research on the training, expertise, and independence of non-court decision-makers will be needed to develop empirically grounded reform proposals, and to contribute to public law theory on administrative discretion more broadly.

### Dissonant decision making

The second theme that emerges is that of “dissonance”. Whereas doctrinal research attempts to find coherence in law, and theoretical work seeks to explore theoretical and normative frameworks, socio-legal research can lead to conceptually messy or open outputs.[[87]](#footnote-87) There is a sense of a lack of harmony on how administrative discretion is animated on the frontlines of administration. This is not surprising considering the reality of how law is animated, and by whom. A way of explaining this dissonance can be found in the decision-makers comments relating to the role of “instinct” in decision-making:

DM4: I’d love to say there was some science involved, but there isn’t really. I think it’s on your own gut instinct of what? How is the hearing going to work?

DM5: Yeah, this was probably the most when I looked at your list of questions. This was the one that really kind I was like, gosh, what do I do? And I think I have to say, Aisling, in that I do it instinctively and maybe that’s from experience or how could do it right? I hope I’m fair, but I think it’s just from... I do think it's from experience in practice and being very mindful.

This form of instinctive or intuitive decision making is something that requires further investigation, and sets up a methodological challenge in terms of trying to assess and understand the role of instinct and intuition – as well as reason and logic - in administrative decision-making. By contrast, another decision-maker in this study described their decision making process as almost having to push back against instinct and refocus on process:

DM3: Once you’re instinctively… as a human being you, you’re going to form views as you go through the case. One of the disciplines is to, well, you’re forming a view when you’re thinking you know, where you think you’re going with the case. You need to step back always and just address… just think through the issues and take your time to do that.

There was also a sense of dissonance to be gleaned from the relationship between frontline decision-makers and appellate or review bodies. To err is human. There is no question of expecting decision-makers to get it right every single time. Decision-makers work under challenging conditions, making complex decisions with limited resources. Mistakes happen in all walks of life; no decision-maker is going to get it right all of the time. Nor should we have that unrealistic expectation of decision-makers. What is important is that when mistakes happen, processes are in place to ensure the same errors are not repeated (either by the original decision-maker or other decision-makers). This speaks to the shift in mindset from “putting things right” to “getting things right”.[[88]](#footnote-88) Doctrinal research illuminates how things can still go wrong after a case is remitted by the High Court back to the first instance for fresh determination. The observations of MacEodhaidh J in *A.A.S v Refugee Appeals Tribunal and Others* are illustrative in this regard:

It is regrettable that the decision maker in this case does not appear to have had access to the decision of Birmingham J. or to an account of it. It seems to me that in any case which is remitted to a decision maker from the High Court, the decision maker ought to be concerned with the views of the High Court on how the matter was first handled. Unless this happens, the mistake or error which led to the first set of proceedings might be repeated. This appears to be what has happened in this case.[[89]](#footnote-89)

There was considerable variance across the sample on what would happen if a first instance decision was appealed or reviewed. Potential deficiencies in knowledge sharing mechanisms were identified by some of the decision makers interviewed – for example one said that it was up to each decision maker to keep track of their decisions and check if there was any appeal.[[90]](#footnote-90) Another decision maker noted that it would not be appropriate to be informed about appealed decisions because the appeal body make their decision based on the application argued before it, which could have been run differently to the first instance application.[[91]](#footnote-91) The development of clear knowledge sharing mechanisms on important cases could provide clarity on areas where first instance decision-makers could improve and go some way in ensuring that the same errors are not repeated. There is a legitimacy concern in circumstances where most first instance decisions go unchallenged so if the decision-maker is getting it “wrong”, surely they ought to be notified to reduce the risk of injustice or systemic maladministration.

