Against Monism & In Favour of an Anatomical Approach to Administrative Law

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ABSTRACT

This thesis is an exercise in arguing for an 'anatomical approach to administrative law.' In doing so the thesis aims to show, broadly, two main things. Firstly, that if we pull administrative law apart and examine the basic legal and normative structures in play we see that those structures are both complex and varied in three core senses: administrative law doctrine interacts with an array of different administrative schemes, administrative law doctrine intervenes to protect a variety of different values and interests and administrative law is concerned with legal relationships of different kinds. Secondly, that by pulling apart administrative law in this way it becomes possible to construct understandings of particular doctrines within it which are capable of capturing the legal and normative complexities with which judges must grapple in giving effect to them. The later chapters of the thesis will make use of three case studies of central doctrines within administrative law – procedural fairness, legitimate expectations and standing – through which to demonstrate this.

Throughout this thesis the anatomical approach to administrative law for which the thesis argues is juxtaposed to an alternative approach: 'monism.' A scholar making use of a monistic approach would proceed by seeking to identify some singular 'organising concept' which is capable of unifying administrative law. A core aim of this thesis is to demonstrate, through an exploration of one important, and increasingly influential, monistic approach to administrative law (the 'public interest conception'), why administrative law is not amenable to analysis of this kind. The basic legal and normative components which make up administrative law, it is argued, are too complex and varied for the subject to be adequately analysed through the lens of a singular 'master idea or principle.'

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Chapter 1

Monistic & Anatomical Approaches to Understanding

This thesis is concerned to explore in detail a single, but broad and important, question: how should we approach the development of an understanding administrative law? To that end, this introductory chapter has two main aims. Firstly, to offer some reflections on different ways in which we might set about developing an understanding of administrative law. Secondly, to introduce in some detail the arguments which will be developed in later chapters. Before turning to these aims, however, it is helpful to begin by making clear what is meant by 'administrative law.'

'Administrative law', for the purposes of this thesis, refers to the cluster of legal standards or principles commonly referred to as the 'grounds of judicial review.'[1] It is very difficult to provide an uncontentious list of these standards. Famously, for example, Lord Diplock[2] arranged the grounds of review under three 'heads': illegality, irrationality and procedural impropriety,[3] while others have proposed much more lengthy lists.[4] That said, it would seem to be the case that most scholars or judges asked to list the main principles of administrative law would include the following:[5] public authorities must act in accordance with the

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1 Language used for example in Timothy Endicott, *Administrative Law* (3rd edn, OUP 2015), 70.

2 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).

3 Ibid, 410. Note that the idea that the grounds are best understood as threefold continues to have force: see for example Timothy Endicott (n 1), 70.

4 See for example Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016), 17.

5 It ought to be noted that while the following list uses the language of 'public authorities' an important question arises within the context of administrative law as to whether, and the extent to which, the legal requirements embodied in administrative law doctrine are confined to bodies which are, in some sense, 'public.' See for example *Nagle v Fielden & Others* [1966] 2 QB 633 (CA); *R v Panel on Take-overs and Mergers, ex parte Datafin Plc* [1987] QB 815 (CA); *R v Panel on Take-overs and Mergers, ex parte Guinness Plc* [1990] 1 QB 146 (CA); *R v Football Association, ex parte Football League* [1993] 2 All ER 833 (QB); *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909 (CA); *R v Jockey Club, ex parte RAM Racecourses Ltd* [1993] 2 All ER 225 (QB); *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661, especially [23]-[32]; Christopher Forsyth, 'The Scope of Judicial Review: "Public Duty" Not "Source of Power" [1987] PL 356; Murray Hunt, 'Constitutionalism and the Contractualisation of Government' and Paul Craig, 'Public Law and Control Over Private Power' both in Michael Taggart (ed), *The Province of Administrative Law* (Hart, 1997); Colin Campbell, 'Monopoly Power as Public Power for the Purposes of Judicial Review' (2009)

requirements of the legislation which confer and regulate their powers,[6] public authorities must act on a proper understanding of the law,[7] public authorities must act to further the 'objects and purposes' of the statutes which confer their powers[8] and not for some other improper purpose,[9] public authorities must take into account all relevant considerations and must ignore all irrelevant considerations,[10] public authorities must act in a manner which is procedurally fair,[11] public authorities may not be biased,[12] public authorities may not act in a manner which is unreasonable[13] nor, in certain circumstances, disproportionate,[14] public

125 LQR 491; Mark Elliott, 'Judicial Review's Scope, Foundations and Purposes: Joining the Dots' [2012] NZLR 75.

6 What Jason Varuhas refers to as 'bog standard vires review': Jason Varuhas, 'The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications' in John Bell, Mark Elliott, Jason Varuhas & Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, 2016), 79.

7 *Anisminic v Foreign Compensation Commission & Another* [1969] 2 AC 147 (HL); *R v Lord President of the Privy Council, ex parte Page* [1993] AC 682 (HL).

8 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL).

9 *Wheeler v Leicester CC* [1985] AC 1054 (HL); *R v Lewisham LBC, ex parte Shell* [1988] 1 All ER 938 (DC); *R (Trafford) v Blackpool BC* [2014] EWHC 85 (Admin), [2014] 2 All ER 947; Graham Taylor, 'Judicial Review of Improper Purposes and Irrelevant Considerations' (1976) 35(2) CLJ 272.

10 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA), 229; *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL).

11 *Ridge v Baldwin* [1964] AC 40 (HL).

12 *Dimes v Grand Junction Canal Proprietors* 10 ER 301 (HL); *Locabail v Bayfield Propertyies Ltd* [2000] QB 451 (CA); *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 (HL); *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357; Abimbola Olowofoyeku, 'The Nemo Judex Rule: The Case Against Automatic Disqualification' [2000] PL 456.

13 *Wednesbury* (n 10); *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696 (HL); *R v Ministry of Defence ex parte Smith* [1996] QB 517 (CA); *Keyu v Secretary of State for Foreign & Commonwealth Affairs* [2015] UKSC 69, [2015] 3 WLR 1665; Paul Daly, '*Wednesbury*'s Reason and Structure' [2011] PL 238; Paul Craig, 'The Nature of Reasonableness Review' (2013) 66 CLP 131; Jeffrey Jowell, 'Proportionality and Deference: Neither Merger Nor Takeover' in Mark Elliott & Hanna Wilberg (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart 2015); Rebecca Williams, 'Structuring Substantive Review' [2017] PL 99.

14 Note that it is well settled law that proportionality is available when an applicant is able to demonstrate a prima facie breach of a qualified right under the Human Rights Act 1998, Sch 1: *Smith v United Kingdom* (33985/96) (2000) 29 EHRR 493. There is, however, increasing recognition that there are certain categories of case in which proportionality is available as a matter of purely common law. Three categories seem particularly important. Firstly, where an applicant is able to demonstrate that she has a 'legitimate expectation': *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, Official Transcript; *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32, [2012] 1 AC 1. Secondly, where an applicant is able to demonstrate a prima facie breach of a fundamental 'common law constitutional right': *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 542; *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455; Roger Masterman & Se-Shauna Wheatle, 'A Common Law Resurgence in Rights Protection?'

authorities may not fetter their discretionary powers,[15] public authorities may not unlawfully delegate their powers,[16] public authorities must generally abide by their policies and central government guidance unless there is a good reason not to,[17] and public authorities must, in certain circumstances, fulfil the legitimate expectations of those to whom they make representations.[18]

Administrative law can be differentiated from 'judicial review'. Judicial review, at least for the purposes of this thesis, refers to the legal procedure, first introduced in 1977,[19] known as the 'application'[20] or 'claim for judicial review.'[21] It is true that many challenges based on administrative law are brought via this procedure. There are, however, two important instances in which judicial review and administrative law diverge. In the first place, it is perfectly possible to use the application for judicial review procedure in order to challenge public authority conduct on legal grounds other than the principles of administrative law. This is most notably true of challenges based on human rights legislation[22] and European

(2015) 1 EHRLR 57. Thirdly, where the applicant is able to show that some other fundamental legal status of hers, such as European Union citizenship, is at stake: *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591.

15 *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL). Note however, this principle does not seem to apply in the same way in all cases. See for example *Attorney-General (Tilley) v Wandsworth LBC* [1981] 1 WLR 854 (CA), 858; *R (Nicholds) v Security Industry Authority* [2006] EWHC 1792 (Admin), [2007] 1 WLR 2067; *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [2014] 1 WLR 2697. Chris Hilson, 'Judicial Review, Policeis and the Fettering of Discretion' [2002] PL 111.

16 *Barnard v National Dock Labour Board* [1953] 2 QB 18 (CA); *Vine v National Dock Labour Board* [1957] AC 488 (CA). But note the principle in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (CA) and see further *R v Secretary of State for the Home Department, ex parte Oladehinde* [1991] 1 AC 254 (HL); *R v Secretary of State for Social Services, ex parte Sherwin* (1996) 32 BMLR 1 (QB); *R (Bourgass) v Secretary of State for Justice* [2015] UKSC 54, [2016] AC 384; Mark Freedland, 'The Rule Against Delegation and the *Carltona* Doctrine in an Agency Context' [1996] PL 19.

17 *R v Islington LBC ex parte Rixon* [1997] ELR 66 (QB); *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245.

18 *R v North & East Devon Health Authority, ex parte Coughlan* [2001] QB 213 (CA); *R (BAPIO) v Secretary of State for the Home Department* [2008] UKHL 27; [2008] 1 AC 1003. See further chapter 5.

19 Rules of the Supreme Court (Amendment No 3) 1977 (SI 1977/1955).

20 Senior Courts Act 1981, s31.

21 Civil Procedure Rules 1998, Part 54, rule 1.

22 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) as incorporated by the Human Rights Act 1998.

Union law. Conversely, it is also possible to rely on administrative law doctrine in cases brought to the courts' attention via a different procedural route, for example through collateral challenge.[23]

It is acknowledged that this definition of administrative law, which focuses exclusively on a particular subsection of legal doctrine, is narrow. The label 'administrative law' could be, and has been, quite legitimately used to refer to a much broader set of phenomena. Thus many textbooks which deal with 'administrative law' include chapters on the liability of public authorities in tort[24] and contract.[25] It might also be thought that the study of administrative law quite properly encompasses the study of certain mechanisms, such as ombudsmen[26] and tribunals,[27] by which public authority conduct is regulated outside of the traditional court structure. It is no part of the argument of this thesis, however, that the definition of administrative law set out above denotes the singularly correct way of understanding this term. The purpose in setting out this definition, rather, is simply to make clear the understanding of 'administrative law' from which this thesis proceeds.

1. Two Approaches to Understanding & Two Key Questions Concerning the Nature of Administrative Law

A. Monistic & Anatomical Approaches to Understanding

With this definition of administrative law in mind, this chapter can now turn to its first main aim: to offer some reflections on different ways we might go about developing an

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23 *Boddington v British Transport Police* [1999] 2 AC 143 (HL); Christopher Forsyth, 'Collateral Challenge and the Foundations of Judicial Review: Orthodoxy Vindicated and Procedural Exclusivity Rejected' [1998] PL 364; Mark Elliott, 'Boddington: Rediscovering the Constitutional Logic of Administrative Law' [1998] PL 92

24 See for example Mark Elliott & Jason Varuhas, *Administrative Law* (4th edn, OUP 2017), chapter 15.

25 See for example ibid.

26 See for example Carol Harlow & Richard Rawlings, *Law and Administration* (3rd edn, CUP 2009), chapter 12.

27 See for example ibid, chapter 11.

understanding of administrative law. In doing so, it is helpful to begin with a story which, at first sight, might seem unrelated. As will be seen, however, this story yields some important ideas about what is means to develop an understanding of a subject and thus serves as a useful springboard for discussion.

In 1981 Richard Feynman, Nobel prize winning physicist, took part in a series of interviews with the BBC entitled 'The Pleasure of Finding Things Out.'[28] In the course of these interviews, Feynman offered a well-known monologue which has since become known as his 'Ode to a Flower.' The monologue proceeded as follows:

> I have a friend who's an artist and has sometimes taken a view which I don't agree with very well. He'll hold up a flower and say "look how beautiful it is," and I'll agree. Then he says "I as an artist can see how beautiful this is but you as a scientist take this all apart and it becomes a dull thing," and I think that he's kind of nutty. First of all, the beauty that he sees is available to other people and to me too... At the same time, I see much more about the flower than he sees. I could imagine the cells in there, the complicated actions inside, which also have a beauty. I mean it's not just beauty at this dimension, at one centimetre; there's also beauty at the smaller dimensions, the inner structure, also the processes. The fact that the colours in the flower evolved in order to attract insects to pollinate it is interesting; it means that insects can see the colour. It adds the question: does this aesthetic sense also exist in lower forms? Why is it aesthetic? All kinds of interesting questions which the science knowledge only adds to the excitement, the mystery and the awe of the flower. It only adds. I don't understand how it subtracts.[29]

Underlying this story are two different ideas about what it means to *understand* the flower. These ideas, in turn, suggest different ways in which we might go about seeking to develop an understanding of the nature of administrative law.

On the one hand, according to Feynman's artist friend, in order to fully understand the flower, it is important to isolate *the most important thing about it* – to pinpoint its one *defining characteristic* – and to view the flower through that lens and that lens alone. For the artist friend, the defining characteristic of the flower is its beauty; that the flower has some special

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28 http://www.bbc.co.uk/programmes/p018dvyg (last accessed 2 May 2017).

29 Ibid.

aesthetic and emotional effect on those who look upon it. For the artist friend, to lose sight of this, and to look at the flower through a different and especially a scientific frame, is to misunderstand its true significance. The flower becomes dull. An interesting thing rendered uninteresting by a failure to see it from the proper perspective.

This approach to understanding the flower, which can aptly be labelled a '*monistic*' approach because it seeks to identify a singular, unifying idea which can explain the object, represents one approach which we might take to understanding administrative law's nature. We might, more particularly, seek to identify some 'organising concept'[30] which we regard as, in some sense, capturing the essence of the legal area and from which we see all else as flowing. *Monism,* in this sense, has had a powerful influence in administrative law scholarship. This literature is replete with attempts to identify such an organising concept, albeit with different master ideas being identified by different theorists. 'Jurisdiction,'[31] 'ultra vires,'[32] 'abuse of

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30 Language used in, for instance, Christopher Forsyth, 'The Rock and the Sand: Jurisdiction and Remedial Discretion' (2013) 18(4) JR 360, [27].

31 See for example ibid; Elliott & Varuhas (n 24), chapter 2; *Anisminic* (n 7); *Boddington* (n 23), especially Lord Irvine's judgment; William Wade, 'Unlawful Administrative Action: Void or Voidable' (1967) 83 LQR 499; William Wade, 'Unlawful Administrative Action: Void or Voidable?' (1968) 84 LQR 95; Christopher Forsyth, 'The Metaphysics of Nullity'' in Christopher Forsyth & Ivan Hare (eds), *The Golden Metwand and the Crooker Cord* (OUP 1998). For a significant threat to this way of thinking see their Lordships and Ladyship's reasoning in *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663 and *R (Jones) v First-tier Tribunal* [2013] UKSC 19, [2013] 2 AC 48. For comment see Christopher Forsyth, 'Blasphemy Against Basics: Doctrine, Conceptual Reasoning and Certain Decisions of the Supreme Court' and Philip Murray, 'Process, Substance and the History of Error of Law Review' both in John Bell, Mark Elliott, Jason Varuhas & Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016); Mark Elliott & Robert Thomas, 'Tribunal Justice and Proportionate Dispute Resolution' (2012) 71(2) CLJ 297. See further Thomas Adams, 'The Standard Theory of Administrative Unlawfulness' (2017) 76(2) CLJ 289.

32 See for example Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review' (1996) 55(1) CLJ 12; Mark Elliott, *The Constitutional Foundations of Judicial Review* (Bloomsbury, 2001); Mark Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) 58(1) CLJ 129. For critique and discussion see further Dawn Oliver, 'Is Ultra Vires the Basis of Common Law Judicial Review?' [1987] PL 543; Paul Craig, 'Competing Models of Judicial Review' [1999] PL 428; Jeffrey Jowell, 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' [1999] PL 448; Trevor Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?' (2002) CLJ 87l Paul Craig, 'Constitutional Foundations, the Rule of Law and Supremacy' [2003] PL 92; Paul Craig, 'The Common Law, Shared Power and Judicial Review' (2004) 24 OJLS 237; Paul Craig & Nicholas Bamforth, 'Constitutional Analysis, Constitutional Principle & Common law judicial review' [2001] PL 763; Trevor Allan, 'Constitutional Dialogue and the Justification of Judicial Review' (2003) 23 OJLS 563; Thomas Adams, 'Disunity in the Justification of Judicial Review' presented at the Public Law Conference (Cambridge, September 2016).

power'[33] and the promotion of a 'culture of justification,'[34] for instance, have all found favour as candidates. This thesis, to a large degree, will be dedicated to highlighting the explanatory deficiencies of one increasingly influential monistic approach to understanding administrative law: the 'public interest conception.'[35] As will be seen, judges and scholars who subscribe to this way of thinking invite us to embrace the advancement of goods and values in which the *public as a collectivity*, as opposed to any one individual, has an especially important interest as the 'master idea'[36] which unifies administrative law.

A monistic approach, however, is not the only option for one seeking to understand an object. Feynman's approach, in particular, suggests a very different method. His approach seems well described as an '*anatomical*' one. 'Anatomical' is defined in the Cambridge Dictionary as 'relating to the scientific *study and representation* of the physical body and *how its parts are arranged*'[37] and in Merriam-Webster as 'the art of *separating the parts* of an organism in order to ascertain their *positions, relations, structure and function*.'[38] To take an 'anatomical' approach to understanding a subject, then, is to deconstruct it, to explore the detail of its various components and their relationship with one another, and then to seek to find a way of 'arranging' or 'representing' the information one gleans in a way which sufficiently reflects the reality of the subject.[39] This anatomical approach to understanding is clearly reflected in Feynman's approach to understanding the flower. Thus, for Feynman, it

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33 See for example *R v Somerset CC, ex parte Dixon* [1998] Env LR 111 (QB), 121; *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 (CA), 1130.

34 See for example David Dyzenhaus, Murray Hunt & Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1(1) OUCLJ 5; Thomas Poole, 'Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights' in Linda Pearson (ed), Administrative Law in a Changing State: Essays in Honour of Mark Aronson (Hart Publishing, 2008); Murray Hunt, 'Sovereignty's Blight: Why Public Law Needs a Concept of Due Deference' in Nicholas Bamforth & Peter Leyland (eds), Public Law in a Multi-Layered Constitution (Hart, 2003); Michael Taggart, 'The Tub of Public Law' in David Dyzenhaus (ed), The Unity of Public Law (Hart, 2004); Sian Elias, 'Righting Administrative Law' in David Dyzenhaus, Murray Hunt & Grant Huscroft (eds), A Simple Common Lawyer: Essays in Honour of Michael Taggart (Hart, 2009).

35 Varuhas (n 6).

36 Stephen Smith, *Contract Theory* (OUP 2004), 11.

37 http://dictionary.cambridge.org/us/dictionary/english/anatomical (last accessed 29 June 2017).

38 https://www.merriam-webster.com/dictionary/anatomy (last accessed 29 June 2017).

39 See further Elizabeth Fisher, Pasky Pascual & Wendy Wagner 'Understanding Environmental Models in their Legal and Regulatory Context' (2010) 22(2) JEL 251.

is important that the flower be 'taken apart' and that its 'inner structure' and 'processes' be examined, before an understanding of it can be constructed.

This thesis can be thought of as an attempt to depart from the influence of monism and to argue for an 'anatomical approach' to understanding administrative law. What it aims to show is, roughly, two things. Firstly, that when we take administrative law apart we begin to see that the normative concerns and legal structures at play are both complex and varied in a number of different ways. Secondly, that by taking apart particular doctrines within administrative law in this way, and exploring the detail of their constituent parts, we can begin to construct understandings of those legal doctrines which better capture the legal and normative complexities with which judges must grapple in giving effect to them. No presupposition is made, in the course of taking administrative law apart in this way, that it will be possible to identify some singular 'organising concept'[40] through which everything which is important about administrative law can be explained.[41] Indeed, in the end, the thesis will suggest that administrative law, by its nature, is simply not amenable to 'monistic' analysis.

It is helpful to briefly unpack these ideas just a little more. Take the first point: that when we begin to take apart administrative law we see that the normative concerns and legal structures at play are both complex and varied. This is true, it will be argued, in three core, closely related, senses. Firstly, administrative law interacts with an array of different administrative schemes. That is, at the background to any administrative law case will be an, often complex, legislative and policy scheme[42] set up for a specific set of purposes and with which, in the

40 Forsyth (n 30), [27].

41 Note that one scholar in whose work this approach is broadly reflected is David Feldman. See especially: David Feldman, 'The Nature of Legal Scholarship' (1989) 53(4) MLR 498; David Feldman, 'Public Law Values in the House of Lords' (1990) 106(2) LQR 246; David Feldman, 'None, One or Several? Perspectives on the UK's Constitution(s)' (2005) 64(2) CLJ 329; David Feldman, 'Error of Law and Flawed Administrative Act' (2014) 73(2) CLJ 275.

42 Note that, while the background administrative scheme will often be significantly constituted by legislation, is will not necessarily be the case especially when the scheme is established by prerogative power. See especially: *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864 (QB); *CCSU* (n 2); *R v Secretary of State for the Home Department, ex parte Bentley* [1994] QB 349 (DC); *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 AC 453; *Sandiford* (n 15). Note also the complexities which arise when prerogative power and legislation interact: *De Keyser's Royal Hotel* [1920] AC 508 (HL); *Laker Airways Ltd v Department of Trade* [1977] QB 634 (CA); *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513 (HL); *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] QB 26 (DC); *R (Miller) v Secretary of State for Exiting the European Union* [2017]

course of judicial reasoning, administrative law doctrine will become closely intertwined. Secondly, administrative law intervenes to protect an array of different values and interests, something which is true in two more particular senses. In the first place, the *origins* of the values and interests which administrative law seeks to protect are varied and complex; while some of the values which are invoked by the courts are clearly thought of as originating in the common law, others are found within the logic of the administrative scheme itself and the line between these two sources is, itself, blurred. In the second place, the *focus* of administrative law's values is complex: it is too simplistic to suggest, as the public interest conception does, that administrative law is concerned to protect goods in which the public as a whole, as opposed to any one individual, has a collective and especially important interest. Thirdly, administrative law creates and gives effect to legal relationships of different kinds. Thus, while some of the duties to which administrative law gives effect can be regarded as being 'owed to the public or a section of it,'[43] others are clearly thought of by judges and scholars as being characterised by, what can be termed, Hohfeldian[44] 'individual right-duty correlativity.'[45]

Showing that administrative law can be taken apart in this way is valuable of itself: it tells us something important about the nature and the structure of the legal area. This thesis, however, goes a step further. To return to the second point above, this thesis also seeks to show that by taking apart particular doctrines within administrative law, and examining the detail of their constituent parts, it becomes possible to construct understandings of these doctrines which capture the normative and legal complexities with which the courts must grapple in giving effect to them. The later chapters of this thesis make use of three case studies – procedural fairness, legitimate expectations and standing – by which to illustrate this.

This thesis, then, at core, is an argument against monism and in favour of an 'anatomical approach to administrative law.' Before moving on from this point, two further matters ought to be noted. Firstly, although this thesis is presented to a significant degree as a comparison

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UKSC 5, [2017] 2 WLR 583; *R (XH) v Secretary of State for the Home Department* [2017] EWCA Civ 41, [2017] 2 WLR 1437.

43 Nicholas Bamforth, 'Hohfeldian Rights and Public Law' in Matthew Kramer, *Rights Wrongs & Responsibilities* (Palgrave 2001), 11.

44 See especially Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (The Law Book Exchange 2010).

45 See discussion, e.g. in chapter 4.

between two rival ways of thinking – the 'public interest conception' and the 'anatomical approach' – it is something of an oversimplification to say that its aim is to show that the former is 'wrong' while the latter is 'right.' The reason for this is that, as will be emphasised, the anatomical approach to administrative law recognises that public interest conception is capable of providing a *partial* explanation of how administrative law functions *in some statutory contexts*.[46] It, however, ought to be emphasised that administrative law does not function in the same way in all statutory contexts. To put this point another way, the public interest conception is, in a sense, *incorporated* into the anatomical approach to administrative law; it is recognised as supplying one important set of components which are needed to understand administrative law, but, it is argued, there are many further components to administrative law which the public interest conception fails to capture.

The second important point to note is that the argument of this thesis is both old and new. It is old in the sense that there are many places in the literature in which it is emphasised that the parts which make up administrative law are both complex and varied in some of the senses alluded to above. Dawn Oliver[47] and Paul Daly,[48] for instance, have both developed arguments to the effect that there are a variety of values at stake in administrative law and Trevor Allan has emphasised that administrative law must navigate a plurality of different legal and administrative regimes.[49] The anatomical understanding, however, is new in two senses. Firstly, it represents a sustained attempt to consider the body of administrative law principle as a whole and to capture, in a careful and structured way, the main ways in which its parts are varied and complex. Secondly, it seeks to show how recognition of this variety

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46 See for example *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement* [1995] 1 WLR 386 (QB) discussed at a number of points in this thesis. For a further and recent example see *R (ClientEarth) v Secretary of State for the Environment, Food & Rural Affairs* [2016] EWHC 2470 (Admin), [2017] PTSR 203 (see further my comment: Joanna Bell, '*ClientEarth No 2*: A Case of Three Legal Dimensions' (2017) 29(2) JEL 343).

47 See especially Dawn Oliver, 'The Underlying Values of Public and Private Law' in Michael Taggart (ed), *The Province of Administrative Law Determined* (Hart Publishing 1997); Dawn Oliver, 'Common Values in Public and Private Law and the Public/Private Divide' [1997] PL 630.

48 See especially Paul Daly, 'Administrative Law: A Values-Based Approach' in John Bell, Mark Elliott, Jason Varuhas & Philip Murray, *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016).

49 See especially Trevor Allan, 'Doctrine and Theory in Administrative Law: An Elusive Quests for the Limits of Jurisdiction' [2003] PL 429.

and complexity can help us to construct valuable ways of thinking about particular doctrines within the field.

B. Two 'Key Questions' Concerning the Nature of Administrative Law

To discuss the anatomical approach to administrative law in such detail is to rather leap ahead of the aims of the introductory chapter and it is important at this juncture to take a few large strides backwards and return to Feynman.

As explained, this thesis seeks to understand administrative law by using a similar approach to that used by Feynman in seeking to understand the flower; to take the subject apart and to investigate the detail of its 'inner structures' and workings for the purpose of constructing an understanding. One further point which ought to be noted about Feynman's approach is that he clearly believes that one seeking to deconstruct a flower in this way should not do so mindlessly, but with a set of structured questions in mind to guide her inquiry. In a similar way, in seeking to deconstruct administrative law, it will be helpful to begin by setting out a few key questions which will help to give the inquiry structure. These questions should aim to tell us something which is both *important* and *general* about the constituent parts of administrative law. They should not focus on any singular principle in particular, but direct an inquiry into the *general structure* and *characteristics* of that cluster of principles we know as 'administrative law.' To that end, two 'key questions' are particularly important: the *normative* question and the *legal-structural* question. This part of the chapter will now proceed to unpack each of these questions in turn.

i. The Normative Question

The first key question which can lend structure in an attempt to take apart administrative law is *normative*. Put briefly, the question is this: what are the *normative purposes* of administrative law? Or, to put it another way, what are the *values* and *interests* which this body of law intervenes to protect?

The question of the normative purposes of administrative law may seem rather broad and free-ranging. It is accordingly important to add more structure to it by carving out some more specific issues. Two, in particular, are especially important. The first concerns the legal *origins* of the values and interests which the courts seek to protect in developing and applying administrative law doctrine. Put simply, in thinking about this issue there are two broad though, as will be seen, not mutually exclusive options.[50] On the one hand, we might think of the values of administrative law as originating *within the administrative scheme* decision-makers are tasked with implementing. On this view, the task of the court is understood as being that of identifying the normative values and interests which it is the purpose of the relevant administrative scheme to promote, and of developing principles of administrative law with the aim of improving the effectiveness of the administrative decision-making in promoting those goods.[51] On the other, however, we might think of administrative law's values as originating *in the common law*. From this perspective, the courts' task in administrative law would be understood as being that of looking, outside of the administrative scheme in play, to the *common law* for the purpose of identifying the values which are regarded, or should be regarded, as being fundamental within it, and of developing mechanisms with the aim of providing a form of legal protection for those values.