The interviewees across the board were broadly positive about judicial review of administrative decisions. Some of the descriptors included: important safeguard; vital part of the process; essential safety net; prevents injustice; useful; and critical. This is an important insight from decision-makers in light of recent political rhetoric around the need to limit access to judicial review in the planning context, explored in more detail in relation to institutional culture below. By contrast, interviewees had different perspectives on the utility of appeal body rulings for their work. Some decision-makers were perplexed by decisions coming from the bodies that their decisions may be appealed by:

DM1: We sometimes get their [appellate body] decisions and sometimes they’ll overturn one of reports that we spent a lot of time on and a lot of time writing the report and doing research, and they’ll write a seven page report, of which a couple of pages are just standard with the name and address and stuff, and just like reversing our decision and not giving any good reasons for it.

DM3: I mean what I would expect from them as an appellate body is to spend the time… they have the time to look at the law… they should be custodians of the development of the law and that’s where I think there’s a feeling that they aren’t doing that at the moment. Their focus is on efficiency when I think it should be on the quality of decisions. So, at the moment, our decisions are more detailed and to a higher standard that the [appellate body]. That’s the wrong way around. We should be the efficient body and they should be the substantive body.

Based on these accounts, it is clear that a failure to provide “good reasons” to the first instance decision-maker – and indeed the case parties – for overturning a decision, that they will have spent a lot of time on, is a frustrating experience. And perhaps even more importantly, it is of limited use to a first instance decision-maker because without reasons, it could be hard to see where they went wrong to avoid making similar mistakes in future. Many of the decision-makers expressed fear or “terror” about one of their own decisions being challenged:

DM4: Yeah, I think absolutely it’s fundamental to the administration of justice that there is an appeal process and it’s the appropriate checks and balances. There needs to be for the, you know, proper administration of justice. And that goes without saying, all the way up… And personally, I think while you might be terrified that your decision is being appealed, you know it’s a natural occurrence, you know, it’s going to happen and you know, it should be viewed in a positive way and that it’s actually going to shed light and you know if you’ve gotten wrong you know you’re going to get a decision that will clarify what the error was. I suppose you know, the trick is to see it in a positive what that you know that they’re going to provide clarification.

One decision-maker had the following comments to make about circumstances where judicial reviews are not taken due to costs and this leading to a “slippage in standards” or being seen as a “win” for the public body:

DM3: [i]t’s a vital part of the process. It’s important that bodies take it seriously. I think that because of the costs regime there are always going to be cases, JRs that aren’t taken that could have been taken and bodies need to be aware that that’s not a ‘win’ for them, that’s just a cost issue. I think there can be a slippage in standards where bodies factor in mistakes because the costs regime is so difficult for parties. I predict that the courts will change the regime in relation to costs for JR where even if you don’t participate in proceedings, if the party wins, they will get their costs. That is a change to the law that will and should happen. Public bodies cannot factor in mistakes in their decision making. Mistakes occur, that’s fine, but you can’t, em, you can’t run your public service on that basis. Do you understand the point I am making about the case not being taken?

Researcher: Yeah. So for monetary reasons, the case isn’t taken and then that is seen as a win for a public body whereas it doesn’t really factor in the fact that the mistake might not be remedied, is that kind of the point?

DM3: Yeah.

This interaction with DM3 also speaks to Thomas’ view that focusing on judicial review alone risks missing “much of the action, not least the basic nuts and bolts of how administrative systems operate in practice and develop over time”.[[92]](#footnote-92) The legal framework is of course important, but a real concern of decision-makers that arose during this research were the practical challenges associated with their work. For example, when referring to a shared knowledge folder DM2 noted “the software used is not great and tends to crash a lot”, or in reflecting on what could be improved DM6 noted issues with the relevant forms and the time it takes to pin down the nub of the issue, “sometimes they might have ticked box for one thing, but the narrative contains something else”. In identifying what would support decision-making work, the interview participants identified quite simple and achievable “everyday” supports that speak to the “nuts and bolts” or day-to-day reality of how administrative discretion is exercised: improve case management and knowledge sharing systems; allocate case load based on area of expertise; provide more specific, targeted training; and provide more personnel, physical office space, reliable software, administrative support, and legal research support.