None of this should not be thought of as creating a strict dichotomy between two clear and exclusive ways of thinking. The picture, it ought to be noted, is rather more complex for at least three reasons. Firstly, it should be emphasised that no presupposition is made by this thesis that there exists some sort of universally ordained or agreed list of what constitutes a 'common law value.' The reality is probably that no such list exists; that different judges and scholars would extract from common law doctrine different sets of values and that, in any event, the common law is not static, with new possible values being added to the list all the time.[52] Secondly, as will be seen in the course of this thesis, it is too simplistic to think that we face a strict binary choice between understanding administrative law values as *either*

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50 That these options are not mutually exclusive is reflected, for instance, in the basic premise of the 'modified ultra vires' theory according to which judicial review must be justified by reference to a presupposed intention on the part of Parliament to the effect that the courts are to continue developing common law doctrine: see citations at (n 32).

51 This is not to suggest, of course, that the identification of the goals of an administrative scheme is a straightforward an uncontentious. See for example *Bromley LBC v Greater London Council* [1983] 1 AC 768.

52 See for example *Kennedy* (n 14).

originating from the logic of administrative schemes *or* from the common law. Indeed, as will be seen, one of the reasons for which administrative law is a complex and varied subject is that intervenes to protect *both* values which originate from the logic of an administrative scheme and from the common law. Thirdly, and relatedly, it is also too simplistic to think that each of the *individual values* with which administrative law is concerned must originate *either* in the common law *or* from an administrative scheme. It is perfectly possible, as will be seen, that a singular value may both be thought of as inherent in the common law[53] and be the subject of protection by a particular administrative regime.[54]

One issue which necessitates exploration in the course of an inquiry into the values and interests which administrative regime seeks to protect, then, concerns the *origins* of these values and interests. The second issue concerns the *focus* of these values and interests. In explaining this issue it is helpful to draw a little on the 'public interest conception'[55] – the monistic approach to understanding administrative law on which this thesis will significantly focus. This way of thinking seeks to erect a division between two ways of thinking about the purposes of any given legal area. In the first place, according to the public interest conception, we might think of the purposes of a legal area as being the protection *the individual* from unjustified forms of encroachment. That is, we might say that the normative aim of a branch of law is to identify certain goods and values in which the *individual* is regarded as having a fundamental interest and develop forms of legal protection for the purpose of protecting those interests. In the second place, however, we might say of a legal area that it is concerned to protect the interests *of the public*. That is, that it is a legal field normatively oriented towards the advancement of certain goods and values in which *the public as a whole* is taken as having a collective interest.

These two ways of thinking, again, represent two broad options for understanding the normative purposes of administrative law. To use Jason Varuhas' language, they raise the

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53 See especially Oliver (n 47).

54 See especially chapter 4 in which the point will be made both that judicial intervention in a procedural fairness case will be grounded in a concern to promote common law values such as respect and autonomy and that at least the partial purpose of an administrative scheme may be the promotion of these same values.

55 Varuhas (n 6).

question of whether administrative law is an 'individual-regarding'[56] or 'public-regarding'[57] legal area. As with the question of the origins of administrative law's values, this matter should not be thought of as creating a strict binary choice and this is so for at least two reasons. Firstly, as will be emphasised throughout this thesis, it is perfectly possible that we might see administrative law as being concerned to protect *both* individual and public interests, with different strands of the doctrine being oriented towards broadly different clusters of value. Secondly, as will be shown at points, the line between an 'individual-regarding' and a 'public-regarding' value is a blurred one, it sometimes being the case that a single idea is capable of being viewed as valuable from both perspectives.[58]

ii. The Legal-Structural Question

The first, normative, question concerning the nature of administrative law, then, requires an inquiry into the normative purposes of the legal field. The second is closely related to the first[59] but is *legal-structural* in nature. Rather than focusing on the normative values and interests with which administrative law interacts, this question focuses on the *kinds of legal relationship* with which administrative law is concerned. Put simply, the key question is this: what kinds of *legal relationship* are created and enforced by administrative law and are these similar or different to the kinds of legal relationship which arise in other legal areas?

As with the normative question above, it is helpful once again to add some structure to this question so as to prevent the inquiry from being too abstract and free-ranging. A good way

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56 Ibid, 42.

57 Ibid.

58 See for example chapter 4 in which the point that will be made that the value of 'accuracy' can be thought of either in 'individual-regarding' or 'public-regarding' terms.

59 Note that according to one influential way of thinking about the nature of legal rights in the field of general jurisprudence – 'benefit' theory – the first and second questions are logical corollaries. According to this school of thinking, to say that a legal duty is created for the protection of X's interests is to say that X has a legal right to have the duty performed. See especially: Jeremy Bentham, *The Works of Jeremy Bentham* published under the Superintendence of his Executor John Bowring (William Tait 1838-1843); Joseph Raz, 'Legal Rights' (1984) 4(1) OJLS 1; Jeremy Waldron, 'A Right to Do Wrong' (1981) 92 *Ethics* 21; Matthew Kramer 'Refining the Interest Theory of Rights' (2010) 55(1) *American Journal of Jurisprudence* 55(1), article 2; Matthew Kramer & Hillel Steiner, 'Theories of Rights: Is There a Third Way?' (2007) 27(2) OJLS 281. See also Nicholas Vrousalis, 'Between Insensitivity and Incompleteness: Against the Will Theory of Rights' (2010) 16(4) *Res Publica* 415.

of adding such structure is to think a little about private law and the kinds of legal relationship which are thought to arise therein. It seems fair to say that one particular idea about legal relationships has played a role in thinking about the nature of private law over and above any other:[60] the idea of 'individual right-duty correlativity.' It is helpful to explain in clear terms what is meant by this idea before turning to the way it can lend structure to this legal-structural question.

The idea of 'individual right-duty correlativity' is most commonly associated with the writings of Wesley Hohfeld,[61] the theorist most commonly accredited with drawing attention to it.[62] Hohfeld's central concern in these writings was that judges tend to use the term 'right' 'indiscriminately'[63] to refer to a number of conceptually distinct legal statuses including the privilege,'[64] the 'power'[65] and the 'immunity.'[66] Hohfeld was highly critical of this

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60 The case law and literature on privity of contract is a classic example of the influence of the idea of individual right-duty correlativity. (See especially: Tweddle v Atkinson (1861) 121 ER 762; Dunlop Pneumatic Tyre Company Ltd v Selfridge & Co Ltd [1915] AC 847 (HL); Shanklin Pier v Detel Products Ltd [1951] 2 KB 854 (KB); Scruttons Ltd v Midland Silicones Ltd [1962] AC 446 (HL); Beswick v Beswick [1968] AC 58 (HL); Alfred McAlpine Construction Ltd v Panatown Ltd [2001] 1 AC 518 (HL)). For further examples see especially Ernest Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 Univ of Toronto LJ 349; Rob Stevens, *Torts and Rights* (OUP 2007).

61 Hohfeld (n 44).

62 See for example the following: Andrew Halpin, *Rights & Law: Analysis & Theory* (1997 Hart) especially chapter 2; Leif Wenar, 'The Nature of Rights' (2005) 33 *Philosophy and Public Affairs* 223; Robert Stevens, 'Rights and Other Things' (July 26, 2010) available at SSRN: http://ssrn.com/abstract=1648954; Peter Cane, 'Rights in Private Law' in Andrew Robertson & Donal Nolan, *Rights and Private Law* (Hart Publishing 2011).

63 Hohfeld (n 44), 36.

64 Ibid, 38-50. For Hohfeld, a person can be said to have a 'privilege' to do X when they owe no legal duty requiring them not to do X to any other. The Hohfeldian privilege is similar, though not identical, to what Hart calls a 'liberty-right': HLA Hart, *Essays on Bentham: Jurisprudence and Political Theory* (OUP 2001), 166-167.

65 Ibid, 50-60. Note that Hohfeld uses the term 'power' in a narrow sense to refer to the ability of a person to alter the basic rights and duties which bind themselves (as with the power to contract: Joseph Raz, 'Promises in Morality and Law' (1982) 95 *Harvard LR* 916) or which bind others (as with the power of a judge to issue a sentence: Leif Wenar (n 24), 231). There is a tendency in the public law context not to confine the term 'power' in this way. Thus, for example, public lawyers would tend to describe the ability to conduct an investigation as a 'power' even though this ability has no direct or obvious bearing on basic rights and duties (see for example *R v Monopolies & Mergers Commission, ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23, 31).

66 Ibid, 60-63. As emphasised by Wenar (Leif Wenar (n 62), 232) the Hohfeldian immunity seems best understood as a form of *protection* which is accorded to an individual's existing rights and privileges, immunising those statuses from removal or alteration by another. There is a tendency among public law scholars, however, to use the language of 'immunity' to refer to an absence of duty, i.e. a 'privilege.' See for example Nicholas Barber, 'Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?' (2004) 17(4) *Ratio Juris* 474, 477-478 where the author uses the language of

'chameleon-hued'[67] use of the term, considering it to be a 'peril both to clear thought and to lucid expression.'[68] Rather, he argued, the term 'right' is only used in its 'strictest'[69] and most appropriate sense to refer to an individual right correlative to a duty. Hohfeld explained this idea in the following terms:

> What clue do we find, in ordinary legal discourse, toward limiting the word [right] to a definite and appropriate meaning? That clue lies in the correlative "duty" for it is certain that even those who use the word and the conception of "right" in the broadest possible way are accustomed to thinking of "duty" as the invariable correlative. As said in *Lake Shore & M.S.R. Co v Kurtz*: "A duty or a legal obligation is that which one ought or ought not to do. "Duty" and "right" are correlative terms. When a right is invaded, a duty is violated."[70]

In other words, for Hohfeld, the ideas of 'individual right' and 'duty' are flipsides of one coin. Where an individual has a right that another do X (such as a right that that other stay off her land[71]) it must be the case that that other is under a legal duty, a duty which she owes to the right-holder, to do the same. Similarly, where an individual is under a duty to do Y it must be the case that there is some other individual to whom the duty is owed and who thus holds a right entitling her to have Y done. For Hohfeld, then, we ought not to think of 'individual right' and 'duty' separately for it is not possible to make sense of one without the other. The reason for this is that, simply, these terms are just different ways of describing exactly the same phenomenon – that of a legal doctrine creating a special relationship of correlativity between two individuals whereby one becomes bound to the other to behave in a particular way.

This explanation of individual right-duty correlativity is highly abstract. It is accordingly helpful to concretise the discussion a little. Although it rather anticipates the argument of

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'immunity' to refer to the idea that public authorities are not bound by the obligations which apply to ordinary citizens.

67 Ibid, 35.

68 Ibid.

69 Ibid, 36.

70 Ibid, 38 citing *Lake Shore & M.S.R. Co. v Kurtz* (1894) 37 NE 303, 304.

71 To use Hohfeld's example: ibid, 38.

this thesis to the effect that this idea plays an important role in administrative law, the most helpful way of doing so is to discuss an example of a legislative provision, arising within the field of administrative law, and to show how this provision is well analysed through the framework of individual right-duty correlativity. Take, for example, section 190(2) of the Housing Act 1996, which reads as follows:

> 2) If the authority is satisfied that the applicant has a priority need they shall –
>
> a) secure that accommodation is available for his occupation for such period as they consider will give him a reasonable opportunity of securing accommodation for his occupation…[72]

As the Court of Appeal's judgment in *Conville*[73] illustrates, it is plausible to understand this provision as creating a relationship of 'individual right-duty correlativity' between an individual applicant and her local housing authority:

> The *duty* with respect to accommodation is that it be made available for such period as the authority consider will give the applicant a "reasonable opportunity of securing accommodation for his occupation." That is something *conferred on the applicant*; a *right he acquires coterminous with the extent of the duty*.[74]

The idea being expressed by Pill LJ, speaking for the Court of Appeal, in this passage is as follows: section 190(2) creates a special relationship of correlativity between an individual applicant and a local housing authority. This relationship can be looked at from two angles. On the one hand, one can see the provision as placing the local housing authority under a duty, *owed to the individual applicant*, to make accommodation available for her for a sufficient period of time. On the other hand, one can see the provision as conferring on *the individual* applicant a statutory right entitling her to be given the same by the authority. Ultimately, however, because duty and right as 'coterminous' with one another, these are merely different ways of saying same thing: that, as a result of section 190, a legal relationship pertains between a local housing authority and an individual applicant such that the former is bound to treat the latter in certain ways.

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72 Housing Act 1996, s190(2) (as amended by Homelessness Act 2002, Sch 1, para 9).

73 *R (Conville) v Richmond-upon-Thames LBC* [2006] EWCA Civ 718, [2006] 1 WLR 2808.

74 Ibid, [36] (my emphasis).

With this understanding of individual right-duty correlativity in mind, it is now important to return to its significance for the inquiry undertaken in this thesis. Briefly, the second core question becomes as follows: it is clearly conventional to think of many of the legal relationships which arise in the field of private law as being characterised by individual right-duty correlativity, but what role, if any, does this idea play in the field of administrative law? To put it otherwise, is there an overlap between administrative law and private law in that both are concerned, at least to some extent, with creating legal relationships of individual right-duty correlativity, or is it rather the case that administrative law is a distinct legal area concerned with legal relationships of a fundamentally different kind?

To summarise, this thesis is an exercise in arguing for, an 'anatomical' approach to administrative law. The aim is to take apart administrative law, to look closely at the detail of its constituent parts and to demonstrate how, by doing so, it becomes possible to construct understandings of the various doctrine within the field. Just as Feynman thinks that a person wishing to understand a flower should not approach its deconstruction mindlessly, it is important to approach this project with a set of questions in mind to structure the inquiry. The aim of this section of the chapter has been to identify two key questions which can serve this purpose. Firstly, a *normative* question: what are the normative values and interests which administrative law doctrine intervenes to protect? Secondly, a *legal-structural* question: with what kinds of legal relationship is administrative law concerned to create and give effect to?

2. The Content, Scope & Method of the Thesis

With these key questions in mind, this introductory chapter can now turn to its second main preoccupation: offering an overview of the arguments developed in this thesis. To that end, this part of the chapter will be divided into three sections. The first will offer a brief outline of each of the later chapters. The second will make clear some important caveats relating to the scope of the inquiry conducted herein. The third will then offer some comments on method.

A. An Overview of the Later Chapters

The later chapters of this thesis are divided into three broad parts. The first, which consists of chapters 2 and 3, seeks to introduce the two main approaches to understanding administrative law on which this thesis focuses: the monistic 'public interest conception'[75] and the anatomical approach for which this thesis ultimately argues. The second, which consists of chapter 4, 5 and 6, focuses on three case studies through which this thesis seeks to demonstrate the utility of making use of the anatomical approach in helping us to construct explanations of administrative law doctrine. The third, which consists of chapter 7, offers some reflections, by way of conclusion, on why administrative law resists monistic analysis and on why it is preferable to make use of the anatomical approach. What follows in this section is a more detailed discussion of the content of each of these chapters.

Chapter 2 is focused centrally on the monistic public interest conception. It will be divided into three parts. The first will aim to introduce the *content* of this way of thinking. As will be seen, at the heart of the public interest conception is the suggestion that it is possible to isolate in the field of administrative law an 'organising concept'[76] from which the subject can be seen as flowing: the advancement of goods in which *the public*, as opposed to any one individual, have an especially important interest. The second part of chapter 2 turns to the *influence* of this way of thinking. Two main points fall to be made here. Firstly, the public interest conception has had a broad influence on the literature on administrative law and this influence seems to be increasing. Secondly, the public interest conception is thought of by those who make use of it as being of not only theoretical interest but as having a number of important practical implications including, most importantly for present purposes, implications for how the courts approach issues of standing.[77] The third part of chapter 2 then takes something of a side step into the modern history of administrative law. The reason for which this side step is taken at this stage is simple: an exploration of the modern development of administrative law begins to illustrate why public interest conception can provide at most

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75 Varuhas (n 6).

76 Forsyth (n 30), [27].

77 See for example Lord Reed's judgment in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 and Jason Varuhas, 'Against Unification' in Mark Elliott & Hanna Wilberg (eds), *The Intensity and Scope of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015) both of which are discussed in chapters 2 and 7.

a *partial* explanation of the way that administrative law doctrine behaves *in some contexts*, and why administrative law more generally resists monistic approaches to understanding.

Chapter 3 then takes something of a change in direction. Having begun to indicate why monistic approaches to understanding administrative law cannot hope to capture the complexities with which judges grapple in this legal area, chapter 3 turns to the second possibility: the taking of an 'anatomical approach.' This chapter is thus essentially an exercise in beginning to deconstruct administrative law, and in exploring the detail of the normative concerns and legal structures which make up its constituent parts. The core argument of this chapter is that there are three core, closely related, senses in which administrative law's constituent parts are both complex and varied: administrative law interacts with an array of administrative regimes, intervenes to protect an array of different values and interests and is concerned with different kinds of legal relationship. The focus of the first part of chapter 3 will be on explicating each of these senses of complexity in turn. The second part of chapter 3 then seeks to concretise the discussion a little by showing this process of deconstruction ' in action' through a discussion of two cases concerning the 'common law duty to give reasons:'[78] *Doody*[79] and *Kent*.[80]

Having introduced the two main approaches to understanding administrative law on which this thesis focuses, the thesis then turns to its second major part. Chapters 4, 5 and 6 will each focus on a case study of a central doctrine within modern administrative law: procedural fairness, legitimate expectations and standing. The aim in each case will be to show two main things. Firstly, that the public interest conception fails to provide an explanation of the relevant doctrine which captures the legal and normative complexities with which judges must grapple in giving effect to it. Secondly, that by pulling apart the doctrine along the three lines inherent in the anatomical approach introduced in chapter 3 it becomes possible to construct an understanding of the doctrine which succeeds in capturing these complexities.

Each of these chapters will follow a similar structure, each being divided into three parts. The first part will offer some reflections on the relationship between the relevant doctrine and the public interest conception. The second will engage in an exercise of 'deconstructing' the case

78 Mark Elliott, 'Has the Common Law Duty to Give Reasons Come of Age Yet?' [2011] PL 56.

79 *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 (HL).

80 *R (Campaign to Protect Rural England, Kent) v Dover DC* [2016] EWCA Civ 936, [2017] JPL 180.

law in which the relevant doctrine has been invoked. The main aim here will be to show that there are three core senses which the legal and normative structures in play in each body of case law are both complex and varied in ways which are simply not captured by the public interest conception. The third part will then seek to demonstrate the utility of the public interest conception. It will, in particular, show how, by pulling apart the relevant body of case law in the manner done in part 2, it becomes possible to construct explanations of the relevant doctrine which better capture the legal and normative complexities with which judges must grapple in giving effect to it.

Chapters 4, 5 and 6, then, share similar aims and a similar structure. It ought to be noted, however, that there are two important differences between the arguments developed therein. Firstly, there is something different to be said in relation to each case study on the matter of *why* the public interest conception fails to provide a satisfactory explanation of the relevant doctrine. In the procedural fairness context, the problem, as will be explained, is that those who make use of the public interest conception simply fail to engage with the detail of the procedural fairness case law for the purpose of explaining how the idea that the purpose of administrative law is the advancement of collective public interests is thought of as providing an explanation of it. In the relation to legitimate expectations, the core point is that, although following the landmark *Coughlan*[81] decision broad ideas such as 'abuse of power'[82] and 'good administration,'[83] which may be thought compatible with the public interest conception, were often invoked by way of explaining legitimate expectations, there is an increasing dissatisfaction with explanations grounded in such broad ideas[84] and an increasingly explicit recognition that legitimate expectations is a particularly problematic legal area for the public interest conception.[85] In relation to standing the difficulties for the public interest conception arise primarily because it is a way of thinking which proceeds from

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81 *Coughlan* (n 18).

82 *Begbie* (n 33).

83 See for example Soren Schonberg, *Legitimate Expectations in Administrative Law* (OUP 2000), 24-25.

84 See for example Jack Watson, 'Clarity and Ambiguity: A New Approach to the Test of Legitimacy in the Law of Legitimate Expectations' (2010) 30(4) LS 633.

85 See foe example Jason Varuhas, 'In Search of a Doctrine: Mapping the Law of Legitimate Expectations' in Matthew Groves & Greg Weeks, *Legitimate Expectations in the Common Law World* (Hart 2017).

an overly simplistic understanding of the basic legal and normative components in play in administrative law and this, in turn, causes those who make use of it to focus on only a small subsection of the standing case law,[86] neglecting those cases which are characterised by a legal and normative structures of different kinds.[87]

Secondly, there is also something different to be said in each of chapters 4, 5 and 6 on the subject of how the anatomical approach helps us to construct an explanation of the relevant doctrine which captures the legal and normative complexities with which judges must grapple in giving effect to it. In relation to procedural fairness, the core point is that three main things flow from an exercise in deconstructing of the procedural fairness case law. Firstly, many of the most important and well-known procedural fairness cases[88] arise in the context of an statutory provision of a particular kind: a provision conferring on an administrative decision-maker the power to make a decision as to whether *some individual* ought to be granted a benefit or made subject to some burden. Secondly, when faced with cases of this kind the courts have tended to view their normative and legal tasks in a particular way, namely as those of ensuring that due respect is paid to the *individual* and of determining the content of the legal relationship which persists between *individual* and *administrative decision-maker*. Thirdly, as will be illustrated through a close discussion of *Moseley*,[89] when challenges to the lawfulness of administrative decision-making procedure arise in the context of administrative schemes of different kinds the legal and normative structures in play are much less settled and thus there is much more 'up for grabs.'

In relation to legitimate expectations, two core points emerge from the use of an anatomical approach. Firstly, there are, within the mass of legitimate expectation case law at least four clusters of case – the 'failure to apply policy to an individual' case,[90] the 'directly

86 Especially cases, such as *WDM* (n 46) which make use of the idea of representative standing.

87 See, for example, *R v Birmingham CC, ex parte Millard & Connolly* (1994) 26 HLR 551 which is discussed in detail in chapter 6.

88 Including, for example, (n 11).

89 *R (Moseley) v Haringey LBC* [201] UKSC 56, [2014] 1 WLR 3947.

90 For example *Lumba* (n 17).

communicated assurance' case,[91] the 'change of policy at the expense of a group' case[92] and the 'public procedural promise' case[93] - which are characterised by the fact that they share a particular set of factual, normative and legal hallmarks. Secondly, that the courts, in adjudicating upon cases within each of these categories, must grapple with complexities of different kinds.

Finally, on standing the core point which emerges from the use of an anatomical approach to the case law is that we come to see that standing in administrative law is 'ground-dependent.' This assertion is, in turn, make up of three further sub-propositions. Firstly, there is no one singular 'test' of standing in administrative law. The courts, rather, make use of different approaches to standing in relation to different kinds of duty and take into consideration an array of different factors in settling on the proper approach. Secondly, contrary to the explanation of standing offered by the public interest conception[94] there *is* room in relation to certain duties arising within the field of administrative law to make use of an approach to standing analogous to the 'rights-based approach' used in fields such as private law. Five such duties, in particular, will be discussed. Thirdly, it is a perfectly logical possibility that an applicant who is found to have standing to rely on one legal ground, may lack standing to rely on another.[95]

The final chapter of the thesis, chapter 7, returns to the core question posed at the start of this introduction: how should we approach the development of an understanding administrative law? Its aim will be to offer some reflections on what the arguments developed in this thesis suggest about how this question ought to be answered. The chapter will be divided into three part. Each will consider a different reason for which the influence of the public interest conception, and monism more broadly, is understandable: an *historical/explanatory* consideration, a *methodological* consideration and a *defensive* consideration. In relation to each consideration the aim will be to explain two things. Firstly, why the relevant consideration does not provide a convincing argument in favour of monism. Secondly how,

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91 For example *Coughlan* (n 18).

92 For example *BAPIO* (n 18).

93 For example *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin), [2007] Env LR 29.

94 See especially Elliott & Varuhas (n 24), chapter 14.

95 See for example *McBride's Application for Judicial Review* [1999] NI 299.

by reflecting further on the relevant consideration, we come to see that it, in the end, serves to highlight the virtues of an anatomical approach to administrative law.

B. The Scope of the Thesis

With this overview of the thesis' main arguments in mind, it is helpful to note a handful of caveats relating to the thesis' scope. The core point to be emphasised is that this thesis seeks to argue that English administrative law is not amenable monistic analysis and that it is better to make use of the 'anatomical approach' illustrated in the later chapters of this thesis. Four more particular consequences follow from this basic point.

Firstly, this thesis is concerned to develop an understanding of *English* administrative law, and not administrative law generally. It may well be the case that certain ideas developed herein, including the suggestion that the constituent parts of English administrative law are complex and varied in three core senses has resonance in other jurisdictions. It is, however, no part of the argument in this thesis that this is *necessarily* the case. Secondly, this thesis is not intended as a contribution to the debate, in general jurisprudence, concerning the nature of legal rights.[96] It draws at a number of points on certain writings in the field of general jurisprudence on the nature of legal rights, especially the writings of Wesley Hohfeld.[97] It is, however, not among the purposes of the thesis to contribute to that subject.

Thirdly, this thesis will draw at a number of points on an influential way of thinking about the nature of English human rights law. This is because, as will be seen, those who make use of the 'public interest conception' of administrative law, with which this thesis takes significant issue, sometimes draw a sharp distinction between administrative law, on the one hand, and human rights law, on the other.[98] To be clear, where the thesis draws on these ideas it does so for the sole purpose of expounding the 'public interest conception' of administrative law. It is no part of thesis, however, that the characterisation of human rights

96 See especially citations at (n 59), Hart (n 64).

97 Hohfeld (n 44).

98 See especially Varuhas (n 79).

law offered by the public interest conception must be taken to be correct. Questions as to the nature of human rights law doctrine are difficult[99] and lie outside of the scope of this thesis.

The fourth and final caveat to be noted is, in some senses, the most difficult to articulate. The important point, put very roughly however, is that this thesis both *is* and *is not* about the relationship between administrative law and private law. It is *not* about this relationship in two senses. Firstly, this thesis contains no sustained discussion of private law doctrine. True it is that the thesis draws in a number of ways on ideas developed in the private law field, such as the idea of 'individual right-duty correlativity'[100] and the approach to standing used therein,[101] but this is done for the purpose of seeking to develop an understanding of the nature of *administrative law*. Secondly, this thesis, furthermore, does not engage with a number of important questions which one would expect an exploration of the relationship between these two legal fields to grapple with, such as the question concerning the 'scope' of application of administrative law principle,[102] or the question concerning the meaning of a 'public function' within the Human Rights Act.[103]

There is, however, an important sense in which this thesis *is* about the relationship between administrative law and private law in that the arguments developed herein have important implications for how we think about these two fields and their relationship with one another. Many of these implications will be obvious from the outline of the thesis set out above: it is not possible to erect a clear divide between administrative and private law on the basis of the normative values to which these areas give effect, on the basis of the legal relationships which they create or the approaches to standing of which they make use.

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99 See for example Joanna Miles, 'Standing under the Human Rights Act 1998' (2000) 59(1) CLJ 133; Joanna Miles, 'Standing in a Multi-Layered Constitution' in Nicholas Bamforth & Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003); Peter Cane 'Two Conceptions of Constitutional Right' (2015) 8(3) *Insights* 1.

100 Hohfeld (n 44).

101 See for example *Brushmoor UK Ltd v BP Raffinaderij Rotterdam BV*, 24 February 2014 (QB) (unreported), discussed in chapter 2.

102 See citations at (n 5).

103 Human Rights Act 1998, s6. See further *Aston Cantlow Parochial Church Council v Wallbank* [2003] UKHL 37; *YL v Birmingham CC* [2007] UKHL 27, [2008] 1 AC 95; Dawn Oliver, 'Functions of a Public Nature under the Human Rights Act' [2004] PL 329; Maurice Sunkin, 'Pushing Forward the Frontiers of Human Rights Protection: The Meaning of Public Authority Under the Human Rights Act' [2004] PL 643.

Another, is more buried though no less important: it is important that administrative and private law scholars pay attention to each other's fields and that they talk to each other. There is much to be gained from such a dialogue by both sides. From the administrative law scholar's perspective, and as will become apparent in the course of this thesis, administrative law uses a number of legal techniques which bear close analogy to techniques used in private law and it is important to take interest in the learning which private lawyers have built up in relation to these techniques. From the private law scholar's perspective, there has sometimes been a tendency in the field of private law to rely on something of caricature of the relationship between, on the one hand, private law and the common law and, on the other, public law and legislation.[104] According to this caricature, private law is the arena in which the courts do the hard legal work of identifying inherent common values and give them expression through the development of doctrine, whereas public law is just about legislation and legislation, in turn, is just about 'policy.' Public law, in other words, is concerned with the policy choices which happen to be on the agenda of the government which happens to be in power at the time and has, if anything, only a polluting effect on the purity of common law.[105] An important implication of this thesis which unfortunately cannot be fully explored herein, however, is that private lawyers ought to bear in mind that *administrative law* continues to provide fertile ground for the judiciary's development of the common law[106] and has much to teach about the complex legal relationship between common law and legislation.

C. Some Reflections on Method

Before concluding this introductory chapter, and turning to the bulk of argument in this thesis, it seems pertinent to offer some short reflections on the thesis' method. The first point to be noted is that, perhaps unusually, the bulk of the discussion of methodology in this thesis will actually take place in its concluding chapter, chapter 7. Here, an important argument will be developed: if we take seriously the idea that our primary task as legal scholars is to render

104 See especially Ernest Weinrib, *The Idea of Private Law* (OUP 2012), especially at 8.

105 See especially Ronald Dwokin, *Taking Rights Seriously* (New ed, Duckworth 1996). On the failure of some private law theorists to take legislation seriously see James Goudkamp & John Murphy, 'Tort Statutes and Tort Theories' (2015) 131 LQR 133.

106 See for example Lady Hale's judgment in *Braganza* (n 5) and Oliver (n 47).

administrative law *intelligible*[107] as a legal subject, we must abandon monism as an approach to the subject. Seeking to prescribe a singular 'organising concept'[108] through which administrative law can be understood, it will be argued, has the effect, not of rendering the subject intelligible, but of failing to provide an intellectual framework through which the case law, and the legal and normative tasks which judges must undertake therein, can be helpfully understood. The reason for which this discussion is located in chapter 7, and not here, is simple: chapters 4, 5 and 6 of this thesis are, in a sense, a sustained exercise in demonstrating, through a close analysis of three case studies, the ways in which a monistic approach to administrative law detracts from the intelligibility of administrative law. A discussion of this propensity of monism, accordingly, is best placed *after* these chapters.

That said, it is important to, at this early stage, explain two choices which have been made in the course of structuring the inquiry of this thesis. Firstly, it is important to explain why 'the public interest conception'[109] has been chosen as a paradigmatic example of a monistic approach to administrative law, and thus why it is has been thought proper to dedicate a significant portion of the argument to demonstrating the deficiencies of this way of thinking.

Two main points fall to be made here. The first is that there are a number of reasons for which the public interest conception provides a very clear example of a monistic approach to administrative law which can be quite straightforwardly drawn on in the course of argument in this thesis: the public interest conception is clearly an attempt to identify a singular 'master idea or principle'[110] which is capable of explaining administrative law, it is a way of thinking which has been very clearly articulated in recent years especially by Jason Varuhas[111] and,

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107 See Weinrib (n 104); Alan Beever, 'Formalism in Music and Law' (2011) 61(2) University of Toronto LJ 213.

108 Forsyth (n 30), [27].

109 Varuhas (n 6).

110 Smith (n 36), 11.

111 Varuhas (n 6).

as will be demonstrated in chapter 2, it has had a significant influence on the thinking of a number of important judges[112] and scholars.[113]

The second point however is, in some senses, the more important. The point, put simply, is this: a handful of considerations, which will be discussed in detail in chapter 2, mean that the time is ripe for a close analysis of the public interest conception and of the extent to which the explanation it offers of administrative law is acceptable. Two such considerations are particularly important. Firstly, the public interest conception is not thought of as being of theoretical interest only. On the contrary, there are a number of notable instances in which the public interest conception has been drawn upon as the major basis from which to make an important argument about the *practical* development of administrative law. The public interest conception has, as will be explained for instance, been invoked to argue against the expansion of domestic proportionality[114] and the introduction into the courts' remedial armoury of the possibility of making a compensation order.[115] Secondly, the influence of the public interest conception is growing. It, for instance, occupies an important place in the latest edition of Mark Elliott and Jason Varuhas' leading textbook on administrative law.[116] Collectively these considerations mean that there is an important need for a sustained inquiry into the extent to which judges and scholars should adhere to the way of thinking offered by the public interest conception.

The second decision concerning the structure of the inquiry undertaken in this thesis which ought to be explained here concerns the three case studies on which chapters 4, 5 and 6 focus. These case studies have been selected for two main reasons. Firstly, each of these case studies relates to a central doctrine of modern administrative law. What is meant by this is that each of these doctrines – procedural fairness, legitimate expectations and standing – is clearly thought of as being such an established and substantial component of English administrative

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112 See especially Harry Woolf, 'Public Law – Private Law: Why the Divide? A Personal View' [1986] PL 220.

113 See especially Nicholas Bamforth, 'Hohfeldian Rights and Public Law' in Matthew Kramer, *Rights Wrongs & Responsibilities* (Palgrave 2001).

114 Varuhas (n 79).

115 See especially Law Commission, 'Administrative Redress: Public Bodies and the Citizen' (Law Comm No 322, 2010), 8.

116 Varuhas & Elliott (n 24), especially chapter 14.

law that they are worthy of sustained and dedicated discussion in the leading textbooks on the subject. The second important point is that, taken collectively, these three case studies constitute a significant and diverse 'cross-section'[117] of administrative law. As Jason Varuhas has stressed, 'if commentators wish to explain the current state of administrative law as a whole… they ought to closely examine a cross-section of administrative law doctrine'[118] rather than focusing, for instance, on substantive review alone. Procedural fairness, legitimate expectations and standing, taken collectively and cutting, as they do, across the distinction between procedural review, substantive review and procedural matters going to the scope of administrative law, provide such a cross-section. In any event, it ought to be noted, the focus of this thesis will not be strictly limited to a focus on these doctrines. Although these doctrines will form the main focus of the legal analysis in this thesis, the argument will draw upon other aspects of modern administrative law at a number of points where it is appropriate.

3. Conclusion

To summarise briefly, this thesis is an exercise in exploring a single, but broad and important question: how should we approach the development of an understanding administrative law? Its argument, ultimately, is that administrative law is not amenable to monistic analysis; an approach which seeks to understand the subject through the lens of a singular 'organising concept'[119] inevitably fails to adequately capture the legal and normative complexities with which judges must grapple in giving effect to it. Instead, it is argued, we ought to make use of an anatomical approach to the subject which embraces the reality that there are a number of closely related ways in which the basic legal and normative components of administrative law are both complex and varied. The later chapters of this thesis are an exercise in doing three main things. Firstly, introducing in some detail both the public interest conception and the anatomical approach. Secondly, demonstrating through a series of three case studies the deficiencies of the former and the utility of the latter in helping us to understand administrative law. Thirdly, offering some concluding reflections on why administrative law

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117 Jason Varuhas, 'The Reformation of English Administrative Law? "Rights", Rhetoric and Reality' (2013) 72 CLJ 369, 376.

118 Ibid.

119 Forsyth (n 30), [27].

resists monistic analysis and is better understood through an approach which embraces the various ways in which its constituent parts are both complex and varied.

Chapter 2

'The Public Interest Conception' & Administrative Law's Modern History

The aims of this chapter are twofold. The first is to introduce an important, and increasingly influential, monistic approach to understanding administrative law which has been termed the 'public interest conception.'[1] The second is to begin to illustrate, through a brief exploration of administrative law's modern history, why administrative law evades monistic analysis and is thus inadequately explained by the public interest conception.

The chapter is divided into three parts. Part 1 is concerned with the *content* of the public interest conception. As will be seen, at the heart of the public interest conception is the idea that the 'master idea or principle'[2] from which administrative law flows is the advancement of goods in which the public as a collectivity, as opposed to any one individual, is taken as having an especially important interest. As will be explained, this idea tends to manifest in a particular set of answers to the two 'key questions' concerning the nature and structure of administrative law set out in the introductory chapter. In relation to the *normative* question, the public interest conception suggests that a line must be drawn between administrative law and 'individual-regarding'[3] legal areas such as private law[4] and human rights law,[5] in that, while the latter are concerned with providing protection for fundamental individual interests, the normative purpose of the former is the promotion of the *public* interest. Relatedly,[6] in relation to the *legal-structural* question, the public interest seeks to erect a divide between

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1 Jason Varuhas, 'The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications' in John Bell, Mark Elliott, Jason Varuhas & Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, 2016).

2 Stephen Smith, *Contract Theory* (OUP 2004), 11.

3 Varuhas (n 1), 42.

4 See for example Harry Woolf, 'Public Law – Private Law: Why the Divide? A Personal View' [1986] PL 220.

5 See for example Jason Varuhas, 'Against Unification' in Mark Elliott & Hanna Wilberg (eds), *The Intensity and Scope of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015).

6 Note again that, according to one influential way of thinking about the nature of legal rights – 'benefit theory' – these two points are logically corollaries.

private law, which makes frequent use of the idea of individual right-duty correlativity,[7] and administrative law in which legal duties are said to be 'owed either to the public or a section of it.'[8]

Part 2 is then concerned with the *influence* of the public interest conception. Two main points fall to be made. Firstly, the public interest conception is a way of thinking which has already had a substantial influence on both judicial and scholarly thinking and this influence appears to be increasing. Secondly, the public interest conception is not thought of by those who make use of it as being of theoretical relevance only. A number of practical consequences, rather, are said to flow from embracing this understanding of the nature of administrative law. The most important, for present purposes, concerns standing. The 'public-regarding'[9] nature of administrative law, it is said, precludes the utility of the 'rights-based standing rules'[10] used in other fields such as private law[11] and human rights law.[12] Questions as to whether an applicant has standing to rely on administrative law principle in legal proceedings, it is said, must be determined by making use of a fundamentally different approach.[13] As will be explained, however, the practical of implications of the public interest conception are not thought to be limited to standing. Thus, this way of thinking has been invoked to make arguments on such subjects as the proper role of proportionality[14] and monetary compensation[15] in administrative law.

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7 As articulated especially in Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (The Law Book Exchange, 2010).

8 Nicholas Bamforth, 'Hohfeldian Rights and Public Law' in Matthew Kramer, *Rights Wrongs & Responsibilities* (Palgrave 2001), 11.

9 Varuhas (n 1), 42.

10 Varuhas (n 5), 101

11 As illustrated, for example, by *Brushmoor UK Ltd v BP Raffinaderij Rotterdam BV*, 24 February 2014 (QB) (unreported), discussed below.

12 See especially Human Rights Act 1998, s7.

13 See for example Lord Reed's judgment in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, discussed below.

14 See especially Varuhas (n 5) discussed below.

15 See especially Law Commission, 'Administrative Redress: Public Bodies and the Citizen' (Law Comm No 322, 2010), discussed below.

The third and final part of the chapter then takes something of a side step away from the public interest conception into the modern history of administrative law. A discussion of administrative law's modern development is highly pertinent at this stage of the thesis' narrative because it begins to illustrate two things. Firstly, why the public interest conception can provide only a *partial* explanation of how administrative law functions in *some* statutory and policy contexts. Secondly, why administrative law as a legal area resists analysis in monistic terms more broadly. As will be shown, a brief exploration of the history of administrative law since the late 1800s shows that it is a history characterised by at least three, closely related, themes. Firstly, the proliferation of a vast array of different kinds of administrative regime. Secondly, the judiciary's carving out for itself of a role in intervening to protect an array of different values and interests. Thirdly, the courts' attempts to grapple with a plurality of different kinds of legal relationship. The modern history of administrative law, in other words, is not the story of a linear progression from one end of a single spectrum to the other. It is, rather, a story of the courts accumulating the basic components of modern administrative law. These components, importantly, are characterised by complexity and variety. It is hardly surprising, then, that it is unhelpful to approach administrative law through a search for a singular 'organising concept.'[16]

1. The Content of 'The Public Interest Conception'[17]

A helpful starting point for this chapter is with an important point made in the previous: monism, as an approach to understanding administrative law, has had a powerful influence in the literature on administrative law. This, and the next, part of the chapter are, in a sense, an attempt to build further on this point through a close discussion of one monistic approach to understanding administrative law which is coming to have an increasing influence on scholarly and judicial thinking: the public interest conception. This part of the chapter is concerned with the *content* of this way of thinking, and the next with its *influence*.

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16 Language used in, for instance, Christopher Forsyth, 'The Rock and the Sand: Jurisdiction and Remedial Discretion' (2013) 18(4) JR 360, [27].

17 Varuhas (n 1).

At the heart of, what Jason Varuhas has termed, 'the public interest conception'[18] is a basic idea: administrative law is distinct from other legal areas, such as private law and human rights law, on the basis that while these other areas are fundamentally 'individual-regarding'[19] in that their major concern is protecting important individualised values and interests, administrative law is inherently 'public-regarding.'[20] That is, the 'organising concept'[21] underlying this body of law is the advancement of goods in which the public as a collective, as opposed to any one individual, has an important interest. This basic idea, in turn, manifests in particular answers to each of the key questions concerning the nature of administrative law set out in the previous chapter. It is helpful to expand upon each in turn.

As explained in chapter 1, the first *normative* question concerning the nature of administrative law requires an inquiry into the *normative purposes* of the area. Or, to put it otherwise, requires one to consider the *values* and *interests* which administrative law seeks to protect. As was explained in chapter 1, two broad issues warrant special attention here. Firstly, the *origins* of the values which the courts seek to protect in developing administrative law principle. As discussed, there are two broad, but not mutually exclusive, ways of thinking. On the one hand, we might think of administrative law's values as originating within the *logic of the administrative scheme* which the decision-maker is tasked with implementing. On the other, we might think of these values as originating in the *common law*. The second issue then concerns the *focus* of administrative law's values. Again, two broad, but not mutually exclusive, options present themselves. In the first place, we might think of administrative law's purpose as being the identification and protection of fundamental *individual* interests. In the second, we might view it as being the promotion of the *public* good.

It ought to be clear that the public interest conception suggests a particular way of answering this normative question. It is an answer, importantly, which deals primarily with the second question concerning the *focus* of administrative law values. According to the public interest conception, it is important to distinguish between two broad sets of normative purpose which

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18 Ibid.

19 Ibid, 42.

20 Ibid.

21 Forsyth (n 16), [27].

any particular branch of law may be concerned to advance. On the one hand there are *individualistic* values and interests. That is, the purpose of a branch of law may be to confer forms of legal protection on certain fundamental freedoms or goods in which an *individual* has an especially important interest. This is the normative purpose, it is said by the public interest conception, of 'individual-regarding'[22] areas of law such as private law and human rights law. On the other hand, however, there are *collective public* values and interests. That is, certain goods in which the *public* as a collectivity, as opposed to any one individual, is taken to have an interest. The normative groundings of administrative law, according to the public interest conception, are distinctive in that it is *collective public interests* of this kind which its principles are designed to protect and advance.

This way of thinking about the supposedly distinctive normative groundings of administrative law can be clearly seen in a number of places. Take, for instance, the following passage written extra-judicially by Lord Woolf:[23]

> The critical distinction [between public and private law] arises out of the fact that it is the *public as a whole*, or in the case of local government the public in the locality, who are the beneficiaries of what is protected by public law, and it is the individuals or bodies entitled to the right who are the beneficiaries of the protection provided by private law.[24]

Underlying this passage is the idea articulated above: that administrative law, as a branch of public law, is clearly distinguishable from private law in that it is normatively grounded in a concern to advance the interests of the *public*, rather than to confer forms of legal protection on *individuals*. A similar idea, albeit concerning the relationship between administrative law and human rights law, as opposed to private law, clearly underlies the following passage written by Jason Varuhas:

> While human rights law focuses on the interest of private individuals and their protection in the face of administrative action... (individual-regarding), [administrative law's] focus is squarely on public officials and regulation of the

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22 Varuhas (n 1), 42.

23 Woolf (n 4). See also Harry Woolf, *Protection of the Public – A New Challenge* (Stevens and Sons, 1990).

24 Ibid, 221.

> exercise of public power itself, ensuring it is exercised as it ought to be *in the public interest* (public-regarding).[25]

Again, the clear idea being expressed here is that the distinctiveness of administrative law, as opposed to human rights law, lies in the fact that it is normatively oriented towards advancing goods in which the public as whole has a collectivity has an interest.

Those who make use of the public interest conception do not offer an explicit answer to the question of the *origins* of administrative law values. The indications, however, seem to be that those who make use of this idea think of the 'public-regarding'[26] values with which administrative law is concerned as originating in *both* the logic of the administrative schemes in issue and the common law. Take, for instance, the writings of Jason Varuhas. On the one hand, for instance, Varuhas regards the public interest conception as offering an explanation of, what he terms, 'common law review,'[27] the clear implication being that the courts in this field are engaged in the task of developing doctrine for the purpose of preserving common law values. On the other, however, Varuhas regards the following passage from Lord Diplock's judgment in *Swain*[28] as being a paradigmatic example of the public interest conception:

> ...the purpose for which... statutory functions are vested in the [Law] Society.... is the protection of the public... In exercising its statutory functions the duty of the Council is to act in what it believes to be the best interests of that section of the public, even in the event... that those public interests should conflict with the special interests of members.[29]

The clear idea underlying this passage is that the role in the court in the field of administrative law is to ensure that the administrative decision-maker acts to promote the vision of the public interest which underlies the administrative scheme in issue, the implication being that administrative law values are found *within the schemes themselves*.

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25 Varuhas (n 5), 101-102.

26 Varuhas (n 1) 42

27 A term used throughout, for instance Varuhas (n 1).

28 *Swain v Law Society* [1983] 1 AC 496.

29 Ibid, 500.

In a related manner, the public interest conception provides a particular answer to the *legal-structural* question set out in chapter 1. As explained, this question necessitates an inquiry into the *kinds of legal relationship* with which administrative law is concerned and, more particularly, into the question of whether the idea of Hohfeldian 'individual right-duty correlativity,' which has played a significant role in private law,[30] has any role to play in the field of administrative law. The public interest conception, once again, draws a clear line between private law and administrative law on this issue. Thus, it is said that while individual right-duty correlativity plays an important role in the field of private law, it does not play a significant role in the context of administrative law. Legal duties which arise in this field, rather, are said to be characterised by '*collective* right-duty correlativity.'[31] The idea is simple: whereas legal duties arising in private law are, at least very often,[32] owed to *some individual* who in turn holds a correlative right entitling her to have the duty performed, thereby creating a personal legal relationship between claimant and defendant, the legal duties with which administrative law is concerned function differently. They are, more particularly, owed *to the public* as a collective. The *public* thus, in turn, holds a *collective* right entitling it to have the duty performed.

Again, this is a way of thinking which has had a considerable influence on the academic literature dealing with administrative law.[33] Take, for instance, the following passages written by Nicholas Bamforth:[34]

> In public law the primary concern of the courts, analytically speaking, is to remedy breaches of a duty owed by public authorities either *to society at large* or to sections

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30 For classic examples of this influence see especially Ernest Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 Univ of Toronto LJ 349 and Rob Stevens, *Torts and Rights* (OUP 2007).

31 For discussion of this idea see Jason Varuhas, 'The Reformation of English Administrative Law? "Rights", Rhetoric and Reality' (2013) 72 CLJ 369, 409 citing Matthew Kramer, 'Rights Without Trimmings' in Matthew Kramer, *A Debate Over Rights: Philosophical Enquiries* (OUP 2000).

32 For expressions of doubt to the effect that not all of private law can be explained through the lens of individual right-duty correlativity see for example Ronen Perry, 'Correlativity' (2008) 28(6) Law and Philosophy 537).

33 For further examples see for instance Ernest Weinrib (n 30), 8; Thomas Leary, 'The Nature of Public Law Duty and Citizen Standing in English Law' available at: https://www.google.co.uk/?gws_rd=ssl#q=andrew+leary+the+nature+of+public+law+duty (accessed 29 November 2016).

34 Bamforth (n 8).

> of society… public law *does not involve any direct correlative* between a right held by the individual litigant and the duty owed to that litigant.[35]

The clear assertion of this passage is that there is an important structural difference between administrative law and private law doctrine in terms of the *legal relationships* with of which these legal fields are concerned. Thus, according to Bamforth, while much of private law functions by creating relationships of right-duty correlativity between *individual* persons and organisations, administrative law doctrine serves to define the legal relationship between *public authorities* and *the public*. In a similar way, consider the following passage written, again, extra-judicially by Lord Woolf:[36]

> I regard public law as being the system which enforces the proper performance by public bodies of the duties which they *owe to the public*. I regard private law as being the system which protects the private rights of private individuals or the private rights of public bodies.[37]

Again, Lord Woolf's clear suggestion is that administrative law and private law are fundamentally distinct in the sense that the former gives rise to legal duties 'owe[d] to the public'[38] and the latter to legal duties which correlate with an individual personal right.

By way of a final example, consider Jason Varuhas' response to the claim that administrative law doctrine is being 'righted.'[39] As part of this response, Varuhas carves out two different ways of understanding the basic common law duties 'to act reasonably, lawfully and with procedural fairness in the exercise of its statutory functions.'[40] According to the first, these duties are owed *to some individual*, such that in relation to each duty there will be some

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35 Ibid, 15 (my emphasis). See also 11.

36 Woolf (n 4).

37 Ibid, 221.

38 Ibid.

39 Varuhas (n 31). Note that Varuhas sees these claims as being made in particular by Michael Taggart, 'Reinventing Administrative Law' in Nicholas Bamforth & Peter Leyland, *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003) and Thomas Poole, 'The Reformation of English Administrative Law' (2009) 68(1) CLJ 142.

40 Ibid, 409. Here Varuhas makes use of Lord's tripartite structure: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL), 410.

individual who holds a correlative right entitling her to have the duty performed.[41] According to the second, however, these duties are 'owed to the public at large'[42] and thus 'are correlative to claim-rights held by the public at large.' As explained by Varuhas:

> On this analysis the Home Office owes a duty to *the public as a whole* to perform [its] functions reasonably. The Home Office also owes a duty *to the public* to perform its public functions intra vires and another to perform those functions fairly. On this view, each public authority could be said to owe a discrete set of duties, to act reasonably, lawfully and with procedural fairness, in the exercise of its statutory functions, *each of which is correlative to a public right*.[43]

Importantly, Varuhas suggests that it is latter view which is the most convincing.[44]

To summarise, then, the public interest conception seeks to erect a clear line between administrative law and other fields of law such as private law and human rights law in relation to both *normative* and *legal-structural* issues. *Normatively*, the public interest conception suggests that a line can be drawn between administrative law, which is focused on promoting *collective public interests*, and private law, which is concerned to protect fundamental individual interests. *Legal-structurally*, and relatedly,[45] the public interest conception suggests that the idea of Hohfeldian 'individual right-duty correlativity,'[46] which plays an important function in private law, does not play a significant role in administrative law where legal duties are 'owed to the public at large.'[47]

2. The Influence of the Public Interest Conception

41 Varuhas understands the rights contained in Human Rights Act 1998, Sch 1 as functioning in this way: ibid, 398-400.

42 Ibid 409.

43 Ibid.

44 Ibid, 409-411.

45 See (n 6).

46 Hohfeld (n 7).

47 Bamforth (n 8), 11.

Having introduced the *content* of the public interest conception, and the answers it supplies to the two key questions about the nature of administrative law, it is now important to add some reflections on its *influence*. Two main points fall to be made here.

The first important point is simply that the public interest conception has had a considerable influence on the administrative law scholarship and this influence seems to be continuing to grow. An example which illustrates this point very clearly is the extent to which the public interest conception permeates the latest edition of one of the leading textbooks on administrative law.[48] In its chapter on standing, for example, this edition discusses the 'triumph of the public interest model'[49] and goes on to explain the following:

> Adoption of public interest standing rules tells us something of the conceptual nature of the administrative law norms of rationality, fairness and legality. It tends to suggest that these norms are not in the nature of individual rights... but rather free-standing standards or *duties owed to the public at large*, *for the benefit of the public*... if these duties are *public duties* it makes sense that public interest standing ought to be adopted, as we each, *as members of the public*, have an equal and legitimate stake in seeing that these public duties are complied with.[50]

The public interest conception, in other words, is coming to be seen some circles as having acquired such a status of orthodoxy that students of administrative law can be properly introduced to the subject through its frame.

Another good example of the growing influence of the public interest conception is a recent article written by TT Arvind and Lindsay Stirton.[51] This article seeks to tell the story of the modern development of judicial review. Notably, the key theme which has characterised thinking about administrative law in recent decades, for these authors, has been a shift in orthodox thinking away from an approach which focused on 'mediating conflicts between

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48 Mark Elliott & Jason Varuhas, *Administrative Law* (4th edn, OUP 2017).

49 Ibid, 565

50 Ibid, 567 (my emphasis).

51 TT Arvind & Lindsay Stirton, 'The Curious Origins of 99 Judicial Review' (2017) 133(1) LQR 91.

public and private interests'[52] towards 'a subsequent reorienting of the law around the entirely "public" task of ensuring that public bodies discharge their statutory and common law duties.'[53] This theme is, for instance, well summarised in the following passage:

> The judicial decisions of the House of Lords through the 1970s and 1980s... can be seen as having fundamentally limited the direction of development of the common law... Three points, in particular, characterise the approach that emerged in this period: a definition of legality that focused on *public interests*, an approach to assessing legality that is textual rather than purposive and a narrowing of the materials that courts review.[54]

The second important point to be made on the growing influence of the public interest conception is that this is a way of thinking which is not thought of as being of merely theoretical interest. On the contrary, there have been a number of notable instances where the public interest conception has been deployed as the major basis from which to advance an argument about the *practical development* of administrative law. The most important of these, for present purposes, concerns *standing*. Standing will be the subject of lengthy discussion in chapter 6. It is, however, helpful to say something here on the way in which the public interest conception has been invoked as the basis from which to make certain arguments about how the courts should approach the interpretation of the statutory 'sufficient interest'[55] test of standing which applies in administrative law.

In doing so, it is helpful to begin by taking a step away from administrative law into private law and human rights law and to consider how issues of standing are resolved there. In these fields the courts make use of a distinctive approach to standing which can be aptly termed a 'rights-based approach.'[56] Put briefly, this approach involves regarding standing to rely on a legal duty in legal proceedings as grounds for claiming relief as being confined to the individual who holds *the right which is correlative* to that duty. In the event that any person other than the right-holder seeks to rely on the duty, her claim is struck out for want of

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52 Ibid, 92.

53 Ibid.

54 Ibid, 109 (my emphasis).

55 Senior Courts Act 1981, s31(3).

56 Varuhas (n 1), 42.

standing. Two illustrations of this approach in action will suffice. Take, first, *Brushmoor*,[57] which provides a neat illustration of this approach in a private law context.[58] This case concerned a confidentiality agreement entered into by the claimant and defendant companies. Some time after entering the agreement the claimant took the decision to assign its rights under the contract to a third party. When the claimant became concerned that the defendant had acted in breach of its duties under the agreement the question arose whether it had standing to rely on those duties in legal proceedings. The court's answer was that it did not: from the point at which the claimant's rights were assigned to the third party, the rights which were correlative to the defendant's duties were vested in that third party. Accordingly, the third party, and the third party alone, had standing to rely on those duties in legal proceedings.[59] By way of a second illustration, consider the Human Rights Act 1998. Under section 7 of that Act,[60] standing to argue that a body exercising a 'public function'[61] has acted in breach of its legal duty to abide by Convention rights[62] is limited to the 'victim' of the alleged breach. As Joanna Miles has explained,[63] the effect of this provision is to create a relationship of 'privity' between public bodies and individuals whereby the decision to challenge a breach of a human right is limited to the right-holder and the right-holder alone.

With this point in mind, it is now helpful to return to the public interest conception and its purported implications for standing. The important point is this: according to those who make

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57 *Brushmoor* (n 11).

58 For further examples see for instance: *Kirkpatrick v Snoozebox Ltd* [2014] BCC 477 (QB); *Meadows Insurance Co Ltd & Insurance Corporation of Ireland v International Commercial Bank* [1989] 2 Lloyd's Rep 298 (CA). See also discussion in Konrad Schiemann, 'Locus Standi' [1990] PL 342.

59 *Brushmoor* (n 11) [20].

60 Human Rights Act 1998, s7.

61 Ibid, s6. On the courts' struggles to determine the meaning of this term see for example: *Aston Cantlow Parochial Church Council v Wallbank* [2003] UKHL 37; *YL v Birmingham CC* [2007] UKHL 27, [2008] 1 AC 95; Dawn Oliver, 'Functions of a Public Nature under the Human Rights Act' [2004] PL 329; Maurice Sunkin, 'Pushing Forward the Frontiers of Human Rights Protection: The Meaning of Public Authority Under the Human Rights Act' [2004] PL 643.