## Conclusion

As outlined at the outset of this article, the lack of research intersecting administrative law and administrative justice is “a missed opportunity for productive dialogue”.[[93]](#footnote-93) This is not to say that traditional legal scholarship ought to be sidelined, instead space must be eked out for different ways of measuring, knowing and pursuing new knowledge about law.[[94]](#footnote-94) To continue developing this work, it would be useful to do a “deep-dive” in one area of administration or consider the effect of a policy change, piece of legislation or landmark judgment on a public body systemically. Bell highlights the absence of research into the role played by “soft law”, including governmental guidance and administrative policy, in “structuring administrative discretion”.[[95]](#footnote-95) As argued above, it is important to reflect more on the training and expertise of decision-makers with the aim of supporting their work and ensuring consistency, transparency and fairness in administrative decision-making. It would also be instructive to understand how first instance decision-making is changing due to the changing nature of the administrative state – a task that will be never-ending but with unbounded potential to generate new knowledge about public law and what binds us together as a society.

Administrative law does not just exist as a written account. It is animated and experienced in the daily interactions between individuals and the people the state entrusts with exercising public power in order to achieve the collective social ambitions of government. In *Zalewski*, the Irish Supreme Court has provided a useful and timely release from the fallacy that law is solely applied in the courts. The courts do not have a monopoly on law’s application, and they never really have.