62 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) as incorporated into the Human Rights Act 1998 by Sch 1.

63 Joanna Miles, 'Standing under the Human Rights Act 1998' (2000) 59(1) CLJ 133. See also Joanna Miles, 'Standing in a Multi-Layered Constitution' in Nicholas Bamforth & Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003).

use of the public interest conception the 'public-regarding'[64] nature of administrative law means that issues of standing within it must be resolved by making use of a fundamentally different approach to the 'rights-based standing rules'[65] of private law and human rights law. These rules, it is said, are appropriate in private law and human rights law because of their inherently 'individual-regarding'[66] focus. In administrative law, however, where the normative concern is to advance collective public interests and where legal duties are owed to the public, it is not possible to resolve issues of standing by asking whether the applicant holds the right which is correlative to the relevant legal duty. The courts, rather, must make use of a very different approach.

This way of thinking about standing and the relationship between private and administrative law has had a significant influence in the literature and case law on standing.[67] Two examples of discourse to this effect are particularly pertinent. The first is Lord Reed's judgment in *AXA*.[68] Lord Reed, in this judgment, characterises the 'rights-based standing rules'[69] of private law as being a function of the individualistic focus of this body of law.[70] Claims based on administrative law, on the other hand, he says are brought, 'not... to vindicate a right vested in the applicant, but to request the court to supervise the actings of the public authority so as to ensure that it exercises its functions in accordance with the law.'[71] The result of this, for Lord Reed, is that in the field of administrative law, the courts must make use of a fundamentally different approach to standing. This approach, for Lord Reed, 'cannot be based on the concept of rights but must… be based on the concept of interests.'[72]

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64 Varuhas (n 1), 42.

65 Varuhas (n 5), 101

66 Varuhas (n 1), 42.

67 In addition to examples discussed below see further Lord Diplock's judgment in *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed* [1982] AC 617 (HL); *R v Somerset CC, ex parte Dixon* [1998] Env LR 111 (QB), 121; Elizabeth Fisher & Jeremy Kirk, 'Still Standing: An Argument for Open Standing in Australia and England' [1997] Australian Law Journal 370.

68 *AXA* (n 13).

69 Varuhas (n 5), 101

70 *AXA* (n 13), [159]. See further *Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51.

71 Ibid.

72 Ibid, [170].

By way of a second example, Jason Varuhas has also expounded a view of similar effect. Varuhas' view in this regard is most clearly illustrated by the following passage:

> The courts have recognised that the exercise of the court's supervisory jurisdiction necessarily requires a different approach to standing from the rights-based approach in other fields… [administrative law] protects something we all have a legitimate interest in: the proper exercise of public power in the public interest. It is true that individual detriment is a factor that goes to standing. But it is in the nature of an indicator of the genuineness of the applicant's claim. That is, it tells against the application being "prompted by an ill-motive" or the applicant being a "mere busybody or a troublemaker" such that standing should be denied for abuse of process.[73]

The idea being expressed in this passage seems to be as follows: given that administrative law focuses on a distinct set of normative concerns from those which arise in private law[74] and human rights law,[75] so too it must make use of a different approach to standing. More particularly, for Varuhas, there can be no room in administrative law for the 'rights-based standing rules'[76] which prevail in other areas. Issues of standing, rather, must be determined by making use of a fundamentally different approach. For Varuhas the proper approach would seem to be one based on motive. In particular, for Varuhas it would seem, issues of standing in administrative law are to be resolved by asking whether the applicant has initiated legal proceedings as a result of a 'sincere'[77] or 'genuine concern'[78] that the public authority had acted unlawfully, or for some other 'ill motive.'[79]

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73 Varuhas (n 5), 101.

74 Varuhas (n 1).

75 Varuhas (n 5).

76 Ibid, 101-102; Varuhas (n 1), 57-60.

77 *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] QB 522 (QB).

78 *R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWCA Civ 1546, [2004] 1 WLR 1761, [23].

79 Ibid. See for example *Morbaine Ltd v First Secretary of State* [2004] EWHC 1708 (Admin), [2005] JPL 377, [15].

There is, of course, a great deal more to be said about standing, and the extent to which we should accept the suggestion that there is no room within the field of administrative law to make use of the 'rights-based standing rules'[80] used in private law and human rights law. Discussion of these issues, however, must be reserved for chapter 6. The important points for present purposes, rather, are that, firstly, those who make use of the public interest conception argue that this way of thinking has the important practical implication that administrative law must make use of a fundamentally different approach to standing to that used in private law and, secondly, that this way of thinking about standing has had an important influence on the case law and literature.

Furthermore, standing is not the only practical issue for which the public interest conception is said to have implications. By way of illustration it is helpful to more briefly discuss two further examples. The first concerns the place of the proportionality doctrine in domestic administrative law. It is well-known that there is a fervent and ongoing debate concerning how the courts ought to structure substantive review within domestic administrative law.[81] One set of arguments which have emerged seek to show that the concept of proportionality,[82] developed primarily in human rights[83] and European Union law, is apt to play, at least a partial,[84] role in domestic substantive review. The important point for present purposes,

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80 Varuhas (n 5) 101.

81 See for example Anthony Lester & Jeffrey Jowell, 'Beyond Wednesbury: Substantive Principles of Administrative Law' [1987] PL 368; Lord Irvine, 'Judges and Decision-Makers: The Theory and Practice of *Wednesbury* Review' [1996] PL 59; Johns Laws, '*Wednesbury*' in Christopher Forsyth & Ivan Hard (eds), *The Goldern Metwand and the Crooked Cord* (OUP 1998); Murray Hunt, 'Against Bifurcation' in David Dyzehaus, Murray Hunt & Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (OUP 2009); Michael Taggart, 'Proportionality, Deference, *Wednesbury*' [2008] NZLR 423; Tom Hickman, 'Problems for Proportionality' [2010] NZLR 303; Paul Daly, 'Wednesbury's Reason and Structure' [2011] PL 238; Mark Elliott, 'From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification' and Jeffrey Jowell, 'Proportionality and Unreasonableness: Neither Merger Not Takeover' both in Mark Elliott & Hanna Wilberg (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart, 2015); Rebecca Williams, 'Structuring Substantive Review' [2017] PL 99.

82 See especially *Smith v United Kingdom* (2000) 29 EHRR 493; *Bank Mellat v HM Treasury* [2014] UKSC 39, [2014] AC 700; Julian Rivers, 'Proportionality and Variable Intensity Review' (2006) 65(1) CLJ 174; David Mead, 'Outcomes Aren't All: Defending Process-Based Review of Public Authority Decisions under the Human Rights Act 1998' [2012] PL 61.

83 See especially *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (HL).

84 Paul Craig, for example, argues that proportionality can suitably serve as a general ground of review, replacing reasonableness review in all case (see especially Paul Craig, 'Proportionality, Rationality and Review' [2010] NZLR 303) whereas Jeff King envisages a much more limited role for domestic proportionality review (see Jeff King, 'Proportionality: A Halfway House' [2010] NZLR 327).

however, is that the 'public interest conception' has been invoked by some as the basis by which to argue categorically against such a development. Jason Varuhas,[85] for instance, has argued that the proportionality doctrine, by its very nature, serves as a 'defence'[86] to the claim that an *individual right* has been violated by a public authority. Given this, Varuhas argues, there is no logical room for proportionality to play a role in domestic administrative law, a field concerned, not with conferring or protecting individual rights but, with ensuring the 'proper exercise of power in the public interest.'[87]

In a similar way, and by way of a further example, a version of the public interest conception has been used as a ground for resisting the introduction of monetary compensation orders into the courts' remedial armoury in the field of administrative law. In 2010, for instance, the Law Commission undertook an inquiry into judicial review and statutory appeals with a particular focus on procedure and remedies.[88] In the course of this inquiry, the Law Commission looked into, and ultimately accepted,[89] the case for introducing compensation orders.[90] Of most interest, for present purposes, however is the most common reason offered by respondents, in the course of the Commission's consultation, for resisting such a development. This reason is summarised by the Commission as follows:

> There were some consultees who disagreed vigorously with the proposal that a wider availability of monetary remedies could or should be introduced. They opposed the suggestion to allow individuals to claim damages where no private right had been infringed. Such responses drew a sharp distinction between the rights that arise from a *public duty*, which are *owed to the world at large*, and private rights.[91]

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85 Varuhas (n 5).

86 Ibid.

87 Ibid.

88 Law Commission (n 15).

89 Ibid, 2.16.

90 On the subject of the appropriateness of introducing the possibility of a compensation order in the field of administrative law see especially Peter Cane, 'Damages in Public Law' (1999) 3 Otago LR 489; Michael Fordham, 'Reparation for Maladministration: Public Law's Final Frontier' [2003] JR 104; Yasser Vanderman, 'Ultra Vires Legitimate Expectation: An Argument for Compensation' [2012] PL 85.

91 Law Commission (n 15), 8.

At the heart of this argument is the legal-structural tenet of the 'public interest conception.' Because, it is argued, administrative law gives rise to legal relationships of *collective*, as opposed to individual, right-duty correlativity, there can be no room for monetary compensation within it. Monetary compensation, it is said, is logically confined to bodies of law which *are* concerned with creating personal legal relationships between individual persons and organisations.

To summarise, then, the public interest conception has had a considerable influence on the case law and literature concerning administrative law. This influence, furthermore, appears to be growing and is practical in nature, the conception being invoked as the major basis from which to develop arguments concerning the practical development of administrative law.

3. Administrative Law's Modern History

This chapter, so far, has been concerned with the public interest conception, an important and increasingly influential monistic approach to understanding administrative law. Part 1 introduced the content of this way of thinking and part 2 offered some reflections on its influence. This final part of this chapter now takes something of a change of direction: it aims to briefly tell the story of the modern history of administrative law. As explained in the introduction, the taking of this sidestep at this stage of the argument is important because an exploration of this modern history begins to illustrate two things. Firstly, why the public interest conception is capable of providing only a *partial* explanation of the way that administrative law functions *in some statutory contexts*. Secondly, why, more broadly, administrative law is a legal area which is not amenable to *monistic* analysis.

The discussion which follows will be divided into two unequal sections. The first, and largest, section will seek to briefly tell the story of administrative law's modern history, beginning in the late 1800s with the publication of Albert Venn Dicey's *Introduction to the Study of the Law of the Constitution*[92] and ending in the decades following the 1977 procedural reforms.[93]

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92 Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (Liberty Fund 1982) reprint of (8th edn, MacMillan 1915).

93 Rules of the Supreme Court (Amendment No 3) (SI 1977, No 1955).

The second section will then aim to do two things in the way of rounding off the discussion. Firstly, to reflect on some of the main themes which have characterised the modern development of administrative law. Three in particular will be discussed: the proliferation of an array of different administrative schemes, the courts' development of administrative law principle for the purpose of protecting different clusters of values and the courts' attempts to grapple with legal relationships of different kinds. Secondly, to offer some reflections on what these themes suggest about the explanatory force of the public interest conception, and monistic approaches to understanding administrative law more broadly.

Before turning to this history, two caveats concerning the nature of the endeavour in this part of the chapter ought to be noted. The first is that, although the history developed in this chapter takes the late 1800s as its starting point this should not be taken as an indication that there is nothing of importance to be learnt about administrative law by looking further back into its history. On the contrary, the writings of such authors as Stephen Sedley,[94] Paul Craig[95] and Philip Murray[96] demonstrate that an historical endeavour of this kind is capable of yielding many intellectual fruits. The second is that this thesis is not strictly an exercise in legal history and this chapter makes no claim to exhaustively detail everything which is significant about the modern development of administrative law. Its purpose is, rather, to draw out a few of the most important features of this history in order to begin to illustrate the complexity and variety of the basic components which make up modern administrative law.[97]

A. The Story of Administrative Law's Modern Development

94 See especially Stephen Sedley, 'The Sound of Silence: Constitutional Law without a Constitution' (1994) 110(2) LQR 270; Stephen Sedley, 'Not in the Public Interest' (2014) 36(5) London Review of Books 29; Stephen Sedley, 'The Lion Beneath the Throne: Law as History' (2016) 21(4) JR 289; Stephen Sedley, *Lions Under the Throne: Essays on the History of English Public Law* (CUP 2015).

95 See especially Paul Craig, 'Public Law, Political Theory and Legal Theory' (2000) PL 211; Paul Craig, 'Administrative Law in the Anglo-American Tradition' in Guy Peter & Jon Pierre, *The SAGE Handbook of Public Administration* (2nd edn, SAGE Publications, 2012).

96 See especially Philip Murray, 'Process, Substance and the History of Error of Law Review' in John Bell, Mark Elliott, Jason Varuhas and Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016).

97 To borrow a phrase used in a different context, this part of the chapter can be thought of as a simplification of reality for a purpose: Elizabeth Fisher, Pasky Pascual & Wendy Wagner 'Understanding Environmental Models in their Legal and Regulatory Context' (2010) 22(2) JEL 251.

With these caveats in mind, this part of the chapter can now turn to its first aim: briefly telling the story of administrative law's modern development. It is convenient to divide this history into five parts, the first beginning in the late 1800s and the last dealing with the decades following the procedural reforms of 1977.[98]

i. The Late 1800s & The Works of AV Dicey

In discussing the modern history of administrative law it is helpful to begin with the influential writings of Albert Venn Dicey for the simple reason that, as will be seen, these writings somewhat set the tone for discussion of administrative law for much of the twentieth century.

As is well known , in 1885 Dicey published his influential treatise: *Introduction to the Study of the Law of the Constitution*.[99] Dicey's aim in this text was to identify and clearly set out 'the doctrines which are the foundation of the existing constitution'[100] of England. Dicey's major thesis in this tome was that the English constitution is founded on two basic principles: parliamentary sovereignty[101] and the rule of law.[102] Much of the text is accordingly dedicated to an exposition of these two ideas. One way of introducing Dicey's main ideas, of course, would be to examine in detail what Dicey meant by the two core ideas of parliamentary sovereignty and the rule of law. It is clearer, however, for the purposes of this thesis to take

98 (n 93).

99 Dicey (n 92).

100 Ibid, xxv.

101 Ibid, chapter I. For illustrations of the influence of Dicey's articulation of parliamentary sovereignty see for example *Ellen Street Estates v Minister of Health* [1934] 1 KB 590; William Wade, 'The Basis of Legal Sovereignty' (1955) 13(2) CLJ 172; *British Railways Board v Pickin* [1974] AC 765 (HL); *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (PC); William Wade, 'Sovereignty: Revolution or Evolution?' (1996) 112 LQR 568; Nick Barber, 'The Afterlife of Parliamentary Sovereignty' (2001) 9 *International Journal of Constitutional Law* 144; *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), [2017] 1 CMLR 34; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583.

102 Ibid, chapter IV.

a different approach. It is, in particular, helpful to proceed by asking what Dicey saw as being the main tasks of the courts.

Two main points fall to be made here. Firstly, for Dicey, the courts had two central tasks. In the first place, their role under the doctrine of parliamentary sovereignty was to give effect to the clearly expressed intentions of Parliament. As Dicey put it:

> The principle... of Parliamentary Sovereignty may, looked at from its positive side, be thus described: Any Act of Parliament... will be obeyed by the courts. The same principle looked at from its negative side, may be thus stated: There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which will be enforced by the Courts in contravention of an Act of Parliament.[103]

When faced with an Act of Parliament, in other words, the courts had one task and one task only: to give effect to the intentions of Parliament.

Outside of the context of an Act of Parliament, the courts, for Dicey, had a second task: to develop the common law in a way which afforded protection to certain basic individual freedoms and entitlements, such as the 'right to personal liberty'[104] and the 'right to freedom of discussion.'[105] This aspect of Dicey's view is encapsulated in his third limb of the rule of law which he explained as follows:

> The rule of law, lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequences of the rights of individuals, as defined and enforced by the Courts.[106]

The second main point which ought to be noted about how Dicey understood the tasks of the court is that he, very explicitly, rejected any role for the courts in developing or dealing with a body of law which could be labelled 'administrative law.' This was so in two more

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103 Ibid, 4.

104 Ibid, 115.

105 Ibid, chapter VI.

106 Ibid, 121.

particular senses. Firstly, Dicey argued that discretionary governmental power was not a feature of English law. With it, he rejected the idea that there are administrative regimes within the English legal system which conferred on public authorities discretionary power to take important decisions affecting individual livelihood.[107] Secondly, and closely relatedly, Dicey also rejected the suggestion that the courts had developed, or had any need to develop, a set of legal rules or principles through which it could seek to control administrative regimes of this kind. Because, for Dicey, discretionary administrative power did not play a significant role in the English constitution there was no need for the courts to turn their minds to the task of designing a special body of principles to deal with such power. Their focus, rather, ought to be on developing the doctrine of *private law*. Thus, for Dicey, the rule of law meant 'equality before the law, or the equal subjection of all classes to the ordinary law of the land.'[108] As a result, Dicey claimed that 'the notion which lies at the bottom of "administrative law" known to foreign countries... is utterly unknown to the law of England, and is indeed fundamentally inconsistent with our traditions and customs.'[109]

Before moving on from Dicey, however, a final important point out to be noted: contrary to Dicey's writings, two things were already happening in the English legal system at the end of the 19th century. Firstly, a broad variety of administrative schemes were beginning to proliferate. Maitland, in a series of lectures delivered in 1888,[110] for instance, advised his students that if:

> If [they took] up a modern volume of the reports of the Queen's Bench division, [they would] find that about half the cases reported have to do with rules of administrative law.... The governmental powers, the subordinate legislative powers of the great officers, the Secretaries of State, the Treasury, the Board of Trade, the Local Government Board... and so forth; these have become of the greatest importance.[111]

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107 Ibid, 110.

108 Ibid, 120.

109 Ibid, 120-121.

110 Maitland, *The Constitutional History of England: A Course of Lectures Delivered by FW Maitland* (CUP 1919).

111 Ibid, 505-506.

Secondly, the courts were also beginning to grapple with the difficult issue of what role they were to play in the way of regulating the implementation of administrative schemes of this kind. Two examples are particularly pertinent. Firstly, take the well-known case of *Cooper*[112] decided in 1863. The background to this case was the Metropolis Local Management Act 1855[113] which, among other things, created a new hierarchy of public authorities[114] and conferred on these authorities a series of powers enabling them to respond to London's slum housing crisis. When one of these authorities, the Wandsworth Board of Works, used these powers[115] to demolish property owned by Mr Cooper without first providing him with notice and an opportunity to argue that his property ought not to be demolished, an important question arose for the Court of Appeal. There was a significant body of case law 'beginning with Dr Bentley's case,[116] and ending with some very recent cases'[117] which illustrated that one of the values inherent in the common law was that of 'natural justice.'[118] As the law report for *Cooper* puts it, this value required that 'no man shall be condemned either in person or property without having had an opportunity afforded him of being heard in his own defence.'[119] In light of this, the question to be determined by the Court of Appeal was whether it had a legitimate role in seeking to protect the value of natural justice in light of the recently enacted Metropolis Local Management Act? The court thought that it did. Thus, as Byles J put it in an oft-cited judgment, 'the justice of the common law [would] supply the omission

112 *Cooper v Wandsworth Board of Works* (1863) 143 ER 414.

113 Metropolis Local Management Act 1855.

114 At the top of this hierarchy was the Metropolitan Board of Works which sat above a tier of vestries and District Board of Works.

115 Metropolis Local Management Act 1855, s76.

116 *R v University of Cambridge* (1723) 1 Stra 557.

117 Cooper (n 112). See for example *Capel v Child* (1832) 2 C & J 558; *Brutton v Vestry of St George's Hanover Square* (1871-1872) LR 13 Eq 339; *Cheetham v Mayor of Manchester* (1874-1875) LR 10 CP 249; *London & South Western Railway Co v Cyril Flower* (1875) 1 CPD 77; *Masters v Pontypool Local Government Board* (1878) 9 Ch D 677; *Hopkins v Smethwick Local Board of Health* (1890) 24 QBD 712.

118 Ibid, 416.

119 Ibid, 416.

of the legislature'[120] and protect the value of natural justice even where 'there are no positive words in a statute requiring that the party shall be heard.'[121]

By way of a second example, consider *Lewisham Union Guardians*[122] decided in 1897. This case concerned the Vaccination Act 1871,[123] a statutory regime designed, in part, to allocate to authorities known as 'guardians of the poor' a series of functions relating to the prevention of the spread of infectious disease for the benefit of the residents of London. The applicant in this case, itself a public authority,[124] sought to argue that the guardians of the poor for its area had failed to fulfil its legal duties under the regime and that relief should accordingly be granted. The Divisional Court in this case was faced again with a difficult question, albeit an importantly different one to that addressed by the Court of Appeal in *Cooper*:[125] here was a statutory scheme clearly designed to advance a particular good in the which the public as a collectivity was taken to have a collective interest, namely the prevention of the spread of disease. Given that the guardians of the poor were, in this instance, failing to act so as to promote this good, was there any room for the courts to intervene to remedy their failings by making a judicial order? The Divisional Court thought not. Thus, putting the point in very strong terms, Wright J opined that the court would be:

> ...far exceeding its function if it were to assume jurisdiction to enforce the performance by public bodies of all their statutory duties without requiring clear evidence that the person who sought its interference had a legal right to insist upon such performance.[126]

A significant complicating factor in this case was clearly that, in the absence of a purpose-built remedial route for challenging failure to comply with such statutory duties, the applicant

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120 Ibid, 420.

121 Ibid.

122 *R v Guardians of the Lewisham Union* [1897] 1 QB 498 (DC).

123 Vaccination Act 1871.

124 Note, in this regard, a striking similarity with *R v Secretary of State for Employment, ex parte Equal Opportunities Commission & Another* [1995] 1 AC 1 (HL).

125 *Cooper* (n 112).

126 *Lewisham* (n 122), 500.

had proceeded via an application for mandamus. This remedy, as Stanley De Smith has emphasised,[127] originated as a means of 'compelling [the] restitution [of individuals] to offices and liberties'[128] in circumstances where they were legally entitled to that office or liberty. The classical use of this remedy, in other words, was to provide relief in the context of a particular kind of legal relationship: one characterised by Hohfeldian individual right-duty correlativity where an individual was able to show that *she* had a legal right which was being denied to her by an organisation. By contrast, it was clearly not plausible to understand the legal duties created by the Vaccination Act as being owed to any one individual; they were, rather, designed to benefit the residents of London as a collectivity. In light of this, a major reason for the decision in *Lewisham Union Guardians* was surely that the court struggled to see how the remedy of mandamus could be repurposed for use in the context of a very different kind of legal relationship than that which is originated to enforce.

ii. Dicey's Change of Heart, The First World War & The New Despotism

In light of cases such as *Cooper* and *Lewisham Union Guardians*, it is perhaps not surprising that Dicey's aversion to administrative law was not to last for very long. In the years following the turn of the century, both of the patterns just discussed continued to develop in a way which did not pass unnoticed by Dicey. Thus, on the first of these continued developments – the proliferation of administrative regimes - Dicey wrote in 1915 that:

> During the last fifty years, and notably since the beginning of the twentieth century, the nation as represented by Parliament has undertaken to perform a large number of duties with which before the Reform Act of 1832 no English government had any concern whatever... If any critics doubts [the] substantial accuracy [of this claim] he

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127 Stanley De Smith, 'The Prerogative Writs' (1951) 11(1) CLJ 40, 51.

128 Ibid. See for example *Bagg's Case* (1615) 11 Co Rep 93b which De Smith regards as a classic illustration of mandamus.

should study the long line of Elementary Education Acts dating from 1870, the Old Age Pensions Act 1908 and 1911, and the National Insurance Acts 1911, and 1913.[129]

One thing which is striking about, even the handful of administrative schemes listed by Dicey, is their *variety*. These schemes varied considerably both in terms of their purpose and of the legal relationships which they sought to create. Take, for instance, the Elementary Education Act 1870.[130] It seems fair to say that the main purpose of this Act was to create a new collection of elected institutions, to be known as a local 'School Boards,'[131] and to equip them with an array of broad discretionary powers to be used for the purpose of benefitting residents within their locality. Compare this, further, with Old Age Pensions Act 1908.[132] The purpose of this Act, by section 1, was to lay down clear conditions[133] whereby it could be determined whether any one individual was to be 'entitled to receive'[134] an old age pension from funds specially allocated by Parliament.[135] To draw again on ideas discussed above, it seems to have been the intention of the Old Age Pensions Act 1908 to create relationships of 'individual right-duty correlativity' between *individuals* eligible for assistance and the government, something which cannot be said of the Elementary Education Act 1870.

In a closely related way, the courts also continued to struggle in the early decades of the twentieth century with the problem of the role they were to play in regulating these new schemes. Take, for instance, *Arlidge*.[136] The House of Lords in this case was faced with the Housing, Town Planning &c Act 1909[137] which permitted local authorities to issue closing orders in relation to properties deemed to be unfit for human habitation[138] and empowered

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129 Albert Venn Dicey, 'The Development of Administrative Law in England' (1915) 31 LQR 148.

130 Elementary Education Act 1870.

131 Ibid, s29.

132 Old Age Pensions Act 1908.

133 Ibid, 2

134 Ibid, 1(1)

135 Ibid, 1(3).

136 *Local Government Board v Arlidge* [1915] AC 120 (HL).

137 Housing, Town Planning &c Act 1909.

138 Ibid, s17.

bodies known as Local Government Boards to determine an appeals in relation to such an order.[139] In the face of this scheme, and following the decision by such a Board to uphold a closure order relating to Mr Arlidge's property without disclosing to him an important piece of documentation, the House of Lords, just as the Court of Appeal was in *Cooper*, was faced with a difficult question: was there room for the courts in the face of such a scheme to intervene to protect the traditional common law value of natural justice so as to require that persons in the position of Mr Arlidge receive full disclosure? On this question, the House of Lords in *Arlidge*, at least at first sight, seemed to significantly retreat from the strong position which had been taken in *Cooper*. Take, for instance, the following passage from Lord Moulton's judgment:

> Parliament has widely laid down certain rules to be observed in the performance of its functions in these matters, and those rules must be observed because they are imposed by statute... These rules are beyond the criticism of the Courts, and it is not their business to add or take away from them.[140]

This passage, might be thought to mark a significant departure from *Cooper*; that is, we might say of this case that Lord Moulton was retreating from the idea that the courts had a valuable role to play in developing legal doctrine so as to protect the common law value of natural justice in the face of administrative schemes. The matter, however, is not so simple. As with *Lewisham Union Guardians* discussed above, a significant complication in this case again concerned the *procedural route* by which the applicant brought his complaint to the attention of the court. In particular, in the absence of a purpose-built procedural route for challenging the decision of the Board, Arlidge had applied for a writ of certiorari. As Philip Murray has explained, this remedy originated in the jurisdiction of the King's Court to control the activities of lower *courts*.[141] There was, accordingly, a difficult question to be addressed about the extent to which the remedy was available in relation to decision-makers which were not constituted in a manner analogous to courts. In *Arlidge*, and a handful of other cases

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139 Ibid, s39.

140 *Arlidge* (n 136), 150-151.

141 See especially Philip Murray, 'Escaping the Wilderness: R v Bolton and Judicial Review for Error of Law' (2016) 75(2) CLJ 333.

decided in the decades which followed,[142] the complication manifested in a particular idea: that a line was to be drawn between 'judicial' functions, in relation to which the courts did have a role in intervening to protect natural justice by granting certiorari, and purely 'administrative' functions, in relation to which the courts did not have such a role.[143] At least part of the explanation for the House of Lords' seeming retreat in *Arlidge*, from the strong position in *Cooper*, in other words was that the courts were being asked to use a square peg to fill a round hole; in the absence of a purpose-built process enabling challenges to public authorities to be brought, applicants were proceeding via procedural routes which originated in order to remedy a very particular set of issues and the repurposing of these routes to serve other ends was proving far from straightforward.

Regardless of these complications, the important point for present purposes is that the continued growth of the administrative law, and the courts' continued grapples with the question of the role they were to play in regulating the schemes within it, caused Dicey, at a number of points over the early decades of the 1900s, to revisit his assertion that any notion of administrative law was incompatible with the major features of the English constitution. At first his view was slow to change. In an article written in 1901,[144] for instance, he maintained that 'droit administratif... rests upon... ideas absolutely foreign to English law.'[145] Dicey's major change of heart, however, came in an article written in 1915[146] in response to *Arlidge*[147] and the House of Lords' further decision in *Rice.*[148] Dicey in this article, entitled 'The Development of Administrative Law in England', revised two of his major claims from *An Introduction to the Law on the Constitution*. Thus, firstly, Dicey withdrew his claim that there is, in English law, no such thing as discretionary government power; for Dicey the

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142 See especially *R v Electricity Commissioners, ex parte London Electricity Joint Committee* [1924] 1 KB 171 (CA); *R v Legislative Committee of the Church Assembly, ex parte Haynes-Smith* [1928] 1 KB 411 (KB).

143 See further David Mullan, 'The New Natural Justice?' (1975) 25(3) University of Toronto LJ 281, 300.

144 Albert Venn Dicey, 'Droit Administratif in Modern French Law' (1901) 17 LQR 302.

145 Ibid, 304. Though note he did recognise a small exception in relation to officials exercising powers akin to judicial authority': Ibid, 305.

146 Dicey (n 129).

147 *Arlidge* (n 136).

148 *Board of Education v Rice* [1911] AC 179.

administrative state had been growing at a significant rate especially since the turn of the century.[149] Dicey furthermore, and secondly, also revised his suggestion that there was no need in English law for a body of principles, over and above the doctrines of private law, designed especially to control administrative schemes. On the contrary, the House of Lords in *Rice*[150] and *Arlidge*[151] had taken major strides towards the development of such principles.[152]

In light of this rather major change of heart by Dicey, it is perhaps surprising that, as Otto Kahn-Freund put it 'administrative law' was to continue to be a 'dirty word'[153] well into the 1950s. A significant factor in this regard seems to have been that, shortly after Dicey's softening of his earlier claims, the UK found itself in the midst of a world war and, as a result, saw a massive and sudden growth in the administrative state. On 8th August 1914 the Defence of the Realm Act (DORA)[154] was passed conferring on the Crown broad power to 'issue regulations for securing the public safety and the defence of the realm.'[155] As Cecil Carr has noted, this power was used lavishly during the course of the war:

> There were restrictions affecting dangerous drugs, firearms, celluloid storage and the preservation of official secrets; there were obligations to carry wireless apparatus on ships, to close shops early and to sell tea by net weight... Regulations under DORA dealt not only with food control, war supplies and State management of the liquor trade, but even with the prohibition of dog shows and of whistling for cabs in London.[156]

Perhaps even more important, however, than the extensive use of these legislative powers while the war was still ongoing was that there was no attempt on the part of the government

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149 Dicey (n 129), 149.

150 *Rice* (n 148).

151 *Arlidge* (n 136).

152 Dicey (n 129), 151-152.

153 Otto Kahn-Freund, 'The Legal Framework of Society' in William Robson (ed), *Man and the Social Sciences* (London: Allen & Unwin, 1972), 212.

154 Defence of the Realm Act 1914.

155 Ibid, s1.

156 Cecil Carr, 'Administrative Law' (1935) 51 LQR 58, 60.

'after the last shot was fired'[157] to disarm itself of the extensive powers it had acquired; 'tolerated while the guns were still firing' these broad discretionary powers 'outstayed [their] welcome, as abnormal departmental activity so often does.'[158]

Two different, broad kinds of reaction to this expansion of the administrative state can be noted in the decade following the conclusion of the war. They are neatly encapsulated by two important books, both published in 1929. The first is FJ Port's *Administrative Law*, the first English textbook published under that title.[159] The general thrust of this text is neatly summarised by the following passage taken from the author's preface:

> Conditions have so changed during the past fifty years or so, that much to which exception might well have been taken under the earlier and simpler system of government must now be admitted as inevitable... [These developments] make it imperative that there shall be as little delay as possible in setting our house in order. To delay reforms further would be to endanger the well-being of the whole system of Administrative Law in this country.[160]

For Port, in other words, it was time to recognise that governmental discretionary powers had become a central fixture of the English legal system and thus to turn to the task of identifying 'new methods'[161] of control, 'either by adapting old law to modern situations or creating a new code to deal with [these powers].'[162] For this purpose, Port in *Administrative Law* looked to both the US[163] and France[164] for inspiration. It is noteworthy that there is a clear synergy between Port's argument and Dicey's 1915 article; the thrust of the argument in both was to the effect that, because discretionary administrative power had become a central feature of

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157 Ibid.

158 Cecil Carr, *Concerning English Administrative Law* (Columbia University Press 1941), 25.

159 FJ Port, *Administrative Law* (Longmans, Green & Co 1929). See further Carol Harlow & Richard Rawlings, 'Administrative Law in Context: Restoring a Lost Connection' [2014] PL 28; Cecil Carr, 'Review: Administrative Law in England by Frederick John Port' (1929) 11(4) *Journal of Comparative Legislation and International Law* 285.

160 Ibid, author's preface.

161 Ibid, foreword by Lord Justice Sankey.

162 Ibid.

163 Ibid, chapter 5.

164 Ibid, chapter 6.

English law, it was proper for the courts to turn their minds to the task of developing a set of legal principles appropriate to the task of regulating these powers.

There was, however, another more popular response to this proliferation of administrative power which was informed quite heavily by more classical Diceyan thinking. As David Williams put it:

> The suggestion that a system of administrative law... was inconsistent with... 'the Rule of Law' was easily converted by others into the superficial view that the growing powers of the administration and indeed any concept of administrative law, were inconsistent with 'the Rule of Law.'[165]

Rather than revisiting, in other words, as Dicey himself had done[166] the idea that English law knew no such thing as discretionary power and thus had no need for a special set of administrative law principles, Diceyan thinking was used by many in another sense. The argument, more particularly, was offered that the proliferation of administrative power was inconsistent with the rule of law and, therefore, that the state was headed in a direction which was inherently unconstitutional. This line of argument is most clearly epitomised in the second important book published in 1929: Lord Hewart's *The New Despotism*.[167] This text condemned in the strongest possible terms the growth of administrative power in the English legal system as being fundamentally inconsistent with basic constitutional principle and sought to bring to the attention of the public a growing 'new despotism'[168] by which the government sought to facilitate such growth nonetheless. David Williams, writing reflectively,[169] records how the writings of Lord Hewart, and through his Lordship the early writings of Dicey, had a powerful and wide-ranging impact on public opinion. Following the First World War, Williams writes:

> many people in this country protested about the uncontrolled growth of departmental power.... The constitutional principles of parliamentary sovereignty and the 'Rule of

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165 David Williams, 'The Donoughmore Report in Retrospect' (1982) 60 *Public Administration* 273, 275.

166 Dicey (n 129).

167 Lord Gordon Hewart of Bury, *The New Despotism* (London: Ernst Benn Ltd, 1929).

168 Ibid.

169 Willliams (n 165), 278.

> Law' expounded by Dicey were referred to time and again, and alleged violations of the Rule of Law came in for particular emphasis.[170]

iii. The Donoughmore Report, World War II & The Labour Government of 1945

The next major chapter in the story of administrative law's modern history is the publication of the Donoughmore Report in 1932.[171] Learning early of Lord Hewart's intended publication of *The New Despotism* the Government of the day made something of a pre-emptive strike.[172] It, in particular, appointed a 'Committee on Minsters' Powers' which was assigned the remit of reporting on the 'safeguards [which] are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law.'[173] There is much to be said about this report.[174] The most important point for present purposes, however, is that a clear purpose of the report was to reassure the public of the compatibility of the governmental discretionary power with the Rule of Law. Thus, as explained by David Williams, the report:

> ...broke away early on from any obvious misconceptions arising from the charged atmosphere create by *The New Despotism*... [The report] gave early warning of a cautious and measured approach to the two principal areas of controversy... and the Report as a whole exonerated the civil service from accusations of wishing to seek arbitrary power for itself.[175]

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170 Ibid.

171 Committee on Ministers' Powers, 'Report' (London HMSO, 1932) (herein 'Donoughmore Report').

172 William Robson, 'The Report on the Committee on Ministers' Powers' (1930) 3(3) The Political Quarterly 346; Williams (n 165), 281.

173 Donoughmore Report (n 215).

174 For discussion see for example Williams (n 165); William Robson, 'The Report on the Committee on Ministers' Powers' (1930) 3(3) The Political Quarterly 346; Ivor Jennings, 'The Report on Ministers' Powers' (1932) 10(4) *Public Administration* 333; Franz Becker, 'The Donoughmore Report and the Franks Report' (1958) 24 *International Review of Administrative Sciences* 31.

175 Donoughmore Report (n 165), 282.

It seems clear that the report had the desired effect. Thus, for instance, Cecil Carr wrote in 1935 that 'on the whole criticism [was] now passing from the demand that all delegated legislation be abolished' and concentrated instead 'on the lines of limitation.'[176]

Two events in the decades immediately following the publication of the Donoughmore Report are particularly worthy of mention. The first is that from 1939 England found itself in another world war. As David Williams has noted, in relation to administrative law, this development had a dual effect.[177] On the one hand, we see again rapid change in the size and shape of the administrative state. Administrative power continued to grow; another Defence of the Realm Act[178] was passed without objection[179] and 'delegated legislation continued to grow in volume.'[180] On the other, however, the collective appetite to explore and develop forms of regulation to counterbalance this growth significantly weakened. Thus, as Williams put it, 'the Second World War ensured... the relegation of the search for competing safeguards to a low priority in political and legislative attention.'[181]

The judges of the time too continued to struggle with questions (raised by the second and third themes) relating to the role they could legitimately play in the face of such schemes. This is particularly acutely illustrated by *Liversidge v Anderson*.[182] The House of Lords in this case were faced with the difficult question of the extent to which it could intervene to protect the traditional common law value of 'personal freedom'[183] in the face of legislation passed so as to confer on the Secretary of State a broad discretionary power to detain an individual on the basis that she had 'reasonable cause to believe'[184] that individual to be of

176 Carr (n 156), 73.

177 Williams (n 165), 290

178 Defence of the Realm Act 1939.

179 Carr (n 157), 20: 'that Act was passed in one afternoon, with no warning... all that anybody said was that the Act ought to have been passed much earlier.'

180 Williams (n 165), 290.

181 Ibid, 289-290.

182 *Liversidge v Anderson* [1942] AC 206 (HL).

183 Dicey (n 92), chapter V.

184 Defence (General) Regulations 1939, regulation 18B.

hostile associations. Their Lordships held by a majority[185] that the relevant provision ought to be read as conferring on the Secretary of State the broadest of discretionary powers, permitting the courts to interfere only when those powers were exercised in bad faith.[186]

The second major event in the decades immediately following the publication of the Donoughmore Report which is especially worthy of mention is the election, in 1945, of a majority Labour government on a manifesto of extensive post-war social reform. The implementation of this manifesto saw the creation of administrative schemes, the shape and size of which, had not been dealt with by the courts before.[187] These reforms included the laying of the foundations of the National Health Service,[188] the introduction of a whole host of social security benefits[189] including unemployment and sickness benefits[190] and a retirement pension,[191] the creation of schemes for the purpose of nationalising and regulating important public services such as the operation of the coal industry,[192] the provision of utilities,[193] and the maintenance of railways,[194] the introduction of the need to obtain planning

185 Subject to the dissent of Lord Aitkin: ibid, 225-247.

186 Note that one of the considerations which seemed to inform their Lordships' judgment was a fervent belief in the effectiveness of ministerial accountability in regulating the activities of administrative decision-makers (see discussion in JDB Mitchell, 'The Causes and Effects of the Absence of a System of Public Law in the United Kingdom' [1965] PL 95, 100). By contrast, the judicial and scholarly belief in the effectiveness of ministerial accountability has considerably weakened in later decades: see for example Gavin Drewry, 'The Executive: Towards Accountable Government and Effective Governance? In Jeffrey Jowell & Dawn Oliver (eds), *The Changing Constitution* (7th edn, OUP 2011); Tony Wright, 'The Politics of Accountability' in Mark Elliott & David Feldman (eds), *The Cambridge Companion to Public Law* (CUP 2015); Philip Norton, 'Parliament: A New Assertiveness' in Jeffery Jowell & Dawn Oliver (eds), *The Changing Constitution* (8th edn, OUP 2015).

187 See especially Derek Fraser, *The Evolution of the British Welfare State* (4th edn, Palgrave Macmillan 2009), chapter 9.

188 National Health Service Act 1946.

189 National Insurance Act 1946. See discussion in WA Robson, 'The National Insurance Act 1946' (1947) 10(2) MLR 171.

190 Ibid, s11

191 Ibid, s20.

192 Coal Industry Nationalisation Act 1946.

193 Electricity Act 1947.

194 Transport Act 1947.

permission before embarking on a major development of land[195] and the creation of a scheme to protect aspects of the countryside in which the public was deemed to have an especially important interest.[196]

As with the developments in the administrative state discussed by Dicey in 1915, one striking feature of these reforms is that the administrative regimes to which they give rise were not of only one kind. It would be, for example, a vast oversimplification to say that all of the administrative schemes which emerged in this area were created for the purpose of protecting some good in which the public as a collectivity was taken as having an especially important interests. Certain of these regimes can be aptly characterised in this way. A good example is, for instance, the National Parks and Access to the Countryside Act 1949. One major purpose of this Act was to designate areas of especially beautiful land as being of particular important public interest[197] and, in doing so, to confer on it a variety of special legal protections. Not all of the post-1945 reforms, however, can be understood through this frame. Consider, for instance, the National Insurance Act of 1946. Like the Old Age Pensions Act[198] discussed above, a major purpose of this Act was to lay down the conditions in which certain classes of individual were to be regarded as personally entitled to various forms of statutory benefit. Take, for instance, the following section which deals with widow's allowance:

> (1) ... A widow *shall be entitled* to widow's benefit if the husband satisfied the relevant contribution conditions.[199]

The clear intention of this section was to create a legal relationship of individual right-duty correlativity between individuals who meet certain conditions and governmental bodies by defining the circumstances in which the former was to be regarded as *entitled* to be treated by the latter in specified ways.

Following the expansion of the administrative state after both the first world war and the election of the first majority labour government, the courts continued their struggle to decide

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195 Town and Country Planning Act 1947. See especially discussion in Elizabeth Fisher, Bettina Lange & Eloise Scotford, *Environmental Law* (OUP 2013), 791-794.

196 National Parks and Access to the Countryside Act 1949.

197 Ibid, s87-88.

198 Old Age Pensions Act 1908.

199 National Insurance Act 1946, s 17.

upon the role they could play in regulating these new administrative schemes[200]. A good example, for instance, is *Nakkuda Ali*.[201] This case concerned an administrative regime[202] designed to ensure the effective operation of a rationing system of textile supplies during the war period and which did so, in part, by conferring on an administrative body known as the Controller of Textiles, the power to with the trading licences of persons deemed unfit to hold one.[203] When the Controller withdrew the licence of Mr Naukkuda Ali without disclosing and allowing him to comment on an important piece of evidence the Privy Council again had to grapple once again with the difficult question of whether it could intervene to protect common law value of natural justice in the face of such a scheme. The Privy Council, struggling again with the writ of certiorari, and drawing upon the distinction between judicial and administrative functions used by the House of Lords in *Aridge*[204] and other cases, held that it could not.

iv. 1950s-Early 1970s

The 1950s, 1960s and early 1970s are an important, and also somewhat perplexing, time in the modern history of administrative law doctrine. This is so because an important tension can be seen to underlie this time period.

On the one hand, these decades were a time of significant growth for administrative law. The courts in this time period, and especially in the 1960s, made major strides in terms of carving out for itself an important role, or set of roles, in regulating administrative schemes. A few examples are particularly pertinent. Consider, first, the important House of Lords decision in *Ridge*[205] decided in 1964. Their Lordships in this case returned to the problem the courts had

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200 See especially Ian Holloway, 'Natural Justice and the New Property' (1999) 25 Monash University LR 85. See further Charles Reich, 'The New Property' (1964) 73(5) Yale LJ 733.

201 *Nakkuda Ali v MF de Jayaratne* [1951] AC 66 (PC). For a similar case see also *R v Metropolitan Police Commissioners, ex parte Parker* [1953] 1 WLR 1150 (DC).

202 Defence (Control of Textiles) Regulations 1945.

203 Ibid, regulation 62.

204 *Arlidge* (n 136).

205 *Ridge v Baldwin* [1964] AC 40 (HL).

been required to consider a number of times in such cases as *Cooper*,[206] *Arlidge*[207] and *Nakkuda Ali*[208] concerning the role the court could play in intervening to protect the common law value of natural justice in the face of an administrative scheme which empowered an administrative decision-maker to take a decision carrying serious implications for the individual. As has been seen, the absence of a tailor-made procedural route for challenging the activity of such decision-makers in the early decades of the twentieth century had resulted in a particular complexity: as applicants had often proceeded via an application for certiorari, a procedural route which had originated as a means of enabling the King's Court to control the activity of lower *courts*, the courts in such cases as *Arlidge* and *Nakkuda Ali* had drawn a line between 'judicial' functions, in relation to which judicial relief was available, and 'administrative' functions, in relation to which it was not. The House of Lords in *Ridge*[209] took the major forward step of abolishing that distinction;[210] from that point on the distinction between 'administrative' and 'judicial' functions was not to play a role in determining whether the courts could intervene to protect natural justice.[211]

By way of a second example, consider *Padfield*[212] decided in 1969. This case arose against an unusual administrative scheme which aimed to regulate the production and sale of milk.[213] Under the scheme, producers were required to sell milk to a body, constituted by representatives of milk-producing regions, known as the Milk Marketing Board. One of the tasks of this Board was to determine the price which was to be paid to producers within the various regions based on such considerations as transportation costs. When the Board refused to increase the price to be paid to producers in the South-East of England, representatives of these producers requested the Minister for Agriculture to use her statutory power to establish

206 *Cooper* (n 112).

207 *Arlidge* (n 136).

208 *Nakkuda Ali* (n 201). See also *London Electricity* (n 142).

209 *Ridge* (n 205).

210 Ibid, 72.

211 See *In Re HK (An Infant)* [1967] 2 QB 617.

212 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL).

213 Agricultural Marketing Act 1958.

a committee of investigation to consider the matter.[214] When she refused, the producers initiated legal proceedings. The essence of their argument was that the refusal to use the statutory power in this instance threatened to undermine the aims of the statutory scheme; the purpose of these scheme was to ensure that farmers across the UK could produce and sell milk in a way which meant they were not prejudiced by where they were located. The Minister's refusal to investigate the relevant issue was said to undermine that purpose. The House of Lords accepted this argument. Perhaps more importantly, in doing so, they concretised an important principle: that public authorities, in exercising statutory power, are obligated to 'promote the policy and objects of the Act'[215] which confers those powers. The effect of this principle, commonly known as the '*Padfield* principle'[216] is to carve out an important role for the judges in terms of the identification and promotion of the interests and values which underlie an administrative scheme.

In the 1960s, then, the courts took some important steps forward in terms of carving out for themselves a set of roles in the regulation of administrative schemes.[217] This growth in administrative law in the case law, furthermore, was reflected in the proliferation of textbooks in the subject from the 1950s onwards. John Griffith and Harry Street's *Principles of Administrative Law*[218] was published in 1952, the view of the authors being that administrative law has embedded itself so firmly as a feature of the English system that it 'now claim[ed] a place as a compulsory subject in both University and Professional examinations.'[219] Following this, the first edition of Stanley De Smith's *Judicial Review of Administrative Action*[220] was published in 1959 and De Smith was shortly followed, in 1961,

214 Ibid, s19.

215 Padfield (n 212), 1030.

216 For examples of recent cases in which that term has been used see for example *Patel v Secretary of State for the Home Department* [2013] UKSC 72, [2014] AC 651; *R (Britcits) v Secretary of State for the Home Department* [2017] EWCA Civ 368.

217 Thomas Poole, 'The Reformation of English Administrative Law' (2009) 68(1) CLJ 142, 142.

218 John Griffith & Harry Street, *Principles of Administrative Law* (London: Pitman & Sons 1952).

219 TCT, 'Reviewed Works: Principles of Administrative Law by JAG Griffith & H Street' (1953) 11(3) CLJ 501, 501.

220 Stanley De Smith, *Judicial Review of Administrative Action* (London: Stevens 1959).

by the publication of the first edition of William Wade's leading textbook, *Administrative Law*.[221]

Running counter to the growth of administrative law, however, was a second characteristic of this period. There were, throughout the 1950s and 1960s, a number of high profile statements to the effect that there was, in England, nothing approaching a developed system of administrative law. Lord Reid, for instance, in the important case of *Ridge*[222] in 1964 stated that, in England, 'we do not have a developed system of administrative law.'[223] In a similar way, JDB Mitchell in 1965 wrote that, in England, public law was 'too often regarded as a series of unfortunate exceptions to the desirable generality or universality of the rules of private law, and [was] not seen as a rational system'[224] and Lord Devlin, in 1956,[225] that 'the common law ha[d] now... no longer the strength to provide any satisfactory solution to the problem of keeping the executive... under proper control.'[226]

How can this tension be explained? One factor[227] which was especially important in this regard has already been alluded to a number of times: the absence of any specialised procedure for challenging the lawfulness of administrative decision-making. As has already been noted briefly, there was, until the late 1970s, no tailor-made process by which applicants seeking to argue that an administrative regime was being unlawfully implemented could bring her claim. The result was that applicants seeking to make such a challenge were often required to proceed via a procedural route which had originated in order to address a different set of problems, a state of affairs which, as has been seen, gave rise to a host of complexities.

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221 William Wade, *Administrative Law* (OUP 1961). For a comparison of the structure of later editions of De Smith and Wade see Denis Galligan, 'Judicial Review and the Textbook Writers' (1982) 2 OJLS 257.

222 *Ridge* (n 205).

223 Ibid, 72.

224 Mitchell (n 186).

225 Patrick Devlin, 'The Common Law, Public Policy and the Executive' (1956) 9(1) CLP 1.

226 Ibid, 14.

227 See also Kenneth Culp Davis, 'The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence' (1961) Colum. L. Rev 201 in which the author suggests that another problem at this time is that the courts failing to embrace their role as the 'architects' of administrative law.

As has just been explained, the House of Lords in *Ridge*[228] successfully removed one set of complexities from the law: the distinction between judicial and executive functions which had arisen as a result of applicants making use of the application for certiorari as a means of challenging a failure to uphold natural justice. Another important complexity, however, remained. There continued to be no obvious procedural route by which an applicant could proceed for the purpose of enforcing a statutory duty which was designed to benefit, not any one individual but, the public as a whole or a section of it. This complexity, as has been seen, is well illustrated by *Lewisham Union Guardians*,[229] discussed above. As explained, the applicant is that case sought to enforce the administrators 'public-regarding'[230] legal duties under the Vaccination Act, but the Court of Appeal held that mandamus was not available for such purposes.

This complexity continued to manifest itself well into the 1960s and early 1970s. Put briefly, an applicant at this time wishing to obtain relief for the purpose of compelling a public authority to act to promote the public-facing values underlying a statutory scheme had two main options. Firstly, she could apply, as the applicant in *Lewisham Union Guardians* had done, for a mandamus. The problem here, however, was that the courts continued to make use of the idea that, in order to request a mandamus, an applicant must show that she held some personal legal right entitling her to have the relevant duty performed.[231] Admittedly the court had expanded the idea in a rather artificial way to, for example, encompass the idea that, in some context, an individual ratepayer held a personal right to have a public-facing statutory duty performed.[232] The reality was, however, that this artificiality meant there was little legal certainty as to the purposes to which mandamus could be put to use and, in any event, an application for mandamus did not really allow the applicant to make the legal argument which she wished to make: namely that the public authority owed a legal duty *to the public* to behave in a particular way and was failing to fulfil that duty. A second option open to such an applicant was to make a claim, in the alternative, for a declaration or

228 *Ridge* (n 205).

229 *Lewisham* (n 122).

230 Varuhas (n 1), 42.

231 See for example *R v Russell ex parte Beaverbrook Newspapers Ltd* [1969] 1 QB 342 (DC); *R v Commissioners of Customs & Excise, ex parte Cook* [1970] 1 WLR 450 (QB).

232 See especially *R v Hereford Corporation, ex parte Harrower* [1970] 1 WLR 1424 (QBD).

injunction. These traditionally private law remedies, however, proved to be no more useful as, perhaps unsurprisingly, the courts struggled to see how the remedies could be used for a purpose other than the enforcement of *individual* legal rights against defendants who were under corresponding legal duties to respect those rights.[233]

Despite the progress made in such landmark cases as *Ridge*[234] and *Padfield*,[235] then, the lack of a specially designated procedural route by which challenges to administrative regimes could be brought continued to inhibit the courts from taking on a fully formed role in regulating the implementation of administrative schemes. Indeed, writing in 1974[236] Lord Diplock suggested until a streamlining of the procedural law took place, English lawyers could not 'claim to have a fully developed system of administrative law.'[237]

v. The 1977 Procedural Reforms and Onwards

Following the prompts of such writers as Lord Diplock,[238] the Law Commission in 1976 published an influential report on remedies and procedures in administrative law. In it, the Commission recommended substantial change.[239] At the heart of the Law Commission's suggestions was that Parliament intervene for the purpose of creating a unified process to be known as the 'application for judicial review.'[240] This would be the main procedural route by which an applicant seeking to challenge administrative decision-making would proceed and, via it, she would be able to request any one, or any combination, of the mandatory order,

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233 See especially *Gregory v Camden LBC* [1966] 1 WLR 899 (QB), 909. See further *Boyce v Paddington BC* [1903] 1 Ch 109 (Ch); *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL).

234 *Ridge* (n 205).

235 *Padfield* (n 212).

236 Lord Diplock, 'Judicial Review Revisited' (1974) 33(2) CLJ 233.

237 Ibid, 245.

238 Lord Diplock was far from the only commentator who urged reform in this respect. See, for example, Davis (n 227).

239 Law Commission, 'Report on Remedies in Administrative Law' (Law Comm No 73, 1976).

240 Ibid, [43]-[44].

prohibiting order, quashing order, declaration or injunction. The process would consist of two stages. In the first instance, the applicant would be required to apply to the High Court for permission to proceed against the public authority.[241] The second stage, if permission were granted, would then consist of a substantive hearing. The Law Commission further recommended that the test to be applied by the courts in all instances in order to determine whether a particular applicant had standing to claim relief ought to be that of whether the applicant had a 'sufficient interest in the matter'[242] to which her application related. The Commission's recommendations proved influential. This application for judicial review procedure was created, in 1977, through an amendment to the Supreme Court Rules,[243] eventually being incorporated into primary legislation in the Senior Courts Act 1981.[244]

There is room for disagreement about just how significant these procedural reforms were in the story of administrative law's modern development. Some commentators, including Jason Varuhas[245] for instance, characterise the reforms as the historical tipping point at which fuel was well and truly added to the administrative law fire with the courts embarking on their first real conscientious effort to develop a body of administrative law principles. Others, such as Willliam Wade,[246] view the reforms as doing no more than replacing one set of procedural difficulties with another. It is certainly the case, for example, that the 1977 procedural reforms failed to clarify if and when an applicant seeking to challenge public authority conduct could choose to proceed via a claim for a declaration, rather than through an application for judicial review, which the courts had to confront in the well-known case of *O'Reilly*[247] and the complex body of case law which followed.[248] No doubt, for Wade, the courts had already begun the process of carving out for themselves a comprehensive role in

241 Ibid, [35]-[36].

242 Ibid, [48].

243 (n 93).

244 Senior Courts Act 1981.

245 Varuhas (n 1).

246 William Wade, 'Procedure and Prerogative in Public Law' (1985) 101 LQR 180, 182-184.

247 *O'Reilly v Mackman* [1983] 2 AC 237.

248 See for example *Cocks v Thanet DC* [1983] 2 AC 286 (HL); *Wandsworth London Borough Council v Winder* [1985] AC 461 (HL); *O'Rouke v Camden LBC* [1998] AC 188 (HL); *Trustees of the Dennis Rye Pension Fund v Sheffield CC* [1998] 1 WLR 840 (CA).

the regulation of administrative schemes in such landmark cases as *Ridge*[249] and *Padfield*,[250] with the result that the procedural reforms made little difference.

Whatever the effect of the 1977 reforms, it is undoubtedly the case that the subsequent decades have seen the courts carve out for themselves an important and extensive role, or set of roles, in overseeing administrative decision-making. This is so in at least two core senses. Firstly, the courts have continued to develop the idea, prominent in such cases as *Cooper*[251] and *Ridge*,[252] that they have a role in striving to identify in the common law certain values which are to be regarded as fundamental and in developing legal mechanism for the purpose of protecting these values. One particularly astute example of a mechanism of this kind[253] is the courts' development of the so-called 'principle of legality.'[254] As explained by Lord Hoffmann in *Simms*,[255] this legal mechanism enables the courts to identify values which are taken to be inherent in the common law and provide a level of protection for them by invoking the presumption that Parliament is intended to legislate consistently with such values. This principle, in a series of well-known cases, has been used for instance to protect such values as access to court,[256] non-retrospectivity of punishment[257] and privacy of legal correspondence.[258] Two other important mechanisms which the courts have developed for the purpose of providing a level of protection for values regarded as inherent in the common law are the so-called doctrines of 'anxious scrutiny'[259] and, more recently, domestic

249 *Ridge* (n 205).