1. R. Thomas, *Administrative Law in Action: Immigration Administration* (Oxford: Hart Publishing, 2022) p.4. [↑](#footnote-ref-1)
2. P. Daly, “Plural Public Law” (2019) 51(2) Ottawa Law Review 407, 423. [↑](#footnote-ref-2)
3. M. Hertogh, R. Kirkham, R. Thomas and J. Tomlinson (eds.) *The Oxford Handbook of Administrative Justice* (Oxford: Oxford University Press, 2022). [↑](#footnote-ref-3)
4. J. Tomlinson, “Public Law and Administrative Decision-making: Two Key Questions for Research” (2 November 2018) UK Administrative Justice Institute https://essexcaji.org/2018/11/02/public-law-and-administrative-decision-making-two-key-questions-for-research/. [↑](#footnote-ref-4)
5. P. Daly “*Wednesbury*’s Reason and Structure” (2011) P.L. 238-259; P. Craig, “Varying intensity of judicial review: a conceptual analysis” (2022) P.L. 442-462; H. Dindjer, “What Makes an Administrative Decision Unreasonable?” (2021) 84 M.L.R. 265-296; A. Perry, “*Wednesbury* Unreasonableness” (2023) C.L.J. 1-26; M. Teo, “Proportionality as epistemic independence” (2022) P.L. 245-268; P. Daly, “Substantive Review in the Common Law World: *AAA v Minister for Justice* in Comparative Perspective” (2017) *Irish Supreme Court Review* 105. [↑](#footnote-ref-5)
6. J. Přibáň, *Constitutional Imaginaries: A Theory of European Societal Constitutionalism* (London: Routledge, 2021) p.133. [↑](#footnote-ref-6)
7. J. Murray,“Administrative and Citizen Interpretations of Unwritten Constitutional Principles and Constitutional Silences: A Canadian Perspective” (22 July 2024) *VerfBlog,* https://verfassungsblog.de/administrative-and-citizen-interpretations-of-unwritten-constitutional-principles-and-constitutional-silences/. [↑](#footnote-ref-7)
8. T. E. Webb, “Who should exercise the hospital managers’ discharge power under the Mental Health Act 1983 s.23?” (2024) P.L. 505-527. [↑](#footnote-ref-8)
9. J. Bell, *The Anatomy of Administrative Law* (Oxford: Hart Publishing, 2020). [↑](#footnote-ref-9)
10. R. Martin, “Administrative Decision-Making on the Frontline” in Hertogh, Kirkham, Thomas and Tomlinson (eds) *The Oxford Handbook of Administrative Justice* p.7. [↑](#footnote-ref-10)
11. See for example, M.M. Ryan and M. J. Power, “Understanding how decision-makers practice discretion in the context of the Habitual Residence Condition in the Republic of Ireland” (2020) 28(2) *Irish Journal of Sociology* 143-167. This is not to criticise the approach of sociologists. Instead it recognises socio-legal researchers approach such issues in a different way, and therefore generate different knowledge. [↑](#footnote-ref-11)
12. R. Martin, “Administrative Decision-Making on the Frontline” in Hertogh, Kirkham, Thomas and Tomlinson (eds) *The Oxford Handbook of Administrative Justice* p.16. [↑](#footnote-ref-12)
13. R. Martin, “Administrative Decision-Making on the Frontline” in Hertogh, Kirkham, Thomas and Tomlinson (eds) *The Oxford Handbook of Administrative Justice* p.16. [↑](#footnote-ref-13)
14. S. Halliday, *Judicial Review and Compliance with Administrative Law* (Oxford: Hart Publishing, 2004). [↑](#footnote-ref-14)
15. R. Cahill-O’Callaghan and L. Mulcahy, “Where are the numbers? Challenging the barriers to quantitative socio-legal scholarship in the United Kingdom” (2022) 49 (S1) *Journal of Law and Society* S105–S118. [↑](#footnote-ref-15)
16. International Protection Act 2015, Workplace Relations Act 2015. [↑](#footnote-ref-16)
17. G. Guest, A. Bunce & L. Johnson. “How many interviews are enough? An experiment with data saturation and variability” (2006) 18(1) *Field Methods* 59–82.  [↑](#footnote-ref-17)
18. M. Hennink and B. N. Kaiser, “Sample sizes for saturation in qualitative research: A systematic review of empirical tests” (2022) *Social Science & Medicine* 292. [↑](#footnote-ref-18)
19. S. Nason, “Joanna Bell, The Anatomy of Administrative Law, Oxford: Hart Publishing, 2020, xlii+269 pp, hb £75.00” (2021) 84(4) MLR 942-946. [↑](#footnote-ref-19)
20. Bell, *The Anatomy of Administrative Law* p.56. [↑](#footnote-ref-20)
21. K.C. Davis, “The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence” (1961) 61 *Columbia Law Review* 201, 220. [↑](#footnote-ref-21)
22. Thomas, *Administrative Law in Action: Immigration Administration.*  [↑](#footnote-ref-22)
23. C. McCrudden, “Legal research and the social sciences” (2006) L.Q.R 632, 636. [↑](#footnote-ref-23)
24. S. Halliday and C. Scott, “Administrative Justice” in P. Cane and H. Kritzer (eds) *Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press 2010) p.474. [↑](#footnote-ref-24)