250 *Padfield* (n 212).

251 *Cooper* (n 112).

252 *Ridge* (n 205).

253 See also the discussion of *Ridge* (n 205) above.

254 See discussion in, for example, David Dyzenhaus, Murray Hunt & Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) OUCLJ 5.

255 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL).

256 *R v Lord Chancellor, ex parte Witham* [1998] QB 575 (CA).

257 *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539 (HL).

258 *R v Secretary of State for the Home Department, ex parte Leech* [1994] QB 198 (CA); *Daly* (n 83).

259 See especially *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696 (HL); *Smith* (n 82); Paul Craig, 'Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application' [2015] PL 60.

proportionality.[260] In their various ways, both of these doctrines enable the courts to provide a level of protection for interests regarded as fundamental in the common law by requiring an administrative decision-making to explain in the clearest terms why violation of the interest has been thought to be justified.

In addition to carving out for themselves a role in identifying and protecting common law values, the courts in recent decades have also continued their work in *Padfield*[261] in seeking to carve out for themselves a role in intervening to promote those collective interests which it is the purpose of an administrative schemes to advance. The courts' clearest development in this regard is the concept of representative standing.[262] The idea of representative standing, and some of the important case law in which that idea has been utilised by the courts, will be discussed in some detail in chapter 6. For now, however, the important point is that the concept of representative standing allows a court to hear a challenge by an individual[263] or organisation[264] who seeks to argue that an administrative decision-maker is failing to act so as to promote the vision of the public interest which underlies an administrative scheme.

B. Three Themes in Administrative Law's Modern History & Their Broader Significance

With this overview of administrative law's modern history in mind, it is helpful to conclude this part of the chapter by doing two things. Firstly, to draw out a handful of themes which run throughout this history. Secondly, to offer some reflections on the relevance of those themes to the broader narrative of this thesis.

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260 See especially *Daly* (n 83); *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591.

261 *Padfield* (n 212).

262 See especially Peter Cane, 'Standing up for the Public' [1995] PL 276; David Feldman, 'Public Interest Litigation and Constitutional Theory in Comparative Perspective' (1992) 55 MLR 44.

263 See for example *Dixon* (n 67); *Walton* (n 70).

264 See for example *R v Inspectorate of Pollution ex parte Greenpeace (No 2)* [1994] 2 CMLR 548 (QB); *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement* [1995] 1 WLR 386 (QB).

In terms of the themes which have characterised the modern history of administrative law, three closely related themes seem particularly important. The first is that the previous century has seen the proliferation of a very broad array of administrative schemes. The history of administrative law's modern history is, in part, the history of the growth of the administrative state and the vast array of different schemes which constitute it. These schemes, it has been seen, have been created in response to different social events and on the basis of different social ideologies. Perhaps more importantly, however, they have been designed, and continued to be designed, to serve a broad array of different purposes and to create different kinds of legal relationship. Thus, as has been explained, it might be said of certain of these regimes, such as that created by the National Parks and Access to the Countryside Act 1949, that their purpose is to promote some good in which the public as a collective is taken to have an especially important interest. The purpose of others, such as pensions[265] and other social security legislation,[266] however, is to confer a legal benefit on a particular class of individuals and to create legal relationships of right-duty correlativity whereby those individuals are regarded as entitled to assistance.

The second theme which can be seen to have characterised administrative law's modern history is that the courts have developed principles and concepts of administrative law for the purpose of protecting an array of different legal values. This is true in two more particular senses. In the first place, the origins of the legal values which the courts have sought to protect by developing administrative law principle are varied. Thus, while some of these values, such as natural justice[267] and the values protected by the principle of legality,[268] are clearly thought of by the courts as originating in the common law, other strands of administrative law doctrine, such as in the case of the so-called '*Padfield* principle'[269] and the concept of representative standing have clearly been developed so as to enable the courts to intervene to protect the values which underlie the administrative scheme itself. In the second place, and furthermore, the values which the courts protect are clearly neither wholly 'individualistic'

265 Old Age Pensions Act 1908.

266 National Insurance Act 1946.

267 *Cooper* (n 112); *Ridge* (n 205).

268 *Simms* (n 255).

269 (n 216).

in focus nor wholly 'public-regarding.'[270] Thus, while many of the values protected by the principle of legality focus on, for instance, ensuring that the *individual* is not subjected to retrospective punishment,[271] and has easy access to the courts for the purpose of protecting her legal rights,[272] the courts' development of public interest standing was clearly grounded in a concern to ensure that it was able to intervene to enforce statutory duties the purpose of which is to benefit the public as a whole.[273]

The third and final theme which has characterised administrative law's modern history, and which is especially worthy of discussion, is that the courts have had to grapple with a broad variety of legal relationships. Two points are particularly worth mentioning here. The first is that, as has been seen, in the absence of a purpose-built procedural route for challenging statutory duties designed to benefit the public as a collectivity, applicants for many decades were required to resort to applying for, or claiming, remedies which were designed to enforce a very different set of legal relationships, something which manifested in a good deal of complexity. The second is that, even though the procedural reforms of 1977[274] have done much in the way of alleviating these complexities,[275] the point still remains that administrative law requires the courts to engage with legal relationships of different kinds. A significant reason for this, as has been seen, is that the legislative and policy schemes which form the background to administrative law challenges themselves purport to create legal relationships of different kinds.

What is the relevance of all of this for the purposes of this thesis? Two points seem especially important. The first is that even this very brief exploration of administrative law's modern history begins to illustrate why the public interest conception can provide only a *partial* explanation of the way that administrative law functions in *some* statutory contexts. As explained above, the public interest conception suggests a particular set of answers to the two

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270 Varuhas (n 1), 42.

271 *Pierson* (n 257).

272 *Witham* (n 256).

273 *WDM* (n 264).

274 (n 93).

275 Although see further Wade (n 246); Dawn Oliver, 'Public Law Procedures and Remedies – Do We Need Them?' [2002] PL 91.

'key questions' concerning the nature and structure of administrative law set out in the introductory chapter. In relation to the *normative* question, the public interest conception suggests that the purpose of administrative law is to advance goods in which the public as a whole has an interest and, in relation to the *legal-structural* question, that administrative law is concerned with legal duties which are 'owed... to the public.'[276] This brief overview of the development of administrative law, however, begins to illustrate that the basic components of the subject are much more varied and complex than this. True it is that, in some contexts, administrative law aims to promote collective public interests and is concerned with legal relationships characterised by collective claim-right correlativity. But these form only a small subset of the basic components which make up administrative law.

The second important point is related, but somewhat broader. This brief exploration of administrative law's history also surely begins to illustrate why it is a legal area which is not amenable to *monistic* analysis. Thus, each of the three themes drawn out above highlights a different way in which the basic components which make up administrative law are both complex and varied. In light of this, it is hardly surprising that it is it is legal area which cannot be understood through the lens of some singular 'organising concept'[277] which can be thought of as unifying the field.

4. Conclusion

By way of concluding this chapter, it is helpful to offer some reflections on the importance of the arguments developed herein for the broader narrative of the thesis. Two main steps have been taken in this chapter towards the building of that narrative. In the first place, the first two parts of the chapter sought to build on a point emphasis in the last: monism has had an important influence in thinking about administrative law. To that end, part 1 of the chapter sought to introduce an important, monistic, way of thinking – the 'public interest conception'[278] – and chapter 2 sought to illustrate its considerable, and practical, influence.

276 Bamforth (n 8), 11.

277 Forsyth (n 16), [27].

278 Varuhas (n 1).

The second step then taken in this chapter was the telling of the story of administrative law's modern history since the late 1800s. As explained, the taking of this step at this stage of the thesis is important because it begins to illustrate two things. Firstly, that the public interest conception is capable of providing only a *partial* explanation of how administrative law functions in *some* statutory contexts. Secondly, why administrative law, more broadly, resists monistic analysis.

Chapter 3

An Anatomical Approach to Administrative Law

Having begun to illustrate why administrative law is not amenable to monistic analysis this chapter now turns to a second possible approach we could take to understanding this legal field: an anatomical approach. As explained in chapter 1, to take an anatomical approach to understanding a subject is to proceed, not by seeking to identify some 'master idea or principle'[1] or 'organising concept'[2] from which the subject can be seen as flowing. It is, rather, to take apart the subject, to examine the detail of its basic constituent parts and to use the knowledge one obtains to construct an understanding.

As explained in chapter 1, this thesis an exercise in arguing for an anatomical approach to administrative law and this chapter is an important step in making that argument. Its aim is to begin to take apart administrative law and to expose the basic normative and legal structures which are at play within it. The core argument which is developed is that, when we begin this process of deconstruction, we quickly come to see that there are three core senses in which the basic structures of administrative law are both complex and varied. Firstly, administrative law interacts with an array of different administrative schemes. That is, at the background to an administrative law case will be a, usually, complex legislative and regulatory regime with which administrative law doctrine becomes closely intertwined. Secondly, administrative law intervenes to protect an array of different normative values and interests. These values and interests, it will be shown, are varied both in terms of their *origins* and their *focus*. Thirdly, administrative law is concerned with different kinds of legal relationships. Thus, contrary to the 'public interest conception,'[3] it is too simplistic to say that administrative law enforces only duties which are owed, not to any one individual, but

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1 Stephen Smith, *Contract Theory* (OUP 2004), 11.

2 Language used in, for instance, Christopher Forsyth, 'The Rock and the Sand: Jurisdiction and Remedial Discretion' (2013) 18(4) JR 360, [27].

3 Jason Varuhas, 'The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications' in John Bell, Mark Elliott, Jason Varuhas & Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, 2016).

to 'either the public at large or a section of it.'[4] While it is true that there are cases in which the legal relationship at stake is most naturally understood as one of 'collective' claim-right correlativity,[5] there are also clearly instances where the courts view themselves as adjudicating on the content of the relationship which pertains between the *individual applicant* and the administrative decision-maker.

The chapter will consist of two main parts. The first part will explain in detail each of these three senses of complexity and variety. The second will then seek to concretise the discussion by demonstrating this process of deconstruction 'in action.' It will do so through a discussion of two important cases– the well-known House of Lords decision in *Doody*[6] and the Court of Appeal's recent decision in *Kent,*[7] both of which concern the 'common law duty to give reasons.'[8]

1. Deconstructing Administrative Law

This chapter, then, is a first attempt to pull apart administrative law and to expose the basic normative and legal structures which are in play therein. Its core argument is that there are three core senses in which these basic structures are both complex and varied. This part of the chapter will explicate each of these in turn.

A. Administrative Law Interacts with an Array of Different Administrative Schemes

4 Nicholas Bamforth, 'Hohfeldian Rights and Public Law' in Matthew Kramer, *Rights Wrongs & Responsibilities* (Palgrave 2001), 11.

5 See discussion in, for example, Jason Varuhas, 'The Reformation of English Administrative Law? "Rights", Rhetoric and Reality' (2013) 72 CLJ 369.

6 *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 (HL).

7 *R (Campaign to Protect Rural England, Kent) v Dover DC* [2016] EWCA Civ 936, [2017] JPL 180.

8 Mark Elliott, 'Has the Common Law Duty to Give Reasons Come of Age Yet?' [2011] PL 56.

The first sense in which the legal and normative structures of administrative law are complex and diverse is that administrative law interacts with an array of different administrative schemes. The important point is that administrative law doctrine does not apply in a legal vacuum. In any given case, there will be a background administrative regime, usually constituted by a complex framework of primary and secondary legislation[9] and 'soft law,'[10] with which administrative law doctrine will become closely intertwined.[11] Importantly, the administrative schemes with which administrative law doctrine interacts are not of one kind. There are, rather, many different kinds of administrative framework which may form the background to a legal challenge.

This chapter cannot attempt to provide any kind of exhaustive taxonomy of the different kinds of administrative scheme with which administrative law doctrine interacts. Indeed, it is highly doubtful that the compilation of such a taxonomy is even possible. Instead, it will suffice to discussion three broad categories by way of illustration.[12]

The first category of administrative scheme which is particularly worthy of discussion consists of regimes which are designed to regulate the making of *individualised* decisions. It seems prudent to discuss this category of case first because Sarah Nason has recently suggested that approximately half of the Administrative Court's workload is made up of legal challenges based on administrative regimes of this kind.[13] The hallmark of this category of administrative scheme is its central purpose. Schemes of this kind are designed primarily to

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9 For examples of schemes not constituted by legislation, and their subjection to administrative law principle, see for example *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864 (QB); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); *R v Panel on Takeover and Mergers ex parte Datafin Plc* [1987] QB 815 (CA); *R v Panel on Takeovers and Mergers, ex parte Guinness Plc* [1990] 1 QB 146 (CA); *R v Secretary of State for the Home Department, ex parte Bentley* [1994] QB 349 (DC); *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [2014] 1 WLR 2697.

10 Language used, for example, by Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) Federal LR 1 and Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart 2016).

11 Trevor Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry' (2002) 61(1) CLJ 87.

12 Note also that the line between these different kinds of administrative regime may not always be easy to draw.

13 Sarah Nason, *Reconstructing Judicial Review* (Bloomsbury 2016), 143: 'the individual is key, not least because at least half of all Administrative Court judicial review claims are issued by individuals based on their experiences of public service delivery that have been poor quality in their particular circumstances.'

regulate the taking of *individualised* decisions. That is, to govern the making of decisions about whether some *individual* ought to be subjected to some burden, or granted some benefit. Individualised administrative schemes thus tend to prescribe a number of things. Firstly, they very often seek to set out the criteria by which the individual's case will be determined.[14] Secondly, they also, similarly, often lay down stipulations as to the procedure to be followed in the making of an assessment as to whether those criteria are fulfilled in the case of any one person.[15]

There are a number of classic examples of individualised schemes of this kind. One is a licensing scheme[16] such as the regulatory scheme relating to the issuance of TV licences.[17] The central purpose of this scheme is to identify the criteria according to which the BBC, using its statutory power,[18] will 'see fit'[19] to confer a licence for the 'installation and use'[20] of a television on an *individual* who applies for such a licence and, furthermore, to lay down a procedure whereby *individuals* who fail to obtain such a licence may be penalised.[21] Another is a social security or housing scheme[22] such as that regulated by the Welfare Reform

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14 See for example *R v Secretary of State for the Home Department, ex parte Khan* [1984] 1 WLR 1337 (CA) *R v Secretary of State for the Home Department, ex parte Ruddock* [1987] 1 WLR 1482 (QB).

15 Including often making provision for the possibility of a review of an original decision by a further appeal board. See for example the schemes which formed the background to: *Begum v Tower Hamlets LBC* [2003] UKHL 5, [2003] 2 AC 430; *Ali v Birmingham CC* [2010] UKSC 8, [2010] AC 39; *Ali v United Kingdom* (40378/10) (2016) 63 EHRR 20; *Poshteh v Kensington and Chelsea RLBC* [2017] UKSC 36, Official Transcript.

16 For examples of classic licensing cases in which principles of administrative law were invoked see: *Nakkuda Ali v MF de Jayaratne* [1951] AC 66 (PC); *R v Metropolitan Police Commissioners, ex parte Parker* [1953] 1 WLR 1150 (DC); *McInnes v Onslow Fane* [1978] 1 WLR 1520 (Ch). For more recent examples see for instance: *R (Raphael) v Highbury Corner Magistrates' Court* [2011] EWCA Civ 462, [2012] PTSR 427; *Peerless Ltd v Gambling Regulatory Authority* [2015] UKPC 29, [2015] LLR 539.

17 See especially Communications Act 2003, Part 4; The Communications (Television Licensing) Regulations 2004 (SI 2004/692); Communications (Television Licensing) (Amendment) Regulations 2017 (SI 2017/221); Communications (Television Licensing) (Amendment) Regulations 2017 (SI 2017/718). Note that a predecessor of the current scheme relating to TV licencing was in issue in the classic case of *Congreve v Home Office* [1976] QB 629 (CA).

18 Communications Act 2003, s364.

19 Ibid.

20 Ibid, s363.

21 See especially ibid, s366.

22 Which, like licencing schemes, often form the legislative backdrop to challenges based on principles administrative law. See for example: *R (Wiles) v Social Security Commissioners* [2010] EWCA Civ 258, Official Transcript; *R (Hardy) v Sandwell MBC* [2015] EWHC 890 (Admin), [2015] PTSR 1292.

Act 2012[23] and its accompanying legislation.[24] A significant purpose of this scheme is to define the circumstances in which an *individual* applicant[25] will be regarded as having an 'entitlement'[26] to 'a benefit known as universal credit'[27] and to equip such individuals with a set of procedural rights entitling them to have their application decided in a particular way.[28] Further examples include schemes relating to professional discipline[29] the central purpose of which is to provide some kind of regulation for how questions about how some *individual* should be treated are to be determined.

The second category of scheme which is worth emphasising bears some similarity to the first though is also importantly different. Schemes of this kind are, *in part*, designed to regulate the making of decisions about how some *individual* ought to be treated. They also, however, feature a number of *inbuilt safeguards* designed to protect *other interests* which will be particularly acutely affected by the decision. The aims of such a scheme, in other words, are twofold. In the first place, one purpose of schemes of this kind is to provide guidance as to how the decision as to whether an individual person or organisation ought to be granted some benefit ought to be taken. In the second place, however, such schemes also have a second aim of ensuring that the interests of others are accommodated in the decision-making process.

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23 Welfare Reform Act 2012.

24 See especially The Universal Credit Regulations 2013 (SI 2013/376).

25 Or couple: Welfare Reform Act 2012, s1.

26 Ibid, s3.

27 Ibid, s1. For discussion of the implementation of this benefit see for example Grainne McKeever (2015) 22(2) JSSL 62.

28 See especially Social Security Act 1998, s12.

29 See for example the administrative schemes which formed the background to: *Cronin v Greyhound Board of Great Britain Ltd* [2013] EWCA Civ 668, Official Transcript; *R (Hill) v Institute of Chartered Accountants in England and Wales* [2013] EWCA Civ 555, [2014] 1 WLR 86; *R (Chief Constable of Thames Valley Police) v Police Appeals Tribunal* [2016] EWCA Civ 1315, Official Transcript.

The classic example of a scheme of this kind is the planning regime,[30] which forms the background to many challenges based on administrative law doctrine.[31] This regime is *in part* a regime for determining whether individuals who apply for permission to 'develop land'[32] ought to be granted authorisation. That is, *one* of its purposes is to lay down criteria against,[33] and a process by,[34] which an *individual*'s application for planning permission will be determined. Importantly, however, it is also in part a scheme designed to confer a variety of protections on those individuals and interests most likely to be acutely affected by the grant of planning permission. Take, for instance, Section 61W of the Town and Country Planning Act 1990. This provision places applicants for planning permission under a requirement to 'publicise the proposed application in such manner as the person reasonably considers is likely to bring the proposed application to the attention of a majority of the persons who live at... premises in the vicinity of the land.'[35] The purpose of this section is clearly to provide a level of protection for the interests of those individuals whose property rights will be most directly affected by a decision to grant planning permission.[36]

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30 See especially Town and Country Planning (Use Clauses) Order 1987 (SI 1987/764); Town and Country Planning Act 1990; Town and Country Planning (General Permitted Development Order) 1995 (SI 1995/418); Planning and Compulsory Purchase Act 2004; Planning Act 2008; Localism Act 2011. For discussion see Elizabeth Fisher, Bettina Lange & Eloise Scotford, *Environmental Law* (OUP 2013), chapter 18. See further *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, especially [68].

31 See for example *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759; *R v Somerset CC, ex parte Dixon* [1998] Env LR 111; *South Bucks DC v Porter* [2003] UKHL 26, [2003] 2 AC 558; *Kent* (n 7); *Oakley v South Cambridgeshire DC* [2017] 2 P & CR 4. For an older example see *Local Government Board v Arlidge* [1915] 2 AC 120 (HL).

32 Town and Country Planning Act 1990, s57.

33 See especially ibid, s70 which requires local planning authorities to have regard to all 'material' matters. On the meaning of this see especially *Stringer v Minister for Housing and Local Government* [1970] 1 WLR 1281 (note this case was concerned with a predecessor of s57 of the 1990 Act: Town and Country Planning Act 1962, s17).

34 See especially ibid, ss 61, 65, 70-74, 77-79.

35 Ibid, s61W(2).

36 See further for example Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571). Note these Regulations seek to implement Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

The planning regime is not the only administrative scheme which has this dual aspect. One further example will suffice:[37] administrative regimes relating to the grant of particular economic advantages to businesses. Schemes of this kind, like the planning regime, very often have two broad limbs.[38] In the first place, they are often schemes designed to lay down the criteria by which the application of *a particular business* for the benefit will be determined. In the second place, however, they often aim to provide a number of *safeguards* for those others who will be most acutely affected by the grant of the benefit, namely their economic competitors. Take, for instance, the Court of Appeal's recent decision in *Project Management Institute*.[39] The background to this case was an administrative regime[40] designed, in part, to lay down the criteria by which the Minister for the Cabinet Office should determine whether an applicant company ought to be granted a Royal Charter.[41] Another clear aim, however, of this regime was to provide a number of inbuilt safeguards for the economic competitors of applicant companies.[42] Thus, for instance, the Cabinet Office's published policy provided that Chartered status would not usually be granted to an applicant business if there was a 'significant overlap'[43] between its interests and those of an economic

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37 Though note also that some licencing regimes fall more naturally into this category. The regime relating to licencing for the sale of alcohol, which is in part designed to protect the public's interest in 'crime prevention' is a good example. See especially: Licensing Act 2003; Licensing Act 2003 (Personal licences) Regulations 2005 (SI 2005/41); Licensing Act 2003 (Premises licences and club premises certifications) Regulations 2005 (SI 2005/42); Licensing Act 2003 (Licensing authority's register) (other information) Regulations (SI 2005/43); *R (Albert Court Residents' Association and Others) v Westminster CC* [2011] EWCA Civ 430, [2012] PTSR 604.

38 The public procurement regime might be included within this category. See especially Public Contracts Regulations 2015 (SI 2015/102) which implements Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance; *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] PTSR 749, [2009] EWCA Civ 1011. See also the New Zealand case of *New Zealand Dairy Board v Okitu Cooperative Dairy Company Ltd* [1953] NZLR 366.

39 *R (Project Management Institute) v Minister for the Cabinet Office* [2016] EWCA Civ 21; [2016] 1 WLR 1737.

40 Note that the regime was constituted by a combination of prerogative power and published policy. See further citations at (n 19).

41 Thus, for instance, the Cabinet Office had published on its website a list of five criteria which would guide its decision as to whether to grant Chartered status in a given case: *PMI* (n 39), [9].

42 Note that this appears to have been the core factor which led the Court of Appeal to the conclusion that the applicant had a 'sufficient interest' to bring the challenge within the meaning of the Senior Courts Act 1981 s31(3). See especially ibid, [37] and *R (Project Management Institute) v Minister for the Cabinet Office* [2014] EWHC 2438 (Admin), Official Transcript in which Mitting J reached the opposite conclusion.

43 Ibid, [9].

rival. Similarly, the same policy also placed applicants for Chartered status under a requirement to 'take soundings'[44] from their commercial rivals prior to making an application.

A third category of administrative regime which is worthy of discussion is substantially different from the first two. Schemes falling within this category are *in no sense* designed to regulate the taking of *individualised* decisions. Broadly, rather, the aim of these schemes is to provide some mechanism by which some good in which the *public as a collectivity* is taken to have an especially strong interest can be facilitated or protected.

Administrative schemes of this kind often form the background to administrative law challenges and they are both many and varied. Two examples will suffice by way of illustration.[45] First, consider administrative schemes relating to the protection of certain aspects of the environment.[46] One good example is that relating to the designation and preservation of Areas of Outstanding Natural Beauty ('AONBs'). Put briefly, at the core of the scheme is section 82 of the Countryside and Rights of Way Act 2000.[47] This provision confers on Natural England, a statutory body[48] created for the general purpose of ensuring that the 'natural environment is conserved, enhanced and managed,'[49] the power to designate certain rural regions as being of 'such outstanding natural beauty that it is desirable'[50] that a

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44 Ibid.

45 For a further example see especially Peter Cane, 'Open Standing and the Role of Courts in a Democratic Society' (1999) 20 Sing LR 23 in which the author characterises schemes relating to the constitutional allocation of power between the institutions of the state as being designed to regulate decisions in which all citizens have an interest. See further cases such as *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583.

46 There are many examples of such schemes other than that discussed below. To name put a few, there are administrative schemes which confer special protections on air quality (see especially Air Quality Standards Regulations 2010 (SI 2010/1001) which implements Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe), areas of land designated as important natural habitats (see especially Conservation of Habitats and Species Regulations 2010 (SI 2010/490) which implements the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora) and areas designated as sites of special scientific interest (see especially Wildlife and Countryside Act 1981, ss28-33).

47 Countryside and Rights of Way Act 2000,

48 Created by the Natural Environment and Rural Communities Act 2006, s107.

49 Ibid, s2(1).

50 Countryside and Rights of Way Act 2000, s81(1) (as amended by Natural Environment and Rural Communities Act 2006), s107).

special status should be attached. The effect of such a designation is that a cluster of special legal and policy protections applies to the land. One, for instance, is s84(4) of the 2000 Act which places local planning authority under a statutory duty to 'take all such action as appears to them expedient for the accomplishment of the purpose of conserving and enhancing the natural beauty of the area.'[51] Another, is that central government planning policy stipulates that 'planning permission should be refused for major developments [on the land]... except in exceptional circumstances.'[52] Schemes of this kind are clearly distinct from the schemes in the two categories discussed above: their goal is not to regulate the taking of decisions about how an individual person ought to be treated but, rather, to provide some kind of framework for the taking of decisions on a matter in which the public as a collective is taken to have an especially strong interest.

By way of a second example, consider the legislative background to *World Development Movement*.[53] This case turned on the Overseas Development and Co-operation Act 1980.[54] A significant purpose of this legislative scheme was to empower the Secretary of State to take certain actions 'for the purpose of promoting the development or maintaining the economy of a country or territory outside the United Kingdom or the welfare of its people.'[55] Again, the purpose of this scheme was clearly not to regulate the taking of *particularised* decisions about how *individual applicants* ought to be treated. The idea underlying the scheme, rather, would seem to be that the *public as a collectivity* has an interest in seeing assistance provided to foreign states and hence there is a need to provide an administrative framework by which this interest could be realised.

By way of summary, then, the first sense in which the basic normative and legal components of administrative law are complex and varied is that administrative law principle *interacts with an array of different kinds of administrative scheme*. In any given case, administrative

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51 Ibid, s84(1).

52 Department for Communities and Local Government, 'National Planning Policy Framework' (March 2012) ("NPPF"), [116].

53 *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386 (DC).

54 Overseas Development and Co-operation Act 1980 (since repealed by International Development Act 2002).

55 Ibid, s1(1).

law doctrine will become closely intertwined with the background legislative and policy framework and these frameworks are of different kinds. This part of the chapter has discussed three broad categories of scheme, though no claim has been made to exhaustiveness. These are, firstly, individualised administrative schemes designed to regulate the making of decisions about whether particular individuals ought to be made the subject of some burden, or granted some benefit. Secondly, administrative regimes which have the dual purpose of providing guidance as to how decisions about whether an individual will be afforded some benefit will be taken and of building in a series of protections by which acutely affected third party interests can be accommodated in the course of decision-making. Thirdly, administrative frameworks the aim of which is to protect or facilitate some good in which the public as a whole is taken to have an especially important interest.

B. Administrative Law Intervenes to Protect an Array of Normative Values & Interests

The second sense in which the basic legal and normative components in play in administrative law are complex and varied is that administrative law intervenes to protect an array of different values and interested. There are, importantly, two more particular ways in which this is so.

Firstly, the *origins* of the values and interests which the courts seek to protect in administrative law are varied and complex. It is, more specifically, far too simplistic to say of administrative law values that they can be found exclusively in either of the administrative schemes which administrators are charged with implementing, or in the common law. Three points, in particular, ought to be noted.

The first is that there are certainly cases in which the courts very explicitly and primarily ground their decisions in values said to be inherent in the common law. The classic example of this is the case law on the so-called 'principle of legality.'[56] As explained in chapter 2, this principle functions by enabling the courts to carve out certain values, considered to be common law fundamentals, and to provide a level of protection for these values through the

[56] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL).

invocation of the presumption that Parliament intends to legislate compatibly with them. As was noted in that chapter, this principle has been invoked, for instance, to protect such interests as access to court,[57] the privacy of legal correspondence,[58] and non-retrospectivity in punishment.[59] As has been emphasised, this is not to suggest that there is some universally ordained list of common law values. The question of which values underlie the huge mass of common law doctrine is difficult and contentious,[60] and the difficulties proliferate when one recognises that the common law is not static but continually developing.[61] The important point, for present purposes, however is that there are certainly clusters of administrative law case law in which the courts very explicitly normatively ground their decisions in values said to arise in the common law.

The second important point to note on the *origins* of administrative law values is that it is also clear that administrative law principle, in some contexts, intervenes in order to protect values and interests which are thought of as originating, not in the common law but, *in the logic of the relevant administrative regime* itself. There is, in other words, a body of case law in which the courts invoke administrative law doctrine for the purpose of advancing some interest on the basis that that interest lies at the heart of the administrative scheme which the administrator is tasked with implementing. The clearest example of this is undoubtedly the so-called '*Padfield* principle,'[62] discussed in some detail in the previous chapter. As was explained, this principle enables the courts to make an assessment of the 'policy and

57 *R v Lord Chancellor, ex parte Witham* [1998] QB 575 (CA).

58 *R v Secretary of State for the Home Department, ex parte Leech* [1994] QB 198 (CA); *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (HL).

59 *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539 (HL).

60 See and compare, for example, discussions in Dawn Oliver, 'The Underlying Values of Public and Private Law' in Michael Taggart (ed), *The Province of Administrative Law Determined* (Hart Publishing 1997); Dawn Oliver, 'Common Values in Public and Private Law and the Public/Private Divide' [1997] PL 630; Paul Daly, 'Administrative Law: A Values-Based Approach' in John Bell, Mark Elliott, Jason Varuhas & Philip Murray, *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016); Peter Cane, 'Theory and Values in Public Law' in Paul Craig & Richard Rawlings (eds), *Administration in Europe: Essays in Honour of Carol Harlow* (OUP 2003).

61 See for example *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455.

62 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL). See further *Patel v Secretary of State for the Home Department* [2013] UKSC 72, [2014] AC 651 and *R (Britcits) v Secretary of State for the Home Department* [2017] EWCA Civ 368 in which this term is used.

objects'[63] of the relevant administrative scheme and to intervene so as to require the administrative decision-maker to act so as to promote those aims.[64]

The third point which ought to be noted on the matter of where administrative law values come from is that, in some contexts, the line between what is a common law and what is a statutory value becomes blurred. To draw on an example from later discussion, chapter 4 will explain how a significant concern of the courts in a procedural fairness case is to ensure that individuals about whom an important decision is being taken are treated, in the course of the process, as an autonomous and rational person deserving of respect as such.[65] This cluster of values, it will be explained, are often thought to be inherent in the *common law*.[66] It is, however, too simplistic to regard this cluster of values as originating from entirely outside of the statutory schemes in relation to which the procedural fairness applies; indeed, one of the purposes of many of these schemes would seem to be the provision of some form of protection for values of this kind.[67]

The values and interest which administrative law doctrine intervenes to protect, then, are varied in terms of their *origin*. There is, furthermore, an important second sense in which administrative law values are varied. In order to explain this sense, it is helpful to return to a point discussed in chapter 2. It was explained in that chapter that, in answering the *normative* question concerning the nature of administrative law, the 'public interest conception'[68] seeks to draw a line between two different categories of value and interests. On the one hand, it is said, there are *individualistic* values. That is, goods and interests which are to regarded as fundamental to the *individual*. On the other hand, there are goods in which the *public as a collectivity* is taken as having an especially important interest. Administrative law's

63 Ibid, 1030

64 See for example *WDM* (n 53).

65 See especially *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115; Trevor Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18 OJLS 497 citing John Lucas, *On Justice* (OUP 1980).

66 See especially Lord Reed's judgment in *R (Moseley) v Haringey LBC* [2014] UKSC 56, [2014] 1 WLR 3947; Oliver (n 60).

67 See, for example, Prison Rules (SI 1999/728), rule 54, discussed in chapter 4.

68 Varuhas (n 3).

distinctiveness, according to the public interest conception, lies in its normative orientation towards values of this kind.

Of course, there is an element of truth in the public interest conception: one of the functions of administrative law certainly is the protection of the vision of the *public* good which underlies an administrative regime. *World Development Movement*[69] is a classic example of this: the good which the court sought to protect in this case (the economically efficient use of the foreign aid budget) was not one from which any one individual person or organisation would benefit over and above all others, but rather one in which the public as a collective was taken as having an especially important interest.[70] To say, however, that there is a clear divide between 'public-facing' values which administrative law protects, and individual-facing values which at most receive a form incidental protection,[71] is far too simplistic.

There are at least two different ways in which 'individual-regarding'[72] values come to play an important role in administrative law reasoning. Firstly, many of the values which the courts have come to regard as inherent in the common law are highly individualistic in their nature. The common law values which the courts protect through the principle of legality, for instance, are largely concerned to ensure the fair treatment of *individuals*.[73] Furthermore, the values of respect and autonomy, in which it will be shown aspects of procedural fairness and the principle of legitimate expectations, are least significantly, grounded in, are most naturally understood as relating to *the individual*.

Secondly, as has been emphasised at a number of points, administrative schemes are not set up to promote one singular cluster of normative values and interests. Thus, it is a vast oversimplification to say of all these schemes that they are set for the purpose of promoting

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69 *WDM* (n 53).

70 For further examples see for instance *ClientEarth (No. 2) v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 2740 (Admin); *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] QB 522 (QB).

71 See especially Jason Varuhas, 'Against Unification' in Mark Elliott & Hanna Wilberg (eds), *The Intensity and Scope of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015): 'the principal function of [administrative law] is to ensure public power is exercised properly and in the public interest. Individual rights and interests may, and often will, be protected by the operation of [administrative law]... but protection of the individual is not the law's principal concern. The law's concern is not with individual wrongs, but with public wrongs.'

72 Ibid.

73 See citations at (n 56)-(n 59).

some good in which the public as a collective is taken as having an important interest. Many social security schemes,[74] for instance, are more naturally understood as having the purpose of providing some kind of legal protection on a defined cluster of individuals. When, therefore, the courts make use of administrative law principle to, for instance, clarify the meaning of a statutory term which a public authority is required to apply in the course of implementing a social security scheme, the normative value of doing so will often lie in advancing some conception of *individual* interest which it is the purpose of the scheme to promote. A clear example of this is *Conville*,[75] which was briefly discussed in chapter 1. As explained, this case concerned section 190 of the Housing Act 1996,[76] the effect of which was to create a legal relationship between local housing authorities and certain persons in need whereby the latter became entitled to be given by the former a 'reasonable opportunity'[77] to secure accommodation.[78] The question arose in *Conville* what 'reasonable opportunity' meant and, in particular, whether this phrase permitted a housing authority to have regard to budgetary considerations in determining what it was required to offer an eligible individual. The Court of Appeal concluded that such concerns were to be regarded as irrelevant considerations; the purpose of the statutory provision was to require local housing authorities to embark on a context-sensitive needs of the particular *individual*, and the introduction of budgetary and policy considerations into this exercise would fail to accord to the *individual* the legal protections it was the intention of the Housing Act to create.

In summary, then, a second sense in which the basic components of administrative law are complex and varied is *normative*. Administrative law, in particular, intervenes to protect an array of different normative values and interests. This is, furthermore, true in two different senses. In the first place, the values which administrative law doctrine intervenes to protect vary in terms of their *origins*. Thus, while some of the values which the courts protect by use of administrative law principles originate in the common law, others originate in the logic of the administrative regimes which public authorities are tasked with implementing, and the

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74 The previous chapter discussed, for instance, the Old Age Pensions Act 1908 and National Insurance Act 1946. For a modern example see Welfare Reform Act 2012.

75 *R (Conville) v Richmond-upon-Thames LBC* [2006] EWCA Civ 718, [2006] 1 WLR 2808.

76 Housing Act 1996, s190.

77 Ibid.

78 *Conville* (n 75), [36].

line between these two sources can become highly blurred. In the second place, no clear divide can be drawn between 'individual-regarding'[79] values, which are not the concern of administrative law, and 'public-regarding'[80] values, which are. Although administrative law in many contexts is aptly described as being concerned to uphold some vision of the collective public interest,[81] it also clearly plays an important role in protecting values and interests more naturally understood as being individualistic.

C. Administrative Law is Concerned with an Array of Different Legal Relationships

The third core sense in which the basic components of administrative law are complex and varied concerns the *legal-structural* question set out in the introductory chapter. This question, it is important to recall, requires an inquiry into the *kinds of legal relationship* with which administrative law is concerned and, more particularly, into the question of whether the idea of Hohfeldian 'individual right-duty correlativity'[82] has any role to play in the field of administrative law. As has been seen, the public interest conception suggests a simple and monolithic answer to this question: administrative law is distinct from private law in that the legal duties with which it is concerned are owed, not to any one individual, but 'to the public at large or a section of it.'[83]

Close analysis of the legal structures of administrative law, however, shows that the reality is much more complex. There are, in particular, instances in which administrative law manifests in legal duties which must be understood as being characterised by *collective* right-

79 Varuhas (n 3), 42

80 Ibid.

81 For example the AONB scheme discussed above.

82 Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (The Law Book Exchange, 2010).

83 Bamforth (n 4), 11.

duty correlativity,[84] and instances where it manifests in legal duties which are characterised by *individual* right-duty correlativity.

A good example of the former, is *Greenpeace*.[85] The court in this case, which will be discussed in some detail in chapter 5, held that the Secretary of State was under a legal duty to abide by her promise that no change would be made to the UK's nuclear energy policy without 'the fullest public consultation'[86] exercise first taking place. Importantly, this legal duty cannot plausibly be analysed through the framework of individual right-duty correlativity. It seems most naturally understood, rather, as a legal duty which is owed to the public as a collectivity.

Contrary to the public interest conception,[87] however, not all of the legal relationships with which administrative law is concerned are characterised by collective claim-right correlativity in this way. Indeed, many of the legal duties to which the courts give effect in this field are clearly thought of by judges and scholars as being characterised by Hohfeldian *individual* right-duty correlativity.

There are, furthermore, two different senses in which this is the case. In the first place as has been emphasised, many of the statutory schemes with which administrative law is concerned are clearly intended to create personal legal relationships between individuals and public authorities. Consider, again, section 190 of the Housing Act 1996[88] and the Court of Appeal's judgment in *Conville*.[89] As emphasised in chapter 2, the court in this case clearly thought of the statutory duty to offer eligible applicants with a 'reasonable opportunity of securing accommodation'[90] as being *owed to the individual*. Thus, for instance, Pill LJ spoke of the

84 See especially Varuhas (n 5), 409.

85 *R (Greenpeace) v Secretary of State for Trade & Industry* [2007] EWHC 311 (Admin), [2007] Env LR 29.

86 Ibid, [9].

87 Bamforth (n 4), 11.

88 Housing Act 1996, s190.

89 *Conville* (n 75).

90 Housing Act 1996, s190.

duty as being 'conferred on the applicant; a right he acquires coterminous with the extent of the duty.'[91]

In the second place, and furthermore, it is often the case that administrative law principle itself manifests in a legal duty which thought of as being is *owed to some individual*. Two examples, drawn from later chapters, suffice to illustrate. The first concerns procedural fairness which is the focus of chapter 4. One of the arguments developed in this chapter is that there is a clear and consistent tendency in the part of courts and academics to speak of procedural fairness, in those cases which arise in the context of a statutory provision empowering an administrator to take a decision about how some *individual* should be treated as manifesting in a legal duty which is owed *to that individual*. Take, for instance,[92] the following passage from Lord Reed's judgment in *Osborn*:[93]

> The *right of the prisoner* to request an oral hearing is not correctly characterised as a right of appeal. In order to justify the holding of an oral hearing … what he has to persuade the board is that an oral hearing is appropriate.[94]

The clear idea underlying this passage is that the duty in which procedural fairness manifested in *Osborn* was one which characterised by Hohfeldian 'individual right-correlativity.' That is, which was *owed to the individual* subject of the relevant decision and which thus correlated with a *personal legal right* entitling her to have the duty performed. By way of a similar second example, take the following passage from Lord Dyson's judgment in *Lumba*:[95]

> *The individual* has a *basic public law right* to have his or her case considered under whatever policy the executive sees fit to adopt.[96]

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91 *Conville* (n 75), [36]

92 For further examples of discourse of this kind see chapter 4.

93 *Osborn* (n 65).

94 Ibid, [2] (my emphasis).

95 *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245.

96 Ibid, [35] (my emphasis).

Again, the clear idea underlying this passage would seem to be that the duty on the part of a decision-maker to 'follow his published policy… unless there are good reasons for not doing so'[97] is, at least in many contexts,[98] a duty which is *owed to an individual*.

To summarise, this part of the chapter has sought to make a first attempt to pull apart administrative law and to expose the basic normative and legal structures which are in play therein. When we begin to deconstruct administrative law in this way, it has been argued, we begin to see that these structures are both complex and varied in three core senses. Firstly, administrative law interacts with an array of different administrative schemes. These schemes, as has been seen, are set up to promote and protect a variety of different interests and purport to create an array of different kinds of legal relationship. Secondly, administrative law intervenes to protect an array of different values and interests. There are, it has been seen, two further senses in which this is true. In the first place, the origins of administrative law's values are complex and, in the second, administrative law principle focuses on protecting both the individual and collective public interests. Thirdly, administrative law is concerned with different kinds of legal relationship. Thus, administrative law is concerned exclusively neither with determining the content of the relationship between administrative decision-makers and the public as a collectivity, nor administrative decision-makers and individual applicants. It seems clear, rather, that administrative law, in different contexts, requires the courts to grapple with *both* of these kinds of relationship.

2. The Deconstruction of Administrative Law 'In Action': A First Example

The discussion in this chapter, so far, has taken place at a rather general level. The chapter has sought to look at administrative law principle as a whole and to begin to expose the basic legal and normative structures which can be seen to play a role within it. In this second part

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97 Ibid, [26].

98 Note that in *PMI* (n 39) the Court of Appeal recognised that the applicant had standing to challenge an alleged failure to apply policy in the course of determining an application for Royal Charter made by a commercial rival. The implication would seem to be that, in relation to this scheme, both the applicant company and the economical competitors of the applicant company derive a right to have the policy applied. See discussion of this case above.

of this chapter it is helpful to lower the level of generality of the discussion quite significantly and to begin to demonstrate this process of deconstruction 'in action.' To that end, it is helpful to discuss in detail two cases: the well-known House of Lords decision in *Doody*[99] and the Court of Appeal's more recent discussion in *Kent*.[100]

At first sight, these cases might seem very similar. Thus in both, the applicant sought to rely on the administrative law principle of reason-giving in order to challenge the lawfulness of public authority conduct. Similarly, in both the court ultimately concluded that the public authority was under a 'common law duty to give reasons'[101] in relation to its decision. As will be shown, however, when we begin to deconstruct these cases in the three ways outlined above, we begin to see that there are some very important structural differences between the way the principle of reason-giving functioned across these two cases.

Take the first sense in which the basic components of administrative law are complex and varied: administrative law interacts with an array of different administrative schemes. The important point is this: when we begin to explore the administrative background to *Doody* and *Kent* we see that the background to them were statutory and policy schemes designed to create very different sets of legal relationship and to serve very different ends.

Consider, first, *Doody*. The background to this case was an administrative regime of *particularised* decision-making. That is, an administrative framework, the main purpose of which was to regulate the making of decisions about how *individuals* should be treated, albeit a highly unusual one.[102] This scheme, in particular, gave to the Home Secretary the power to decide when an offender convicted of murder should be referred to the Parole Board for

99 *Doody* (n 6).

100 *Kent* (n 7).

101 Elliott (n 8).

102 Unusual in the sense that the sentencing of offenders is traditionally regarded as a judicial rather than administrative function. As a result, this scheme has been the subject of many legal challenges (see especially *Pierson* (n 59); *R v Secretary of State for the Home Department, ex parte Venables* [1998] AC 407 (HL); *Venables v United Kingdom* (1999) 30 EHRR 121). It was finally declared incompatible with Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), article 6 in *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837 and thereafter repealed by the Criminal Justice Act 2003, Sch 37(8), para 1).

consideration for release on licence.[103] As a matter of policy,[104] the Home Secretary exercised this power in a particular way, namely, by specifying at the beginning of the sentence a minimum tariff which the offender would be required to serve before such a referral would be considered. In the course of making a decision about the appropriate tariff to be served by any one prisoner, the Home Secretary would receive a recommendation from the trial judge[105] which would be used as the starting point for deliberation. Very little information about this decision-making process, however, was given to the individual prisoner. Mr Doody, for instance, was told that the Home Secretary had determined he should serve a minimum tariff of fifteen years[106] but was not told whether this accorded or departed from the recommendation of the trial judge nor the basic reasons why the tariff was not set lower.[107] It was against this background that Mr Doody, and three other individual offenders, sought to argue that the Home Secretary was under a common law duty to explain to them the decision-making process which had led to the decision in their individual case.

The administrative scheme which forms the background to *Kent*, on the other hand, was fundamentally different. *Kent*, in particular, arises in relation to the AONB scheme discussed above. As explained, the fundamental purpose of this administrative framework is to regulate public authority decision-making in relation to land in which the public, because of the land's outstanding natural beauty, is deemed to have an especially important interest. The most important part of this scheme, for present purposes, is paragraph 116 of the National Planning Policy Framework[108] which provides that planning permission to build on an AONB is to be granted only in 'exceptional circumstances.'[109] In *Kent*, the applicant organisation relied on this aspect of the policy framework to argue that the local planning authority, in deciding to grant permission to for a major development located partly within a designated AONB was,

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103 Criminal Justice Act 1991, s35. Note Murder (Abolition of the Death Penalty) Act 1965, s1(1).

104 A policy which had been in place since 1983: *Doody* (n 6), 553.

105 Ibid.

106 Ibid, 551.

107 Ibid.

108 NPPF (n 52).

109 Ibid, [116].

therefore, required to publish 'substantial reasons'[110] explaining in detail why it considered the terms of the policy to be met.

Turning next to the second sense in which administrative law's basic structures are complex and varied: administrative law interacts to protect an array of different values and interests. This is clearly true of the courts' imposition of a duty to give reasons in *Doody* and *Kent*. On the one hand, a major concern of the courts in *Doody* was to protect a cluster of *individualised* values which were largely external to the administrative scheme but which the court felt it was appropriate to protect. One such value, for instance, was the value of treating individual persons *consistently*, something which the sentencing scheme at the time *Doody* was decided was failing to ensure. Thus, as Lord Mustill noted that:

> Where a defendant is convicted of, say, several armed robberies... he can be advised by reference to a public tariff of the range of sentences he must expect; he hears counsel address the judge... and when sentence is pronounced he will always be told the reasons for it.[111]

By contrast, a prisoner convicted of murder is afforded a great deal less information, something the House of Lords considered to be an unjustified form of unequal treatment. Another external normative value which the court clearly sought to protect in imposing a duty to give reasons in *Doody* was that of individual dignity. Thus, as Trevor Allan has emphasised:

> Giving reasons expresses respect just as a refusal or failure to do so... expresses contempt. As Lucas explains the point, a requirement to give reasons 'recognizes a party's right to be disappointed by an adverse decision, and the need to assuage it.'[112]

That the imposition of a duty to give reasons in *Doody* was significantly grounded in a concern to ensure respectful treatment of the individual is clear from Lord Mustill's judgment.[113]

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110 *Kent* (n 7), [21].

111 *Doody* (n 6), 565.

112 Allan (n 65), 79-80.

113 *Doody* (n 6), 565.

By contrast, the Court of Appeal's recognition of a common law duty to give reasons in *Kent* was grounded, not in concerns relating to the protection of the individual from unfair forms of treatment but, in a very different set of normative considerations. At the heart of the court's judgment in this case, in particular, was a concern to ensure that the vision of the public interest which was embedded in the administrative scheme *itself* was promoted. The value of imposing a duty to give reasons in this case, for the Court of Appeal, lay in the propensity of such a duty to ensure that the protection of AONBs, in which the public was taken by central government to have an especially important interest, was *taken seriously* by local planning authorities. As Laws LJ noted, central government had elected, in a policy of 'pressing nature'[114] to accord to AONBs 'the highest status of protection in relation to landscape and scenic beauty.'[115] In his view, this meant that:

> A local planning authority which is going to authorise a development which will inflict substantial harm on an AONB must surely give substantial reasons for doing so.[116]

Turning, finally, to the third important sense in which the basic parts of administrative law are diverse and complex: administrative law is concerned with legal relationships of different kinds. This sense of complexity is again reflected across *Doody* and *Kent*. Thus, on the one hand, the duty of reason-giving to which the House of Lords gave effect in *Doody* was clearly thought of by their Lordships as being characterised by *individual right-duty correlativity*. That is, as a legal duty which is *owed to the individual prisoner*. Take, for example, the following passages in which his Lordship sets out the question which he sees as arising for determination by the court:

> The central question is whether *the prisoner is entitled* to know what materials the Secretary of State will found upon when making his decision and how the decision as arrived at.[117]

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114 *Kent* (n 7), [21].

115 Ibid.

116 Ibid.

117 Ibid, 563.

> Although the shape of the arguments presented in the courts begin the inquiry with the judges' opinions... I prefer to go directly to the opposite end of the process to consider *the prisoner's rights* in relation to the decision by the Home Secretary.[118]

The clear idea underlying these passages is that the question which the House of Lords was required to determine in *Doody* was that of the *proper legal relationship* between *two parties*, namely the Home Secretary and the convicted offender. According to this understanding the legal duty to which the House of Lords gave effect in *Doody* was a duty which was *owed to the individual prisoner*.

By contrast, on the other hand, the duty to which the Court of Appeal gave effect in *Kent* cannot plausibly be understood through the frame of individual right-duty correlativity. There was, in particular, no one individual who stood to benefit over and above others by the disclosure of the local planning authority's reasons for granting permission for a development within an AONB. The legal duty to publish 'substantial reasons'[119] for the making of this decision, rather, seems more naturally understood as a duty which is *owed to the public*.

To summarise, then, despite the initial senses in which *Doody* and *Kent* are similar, as soon as we begin to deconstruct these cases along the three lines set out in part 1 we see that there are three important differences between these cases: they arise in relation to administrative regimes of very different kinds, the courts' imposition of a duty to give reasons is grounded in a different set of normative concerns and the duty is thought of as creating different sets of legal relationship. These differences, in turn, correlate which each of the three senses in which, it was argued in the previous part, that the basic normative and legal components of administrative law are complex and varied. *Doody* and *Kent*, then, are a clear example of the anatomical approach in action; they illustrate, at a less general level, the complexity and variety of the basic structures with which judges must grapple in the field of administrative law.

3. Conclusion

118 Ibid, 560.

119 *Kent* (n 7), [21].

At this point, the thesis comes to the end of the first major part of its argument. Taken collectively, chapters 2 and 3 have sought to introduce the two main approaches to understanding administrative law on which this thesis focuses. According to the first, monistic, approach – 'the public interest conception'[120] – it is important to embrace the advancement of collective public, as opposed to individual, interests as the 'organising concept'[121] of administrative law. By contrast, the second – the anatomical approach – emphasises the importance of embracing the complexity and variety of the basic legal and normative structures in play in administrative law. It, in particular, emphasises that there are three main senses in which these basic structures are both complex and varied. Firstly, administrative law interacts with an array of administrative schemes. Secondly, administrative law intervenes to protect different values and interests. Thirdly, administrative law is concerned with legal relationships of different kinds.

Having introduced these two important ways of thinking, the thesis' argument can now turn to its second major part: demonstrating, through a close discussion of three case studies, the utility which lies in the taking of an anatomical approach to administrative law. It is to the first of these case studies – procedural fairness – which chapter 4 now turns.

120 Varuhas (n 3).

121 Forsyth (n 2), [27].

Chapter 4

Procedural Fairness

The previous chapter of the thesis took an important step in making its argument in favour of an anatomical approach to administrative law. It, in particular, engaged in a first attempt to pull apart administrative law and to expose the complexity and variety of the basic legal and normative structures which are in play therein. Having done this, this chapter, and the following two, turn to a closely related task: beginning to demonstrate the *utility* which lies in pulling apart administrative law in this way. These chapters, in particular, will focus on three case studies of central doctrines within modern administrative law and, in relation to each, will seek to show two main things. Firstly, that the 'public interest conception'[1] of administrative law, discussed in chapter 2, fails to provide a way of thinking about these doctrines which adequately captures the legal and normative complexities with which judges must grapple in giving effect to them. Secondly, that by taking an anatomical approach to the case law in which these doctrines are invoked, and thinking carefully about the nature and diversity of the legal and normative structures which are in play therein, it becomes possible to construct explanations of these doctrines which do capture these complexities.

This chapter is concerned with the thesis' first case study: procedural fairness. It will be divided into three parts. The first part will offer some reflections on the relationship between the public interest conception and procedural fairness. As will be explained, this is something of a difficult task for the reason that those who make use of the public interest conception do not tend to engage very closely with the detail of the various grounds of review in general, and procedural fairness in particular. That said, it is possible to envisage how one who subscribes to the public interest conception would tell the story of the procedural fairness's modern historical development. As will be explained, this story proceeds in three main stages. It would explain how the judges moved from a position, in the 1800s, of controlling administrative decision-making procedure with a strong focus on protecting the individual,

[1] Jason Varuhas, 'The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications' in John Bell, Mark Elliott, Jason Varuhas & Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, 2016).

to a recognition in the early-mid 1900s of the importance of promoting the public interest, through finally to the modern, post-*Ridge*[2] position in which judicial intervention is grounded in the idea of procedural fairness, a concept taken to be part of a new vision of administrative law oriented towards ensuring that 'public power is exercised properly'[3] and 'for the ultimate good of the public at large.'[4]

The second part of the chapter then takes a first step in demonstrating the utility of the taking of an anatomical approach to understanding the procedural fairness case law. The main argument developed here is that, when we begin to pull apart this case law and examine the basic legal and normative structures in play, we quickly come to see that there are three core senses in which these structures are both complex and varied in ways simply not captured by the public interest conception. Firstly, the courts assess the lawfulness of the procedures used by decision-makers in the context of an array of different administrative schemes. Secondly, in any given case there will be a range of normative values and interests, varying both in terms of their origins and their focus, at stake which the courts will seek to accommodate. Thirdly, procedural fairness is concerned with different kinds of legal relationship.

The third part of the chapter then takes the final major step towards demonstrating the utility of taking an anatomical approach to the procedural fairness case law. It will, in particular, seek to draw out some of the implications which flow out from the analysis undertaken in part 2. Three main points of importance will be discussed here. Firstly, one thing we begin to see from this exercise is that many of the most well-known and influential cases on procedural fairness arise in the context of a particular kind of statutory provision: a provision which confers on an administrative decision-maker the power to make a decision about whether some *individual* ought to be granted some benefit or made subject to some burden. Secondly, and relatedly, the courts, when faced with a case of this kind, have tended to understand their normative and legal tasks in a particular way. They have, in particular, tended to understand their *normative* task as being that of finding a way of ensuring that the individual is treated with respect in a way which also sufficiently accommodates the particular aims of the administrative scheme and their *legal* task as being the determination

2 *Ridge v Baldwin* [1964] AC 40 (HL).

3 Jason Varuhas, 'Judicial Review at the Crossroads' (2015) 74(2) CLJ 215, 215.

4 Ibid.

of the legal relationship which pertains between the administrative decision-maker and the individual. Thirdly, however, it also becomes clear that not *every* procedural fairness case arises in the context of a statutory power of this kind and that, where issues of procedural fairness arise in the context of *other* kinds of administrative scheme, the courts have a much less settled understanding of their legal and normative tasks, a complication which is neatly illustrated by *Moseley*.[5]

Taken collectively, it will be argued in the final section of part 3, these three points offer an explanation of the procedural fairness case law which captures, in a helpful and structured way, the various legal and normative complexities with which judges must grapple in giving effect to this ground. This understanding, it will be explained, goes beyond an explanation which emphasises merely that procedural fairness is a 'protean concept.'[6] While the anatomical approach generates an understanding of procedural fairness which emphasises the importance of context, and especially statutory context, in adjudicating on matters of procedural fairness, it is an understanding which offers a structured intellectual framework capable of offering meaningful guidance to both judges and students of administrative law.