25. *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701; *Zalewski v An Adjudication Officer, the Workplace Relations Commission, Ireland and the Attorney General* [2021] IESC 24; *Burke v Minister for Education and Skills* [2022] IESC 1. [↑](#footnote-ref-25)
26. *Zalewski v An Adjudication Officer, the Workplace Relations Commission, Ireland and the Attorney General* [2021] IESC 24. [↑](#footnote-ref-26)
27. For further discussion see F. Donson, D. O’Donovan and A. Ryan, “Ireland’s distinct constitutional vision: the ‘administration of justice’ in quasi-judicial bodies” in S. Thomson, M. Groves and G. Weeks (eds) *Administrative Tribunals in the Common Law World* (Oxford: Hart Publishing, 2024); and T. Hickey “*Zalewski* and the Future of Irish Public Law” (2024) 87(2) M.L.R 466-48. [↑](#footnote-ref-27)
28. Article 40.3.1: “The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.” [↑](#footnote-ref-28)
29. *Zalewski* (O’Donnell J) pp.137. [↑](#footnote-ref-29)
30. M. Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russell Sage Foundation, 1980) p.204 [↑](#footnote-ref-30)
31. T. Hickey, “*Zalewski* and the Future of Irish Public Law” (2024) 87(2) M.L.R. 466-483. [↑](#footnote-ref-31)
32. F. Donson, D. O’Donovan and A. Ryan, “Ireland’s distinct constitutional vision: the ‘administration of justice’ in quasi-judicial bodies” in Thomson, Groves and Weeks (eds) *Administrative Tribunals in the Common Law World*. [↑](#footnote-ref-32)
33. For an example from homelessness decision making, see E. Laurie, “Homelessness and the ‘over-judicialisation’ of welfare” (2021) 41 Leg. Studs. 39-54. [↑](#footnote-ref-33)
34. S. Halliday and C. Scott, “Administrative Justice” in Cane and Kritzer (eds) *Oxford Handbook of Empirical Legal Research.*  [↑](#footnote-ref-34)
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37. M. Adler., “A Socio-Legal Approach to Administrative Justice” (2003) 25(4) Law & Policy 323-352; M. Adler (ed), *Administrative Justice in Context* (Oxford: Hart Publishing, 2010). [↑](#footnote-ref-37)
38. For example, Halliday, *Judicial Review and Compliance with Administrative Law* on local authority housing departments; Thomas, *Administrative Law in Action: Immigration Administration* (Hart Publishing, 2022) on immigration administration; and N. Creutzfeldt, *Ombudsmen and ADR: A Comparative Study of Informal Justice in Europe* (Palgrave, 2018)on Ombuds and ADR. [↑](#footnote-ref-38)
39. J. Tomlinson, *Justice in the Digital State* (Bristol: Policy Press, 2019); J. Tomlinson, “Justice in Automated Administration” (2020) 40(4) O.J.L.S.708–736; J. Cobbe, “Administrative law and the machines of government: judicial review of automated public-sector decision-making” (2019) 39(4) Leg. Stud. 636-655; J. Tomlinson, J. Meers and C. Somers-Joce, “Judicial Review of Public Data Gaps” (2023) 28(2) J.R. 69-77. [↑](#footnote-ref-39)
40. J. Meers, S. Halliday & J. Tomlinson, “Why we need to rethink procedural fairness for the digital age and how we should do it” in B. Brożek, O. Kanevskaia, P. Pałka (eds) *Research Handbook on Law and Technology* (Cheltenham & Massachusetts: Edward Elgar, 2024); J. Tomlinson, E. Kasoulide, J. Meers & S. Halliday “Whose procedural fairness?” (2023) 45(3) *Journal of Social Welfare and Family Law* 278–293. [↑](#footnote-ref-40)
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77. As noted by Taggart “I am conscious that all this has had a good thrashing in the literature already, and also of Murray Hunt’s observation that ‘at a purely doctrinal level the topic long since ceased to be very interesting’” in M. Taggart, “Proportionality, Deference, *Wednesbury*” (2008) *New Zealand Law Review* 423, 425. [↑](#footnote-ref-77)
78. Deductive coding or “top-down” coding is where the researcher has predefined codes and assigns those codes to the qualitative data. Inductive coding is where the codes are drawn out from the data as the researcher reads and analyses the data. See L. Epstein and A.D. Martin, *An Introduction to Empirical Legal Research* (Oxford: Oxford University Press, 2014). [↑](#footnote-ref-78)
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81. T. Endicott, “Proportionality and Incommensurability” in G. Huscroft, B.W. Miller and G. Webber (eds.) *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014) p.315. [↑](#footnote-ref-81)
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87. See Perry-Kessaris’ work where she sets up socio-legal problems as “wicked problems” (Rittel and Webber, 1973) and offers insights on how design theory can assist in addressing messy, indeterminate, social, complex problems. A. Perry-Kessaris, *Doing Socio-Legal Research in Design Mode* (Abingdon & New York: Routledge, 2021). [↑](#footnote-ref-87)
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