1. The Modern History of Procedural Fairness & The Public Interest Conception

This chapter, like the following two, then, has two main aims. The first of these is to show that the influential public interest conception, which invites us to embrace the promotion of collective public, as opposed to individual, interests as the 'organising concept'[7] of administrative law, fails to provide an adequate explanation of the procedural fairness case law. It is, accordingly, appropriate to begin this chapter with a discussion of the relationship between the public interest conception and procedural fairness. This is something of a difficult task and the reason for this is simple: those who make use of the public interest conception tend to do very little in the way of engaging with the complexities of the particular

5 *R (Moseley) v Haringey LBC* [2014] UKSC 56, [2014] 1 WLR 3947.

6 See especially ibid, [24]; *R (L) v West London Mental Health NHS Trust* [2014] EWCA Civ 47, 1 WLR 3103, [106].

7 Language used in, for instance, Christopher Forsyth, 'The Rock and the Sand: Jurisdiction and Remedial Discretion' (2013) 18(4) JR 360, [27].

grounds of review and explaining how the public interest conception is thought of as providing a useful way of thinking about those grounds.

By way of illustrating this point take, for instance, the following passage written by Jason Varuhas:

> ...ensuring all relevant concerns have been considered and irrelevant ones omitted from consideration; affording those who may be affected by a decision notice, consulting them or affording them an opportunity to be heard; decision-making unclouded by bias; and holding to representations or established practice, are all *basic expectations of good administrative practice*, and make it *more likely that decision-making processes will result in reliable outcomes*.[8]

One thing which is striking about this passage is the level of abstractedness from which it offers an explanation of the principles of administrative law. There is, for instance, no sustained attempt to engage with the case law on procedural fairness and to explain how it might be thought that the public interest conception offers an accurate and helpful way of thinking about that principle. On the contrary, two vague and undeveloped ideas are invoked to explain the bulk of the grounds of review: the idea that the grounds of review are designed to ensure that public authorities abide by 'basic expectations of good administrative practice'[9] and that compliance with these basic expectations will promote the likelihood that a decision-maker will achieve a 'reliable outcome.'[10] These ideas, however, are not explained in any level of detail, nor is there a sustained attempt to explain how they are thought to be reflected in the case law.

That said, it is not the case that there is nothing of value to say about the relationship between procedural fairness and the public interest conception. It is, in particular, helpful to think about how one looking through the lens of the public interest conception would tell the story of the modern history of procedural fairness. There are two broad reasons why it is helpful to proceed in this way. Firstly, in the course of telling this story we will develop a richer

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8 Varuhas (n 1), 42 (my emphasis). See also Harry Woolf, 'Public Law – Private Law: Why the Divide? A Personal View' [1986] PL 220 and Nicholas Bamforth, 'Hohfeldian Rights and Public Law' in Matthew Kramer, *Rights Wrongs & Responsibilities* (Palgrave 2001) about which a similar point could be made.

9 Ibid.

10 Ibid.

understanding of the relationship between the public interest conception and procedural fairness. Secondly, the exploration of this history will also provide a neat opportunity in which to introduce a number of basic ideas which are important to the later parts of this chapter.

Most accounts of the modern history of procedural fairness divide that history into three main parts:[11] the foundational case law on natural justice, a series of important cases decided in the early-mid twentieth century in which the courts seemed to retreat from their earlier, strong position and the decades following the House of Lords seminal decision in *Ridge*.[12] It is helpful to replicate this structure in this part of the chapter. What follows, accordingly, is a discussion of each of these three stages in the modern history of procedural fairness with a particular emphasis on striving to determine what one looking through the lens of the public interest conception would make of the courts' activities in each stage.

A. The 1800s & Before: Natural Justice as a Mode of Providing Strong Protection for the Individual

The usual story of the development of procedural fairness in administrative law takes the 1800s as the starting point. At this time, judicial control of public authority decision-making procedure was grounded in a particular cluster of legal and normative ideas. Three aspects of this cluster are particularly worth emphasising. The first is the idea of *natural justice*.[13] Put briefly, this idea was thought of as requiring decision-makers[14] to do broadly two things in the course of taking a decision which would have a significant impact on an individual.

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11 See, for example, Elliott & Varuhas (n 2), chapter 10; William Wade & Christopher Forsyth, *Administrative Law* (11th ed, OUP 2014), chapter 14.

12 *Ridge* (n 3).

13 For some classic examples of natural justice cases see for example *Bagg's Case* (1615) 11 Co Rep 93b; *R v University of Cambridge* (1723) 1 Stra 557; *Capel v Child* (1832) 2 C & J 558; *Brutton v Vestry of St George's Hanover Square* (1871-1872) LR 13 Eq 339; *Cheetham v Mayor of Manchester* (1874-1875) LR 10 CP 249; *London & South Western Railway Co v Cyril Flower* (1875) 1 CPD 77; *Masters v Pontypool Local Government Board* (1878) 9 Ch D 677; *Hopkins v Smethwick Local Board of Health* (1890) 24 QBD 712.

14 Note that this idea applied to both classically *public* and classically *private* decision-makers. For examples of the latter, see for example *Innes v Wylie* (1844) 174 ER 800; *Wood v Woad* (1873-74) LR 9 Ex 190; *Fisher v Keane* (1878) 11 Ch D 353; *Andrews v Mitchell* [1905] AC 78 (HL).

Firstly, to provide that individual with fair *notice* that a decision was to be taken. Secondly, to give that individual a fair opportunity to make *representations*. Thus, as Griffith CJ put it in *Harris*:[15]

> ....the general rule of law is that a person... who is liable to be called upon by some public authority to incur a heavy burden or loss – is entitled to be heard and to have the opportunity of giving reasons why such an order should not be made and enforced against him.[16]

The second important idea which prevailed at this time was that natural justice was a value embedded in the *common law* and that the courts would lend protection to this value, even in the face of a statutory scheme which failed to do so. Take, for instance, *Cooper*,[17] discussed in some detail in chapter 2. In an oft-cited passage, Byles J explained that:

> A long course of decisions... establish that, although there are no positive words in a statute requiring that the party shall be heard, yet *the justice of the common law* will supply the omission of the legislature.[18]

The third and final idea is perhaps the most important for present purposes. Judicial intervention at this time was very firmly normatively grounded in a concern to provide strong legal protection for *individual rights and interests*. The basic idea is simple: natural justice, and the requirement to give notice and an opportunity to make representations to an individual, were thought of as being triggered when the decision being taken was one which carried serious implications for the existing legal rights and interests of that individual. Natural justice, in other words, was conceptualised as a means for providing *strong legal protection* for the individual, by ensuring that she could not be 'condemned either in person or property without having had an opportunity afforded him of being heard in [her] own defence.'[19]

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15 *Municipal Council of Sydney v Harris* (1912) 14 CLR 1.

16 Ibid, 7-8 (my emphasis).

17 *Cooper v Wandsworth Board of Works* (1863) 143 ER 414.

18 Ibid, 420 (my emphasis).

19 Ibid, 416. See also Stanley De Smith, 'The Right to a Hearing in English Administrative Law' (1955) 68(4) Harv LR 569, 574.

What, then, would a scholar, looking through the lens of the public interest conception, make of the courts' conduct at this time? The writings of Jason Varuhas provide a helpful indication. Take, in particular, the following passage:

> Down another path is a conception of review which has *individual rights and interests* at its heart. This model is both old and new. It was once the case, for example, that standing on review often depended on whether one's personal rights had been adversely affected, and *requirements of natural justice only arose in such circumstances*.[20]

The clear suggestion of this passage is that the foundational cases on natural justice, such as *Cooper*[21] and *Bagg's case*,[22] are best seen as being a part of an 'old'[23] vision of administrative law. This vision had at its core the idea that the task of the court in developing administrative law was to provide legal protection for important 'individual rights and interests.'[24] While undoubtedly seen as an important first step towards the development of the modern concept of procedural fairness, then, these cases, for a public interest theorist, represent a way of thinking which was prominent in, but which firmly belongs to, a bygone era.

B. The Early-Mid 1900s: A Retreat from Natural Justice and Embracement of the Public Interest?

The second usual chapter in the story of the modern history of procedural fairness concerns a cluster of important cases decided in the early-mid 1900s. Two of these – *Arlidge*[25] and

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20 Varuhas (n 4), 215 (my emphasis).

21 *Cooper* (n 18).

22 *Bagg's case* (n 14).

23 Varuhas (n 4), 215

24 Ibid.

25 *Local Government Board v Arlidge* [1915] AC 120 (HL).

Nakkuda Ali[26] - were discussed in some detail in chapter 2. A third - *Parker*[27] - is also particularly worthy of mention.[28]

One thing which is striking about this cluster of cases is that they are, in a number of important ways, very similar to the classic case of *Cooper*.[29] Thus, in all of these cases a public authority was tasked with making a decision, carrying serious implications for the individual. Furthermore, the applicant in all of these cases sought to make the same kind of argument: that although the statutory regime which conferred the relevant powers on the public authority did not make explicit provision to that effect, the decision-maker was bound, as a matter of natural justice, to afford her with a fair hearing. The courts' response in each of *Arlidge*, *Nakkuda Ali* and *Parker*, however, as was seen in chapter 2, was markedly different to that of the Court of Appeal in *Cooper*.[30] The court, more particularly, in each of these cases rejected the applicant's argument and, in doing so, made use of a particular idea: namely, that there was a distinction between 'judicial' functions, in relation to which the courts could intervene to protect natural justice, and 'administrative' functions, where the authority's only duty was to comply with the procedural requirements laid down by legislation.[31]

How might the public interest conception explain this development? One line of argument seems especially obvious.[32] It might, in particular, be said of these cases that the courts were beginning to embrace in these decades an important and foundational idea: that the major purpose of administrative law is not to protect *the individual* from encroachment, but to promote the *public interest*.

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26 *Nakkuda Ali v MF de Jayaratne* [1951] AC 66 (PC).

27 *R v Metropolitan Police Commissioners, ex parte Parker* [1953] 1 WLR 1150 (DC).

28 See also especially *R v Electricity Commissioners, ex parte London Electricity Joint Committee* [1924] 1 KB 171 (CA); *R v Legislative Committee of the Church Assembly, ex parte Haynes-Smith* [1928] 1 KB 411 (KB).

29 *Cooper* (n 18).

30 William Wade, 'The Twilight of Natural Justice?' (1955) 67 LQR 103.

31 *Arlidge* (n 26), 150-151.

32 For discussion see especially See especially Charles Reich, 'The New Property' (1964) 73(5) Yale LJ 733; Ian Holloway, 'Natural Justice and the New Property' (1999) 25 Monash University LR 85, 94; *Liversidge v Anderson* [1942] AC 206 (HL); Stephen Sedley, *Lions Under the Throne: Essays on the History of Public Law* (CUP 2015), 34.

This point is best explained through an example. Take, again, *Arlidge*.[33] As explained in chapter 2, House of Lords held in this case that, in the course of taking a decision under the Housing, Town Planning &c Act 1909[34] to issue a closing order in relation to property the Local Government Board was under no obligation to make full disclosure of the relevant documentation to the property owner. There seems to be an obvious way in which the public interest conception might explain this conclusion: the House of Lords in this case, it might be said, recognised that the 1909 Act was set up for a particular purpose – advancing the *public's collective interest* in the proper maintenance of safe housing. In light of this, it might be said, the reason for the House of Lords' conclusion was that the courts were moving away from the idea that their proper role in regulating administrative decision-making procedure was to ensure strong legal protection for the individual, and towards the idea that the purpose of administrative law was the advancement of the interests of the public as a collectivity. .

C. *Ridge* & The Following Decades: A Rethink of the Relationship between Process & The Public Interest?

The third and final usual stage in the story of the modern development of procedural fairness concerns the House of Lords' landmark decision in *Ridge*,[35] and the decades which have followed that case. Ridge was Chief Constable of Brighton Police Force whom had been dismissed by the watch committee, using its power under s191(4) of the Municipal Corporations Act 1882.[36] The consequence of the dismissal to Mr Ridge was not only that he lost his office, but that he lost his pension rights. Mr Ridge applied to the court for a declaration that his dismissal, which had taken place without the provision to him of notice or an opportunity to make representations, was unlawful and void. One legal basis on which

33 *Arlidge* (n 26).

34 Housing, Town Planning &c Act 1909.

35 *Ridge* (n 3).

36 Municipal Corporations Act 1882, s191(4) as cited in *Ridge* (n 3), 64

he applied for relief was the principle of natural justice, a basis which was accepted by three out of five judges sitting in the House of Lords.[37]

The most important point about the case, for present purposes, is that Lord Reid took the opportunity presented by *Ridge* to overview the case law in which the courts had exercised control over the decision-making processes used by administrators. In the course of doing so, his Lordships emphasised two main things. Firstly, the importance of looking back to the classic natural justice cases such as *Bagg's case*[38] and *Cooper*.[39] For his Lordship, these cases established a number of basic legal propositions, important for the resolution of Ridge's case, which ought not to be lost sight of. These propositions included that 'an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation'[40] and that 'no man is to be deprived of his property without his having an opportunity of being heard.'[41] Secondly, his Lordship also suggested that the courts' carving out of a distinction between judicial and administrative functions, and the 'function-based'[42] approach the courts had been using to regulate the decision-making processes of public authorities as a result, had been mistaken. In his Lordships' view there were a number of important considerations which explained this mistake,[43] but the time had come to abandon the idea that where a public authority was exercising a purely 'administrative' function the courts' only task was to ensure compliance with the express terms of the statutory scheme.

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37 Note the dissent of Lord Evershed and the omission by Lord Devlin to express a conclusive view on this ground.

38 *Ridge* (n 3), 66.

39 Ibid, 69.

40 Ibid, 66.

41 Ibid, 69.

42 Language used for example in Elliott and Varuhas (n 2), chapter 10.

43 One such reason was discussed in chapter 2: the absence of a purpose-built procedure for challenging the lawfulness of public authority conduct and the resultant use of certiorari, a remedy which had originated for the purpose of providing relief in a very different context. See especially Stanley De Smith, 'The Prerogative Writs' (1951) 11(1) CLJ 40, 51; Edith Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard 1974); Philip Murray, 'Escaping the Wilderness: R v Bolton and Judicial Review for Error of Law' (2016) 75(2) CLJ 333.

In the decades following *Ridge* a huge body case law concerning the lawfulness of the process used by administrative decision-makers has amassed. It is, of course, impossible to indicate more than a few of the most important features of this case law. Three developments are particularly worth discussion because they are important to the discussion in the later parts of the chapter.

Firstly, the courts have continued to develop the idea, concretised in *Ridge*, that there are circumstances in which an individual must be given both notice and an opportunity to make representations prior to some important decision about them being taken. Thus, the courts have clarified, for instance, that in taking decisions to revoke or renew an individual's licence to work in a particular industry,[44] to grant or revoke the parole of an individual offender,[45] to remove an individual from public office,[46] to find an individual guilty wrongdoing[47] and to permit or deny an individual entry into the country,[48] administrative decision-makers must provide the individual with fair notice and an opportunity to make representations.

This idea often finds expression in a particular form: an administrative decision-maker, it is commonly said, must provide an individual with notice and an opportunity to make representations when one of two things is true: [49] the administrative decision-maker is taking a decision which will have either a substantial impact on the existing legal 'rights' of the individual, or on an important 'interest.' In this context, 'right' is taken to refer to a relatively narrow set of protected individual interests namely property and liberty. Thus, for example, where a public authority is taking a decision to interfere with or deprive a person of their real

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44 *McInnes v Onslow Fane* [1978] 1 WLR 1520 (Ch).

45 *R v Parole Board, ex parte Wilson* [1992] QB 740 (CA); *Roberts v Parole Board* [2005] UKHL 45, [2005] 2 AC 738; *R (West) v Parole Board* [2005] UKHL 1, [2005] 1 WLR 350.

46 *Ridge* (n 3); *R v Chief Constable of North Wales, ex parte Evans* [1982] 1 WLR 1155 (HL).

47 *Lloyd v McMahon* [1987] AC 625 (HL); *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357; *R (Davis) v West Sussex CC* [2012] EWHC 2152 (Admin); *R (Crookenden) v Institute of Chartered Accountants* [2013] EWHC 1909 (Admin), Official Transcript; *R (Soar) v Secretary of State for Justice* [2015] EWHC 392 (Admin), Official Transcript; *Smith v Bar Standards Board* [2016] EWHC 3015 (Admin), Official Transcript.

48 *Re HK (An Infant)* [1967] 2 QB 617 (QB).

49 See for example Paul Craig, 'Perspectives on Process: Common Law, Statutory and Political' [2010] PL 275; Harry Woolf, Jeffrey Jowell, Andrew Le Sueur, Catherine Donnelly & Ivan Hare, *De Smith's Judicial Review* (7th edn, Sweet & Maxwell 2015), 7-010; Soren Schonberg, *Legitimate Expectations in Administrative Law* (OUP 2000) chapter 2.

or personal property, such as in *Cooper*,[50] or their liberty, such as in the parole cases,[51] the courts will require them to give that individual some sort of hearing. As Paul Craig has pointed out, 'the term interest' on the other hand 'is looser and has been used even where the individual does not in law have any substantive entitlement in the particular case.'[52] A good example of such a case is *Al Fayed.*[53] The Court of Appeal held that Home Secretary could not lawfully reject the applicants' naturalisation application on the ground that they not of good character without a prior hearing because rejection would have a serious impact on reputations and would deny them the 'substantial' benefits of citizenship.[54]

One further point which ought to be noted about the duty to afford the individual with a fair hearing in such cases concerns the flexibility and context-sensitivity of this duty. As Lord Bridge famously put it in:[55]

> The so-called rules of natural justice are not engraved on tablets of stone… What the requirements of fairness demand… depends on the character of the decision-making body, the kind of decision is has to make and the statutory or other framework in which it operates.[56]

Thus take, for instance, the question of what constitutes 'fair notice' that a decision is to be taken. The post-*Ridge* case law indicates that different levels of notice must be given in different contexts. Thus, in some circumstances appropriate notice will require the public authority to make directly available to the individual all of the evidence against her,[57] while in others simply informing her in general terms of the matter in issue will be sufficient.[58] Something similar is also true of the provision of a fair opportunity to make representations.

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50 *Cooper* (n 18).

51 See citations at (n 46).

52 Craig (n 50), 280.

53 *R v Secretary of State for the Home Department, ex parte Al Fayed (No 1)* [1998] 1 WLR 763 (CA).

54 Ibid, 743.

55 *Lloyd v McMahon* [1987] AC 625 (HL).

56 Ibid, 702.

57 For example *Evans* (n 47).

58 For example *Al Fayed* (n 54), 776. See also *Roberts* (n 46).

Thus, for instance, the courts have clarified that while in some contexts it will be necessary for a decision-maker to arrange an oral hearing,[59] in others the receipt of written representations will be enough.[60]

The second post-*Ridge* development which is particularly worthy of mention concerns the law on consultation. Put simply, the courts have begun to concretise a set of principles which can be used to determine when a public authority, in the course of taking a decision, is obligated to run some sort of consultation exercise in order to obtain the views of the public or a subsection of it, and the form that that consultation exercise must take. Three points about these principles are particularly worthy of mention. The first is that, where a public authority is placed under a statutory duty to consult,[61] the authority must comply with the courts' interpretation of the requirements of that duty.[62] The second is that the courts have begun to develop, through endorsement of the so-called '*Gunning*'[63] or 'Sedley criteria,'[64] basic criteria with which any consultation process must comply in order to be lawful.[65] These criteria are:

> First... consultation must be a time when proposals are still at a formative stage. Second... the proposed must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third.... adequate time must be given for consideration and response and, finally, fourth... the product of consultation must be conscientiously taken into account.[66]

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59 *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

60 For example ibid; *Lloyd* (n 56).

61 See for example *Fletcher v Minister of Town & Country Planning* [1947] 2 All ER 496 (DC).

62 See for example *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms* [1972] 1 WLR 190 (QB).

63 *R v Brent LBC, ex parte Gunning* (1985) 84 LGR 168 (DC).

64 So-called because Stephen Sedley appeared as counsel in *Gunning* (n 64) and suggested the formulation.

65 Note that these criteria apply even if the process of consultation is undertaken voluntarily and not pursuant to a statutory duty: *R (Medway Council) v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 2516 (Admin), [2003] JPL 583.

66 *Gunning* (n 64), 189.

Third and finally, it ought also to be noted that there is case law in which it has been held that a public authority could not lawfully make a decision without first running a consultation exercise for the purpose of obtaining the views of that group most affected by that decision, despite the absence of a statutory obligation to that effect. Thus in both *Baker*[67] and *LH*,[68] for instance, the Court of Appeal held that a local authority had acted unlawfully in withdrawing funding for a social care service without running a consultation exercise in order to obtain the views of the users of that service.

The third important development in the case law which ought to be noted concerns the *language* of which the courts have made use. Although the courts, in many cases in which they are called upon to adjudicate upon the decision-making process utilised by a public authority,[69] continue to make use of the language of 'natural justice,' there has been a decisive shift in other cases towards the language of 'procedural fairness.'[70] Megarry VC, in *McInnes*[71] for instance opined that:

> The further the situation is away from anything that resembles a judicial or quasi-judicial situation, and the further the question is removed from what may reasonably be called a justiciable question, the more appropriate it is to reject an expression which includes the word "justice" and to use instead terms such as "fairness" or the "duty to act fairly."[72]

Thus, for Megarry VC, it was better in the context of the mass of administrative functions, including licencing functions, to regard the basis of judicial intervention as being grounded in the idea of 'procedural fairness,' rather than natural justice.

What, then, would the public interest conception suggest we ought to understand these developments in the post-*Ridge* case law? Two main points fall to be made here. The first is

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67 *R v Devon County Council, ex parte Baker* [1995] 1 All ER 73 (CA).

68 *R (LH) v Shropshire Council* [2014] EWCA Civ 404, [2014] PTSR 1052.

69 See for example *Bank Mellat v HM Treasury* [2014] UKSC 39, [2014] AC 700; *Hopkins Developments Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 470, [2014] PTSR 1145, [46]. See also discussion in Wade & Forsyth (n 12), 416-419.

70 See for example *Moseley* (n 6) and discussion in Peter Cane, *Administrative Law* (5th ed, OUP 2011), 70.

71 *McInnes* (n 45).

72 Ibid, 1530.

that there is a clear sense in which those who make use of the public interest conception think of the modern era of 'procedural fairness' as being fundamentally different from the classical era of 'natural justice.' Whereas the classical natural justice case, it is said, were grounded in a concern to provide strong protection to important individual interests, the focus of procedural fairness is on advancing the interests of the public. Thus, Jason Varuhas, for instance has suggested that the modern doctrine of procedural fairness is part of the new, 'dominant,'[73] way of thinking about administrative law's nature according to which:

> [Administrative law's] principal concern is to ensure public power is exercised properly, according to precepts of good administration, for the public purposes for which power was conferred, all for the ultimate good of the public at large.[74]

The second important point which ought to be made, however, has already been noted: those who make use of the public interest conception do little in the way of engaging with the detail of the grounds of review for the purpose of explaining how its central suggestion, that promotion of the public interest is the 'organising concept'[75] of administrative law, is reflected in and helps to illuminate the case law in which those grounds are invoked. Take, for instance, the passage just cited. The characterisation of procedural fairness within it leaves many questions unanswered. How, for instance, does a court, in any given case, make use of the principle of procedural fairness in order to ensure that the administrative decision-making acts for the 'ultimate good of the public at large'?[76] How does a judge determine what is a 'precept of good administration' and how those precepts can be used to advance collective public interests in a given set of facts? Those who make use of the public interest conception offer no clear answers to questions of this kind.

2. Taking an Anatomical Approach to the Procedural Fairness Case Law

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73 Varuhas (n 4), 215.

74 Ibid.

75 Forsyth (n 8), [27].

76 Ibid.

The previous part of this chapter told a story about the development of procedural fairness. It was a story which was told from the perspective of the, influential and monistic, public interest conception and explained how the courts gradually, over the course of more than a century, moved from a position in which judicial control of public authority process was conceptualised as being grounded in natural justice and a concern to ensure strong legal protection for individual rights and interests,[77] to one in which it is understood as being based on the distinct concept of procedural fairness and some loose, undeveloped idea to that effect that the concern of that legal doctrine is to promote the 'public-regarding'[78] virtues of good administration.

This part of the chapter now takes a change of direction and turns again to the anatomical approach. This part of the chapter, in particular, is an exercise in attempting to take apart the modern procedural fairness case law and to examine carefully the basic normative and legal structures which are in play therein. The core argument developed herein is that when we undertake this exercise we quickly come to see that these structures are both complex and varied in three core senses which are simply not captured by the public interest conception.

A. The Courts Review the Lawfulness of Process in the Context of Different Kinds of Administrative Power

The first sense in which it was argued, in the last chapter, that the basic legal and normative components of administrative law are complex and varied is that administrative law principles interact with an array of different administrative schemes. This is a point, it ought to be noted, which applies equally in the context of the procedural fairness case law.

Two more particular points are especially important here. The first is that many of the most well-known procedural fairness cases arise against the background of a particular kind of statutory provision: a provision which functions by conferring on an administrative decision-maker the power to make, by considering a prescribed set of criteria, a determination as to

77 *Cooper* (n 18).

78 Varuhas (n 1), 42.

how *some individual* ought to be treated. Take for instance, the case of *Ridge*.[79] As noted above, the main statutory background to *Ridge* was section 191(4) of the Municipal Corporations Act 1882. This section reads as follows:

> The watch committee may at any time dismiss *any borough constable* whom they think negligent in the discharge of his duty or otherwise unfit for the same and shall comply with any regulations made by the Secretary of State prior thereto affecting such dismissal.[80]

The way in which this section functions is clear: it purports to confer on the watch committee the legal power to make decisions about whether a defined individual – namely, 'a borough constable' – ought to dismissed from office and, furthermore, to lay down certain criteria by which that power is to be exercised.

The statutory provision at the background to *Bourgass*[81] is of a similar effect. *Bourgass* concerned a challenge by a prisoner to a decision to extend the period of segregation to which he was subject.[82] Importantly, the core statutory provision in issue in *Bourgass* was rule 45(1) of the Prison Rules[83] which reads as follows:

> Where it appears desirable, for the maintenance of good order or discipline or in his own interests, that *a prisoner* should not associate with other prisoners, either generally or for particular purposes, the governor may arrange for *the prisoner's* removal from association for up to 72 hours.[84]

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79 *Ridge* (n 3).

80 Municipal Corporations Act 1882, s191(4) (as cited in *Ridge* (n 3), 50) (my emphasis).

81 *R (Bourgass) v Secretary of State for Justice* [2015] UKSC 54, [2016] AC 384.

82 Ibid, [1]. Note that the primary reason which the Supreme Court gave for their finding of unlawfulness, however, was that the Secretary of State was taken to have unlawfully delegated her statutory power to the governor: see especially *Barnard v National Dock Labour Board* [1953] 2 QB 18 (CA).

83 Prison Rules (SI 1999/728).

84 Ibid, rule 45(1) (my emphasis).

Again, this provision functions by conferring on the administrative decision-maker a particular kind of power: a power to take a decision concerning the proper treatment of a defined *individual* – namely a prisoner – according to a prescribed set of criteria.[85]

Ridge and *Bourgass*, furthermore, are not isolated examples. There are a great many procedural fairness cases which arise in the context of statutory provision of this kind. In order to illustrate this, it is helpful to recall the list, given in part 1, of categories of case in which the courts have clarified that an administrative decision-maker is required to afford some individual with a hearing. That list read as follows: the taking of decisions relating to the revocation or renewal of an individual's licence to work in a particular industry,[86] the grant or revocation of the parole of an individual offender,[87] the removal of an individual from public office,[88] the finding of individual wrongdoing[89] and the permission or denial to an individual of the ability to enter into the country.[90] One thing which is striking about all of these categories of case is that at the background of each is a statutory provision which functions in the same way as those at the background to *Ridge* and *Bourgass*: namely, by conferring on an administrative decision-maker the power to take a decision, according to some prescribed set of criteria, about whether *an individual* ought to be granted some benefit or made subject to some burden.

That said, the second important point which ought to be emphasised is that, although many of the classic cases on procedural fairness have arisen in the context of a statutory provision of this kind, this is not true of all procedural fairness cases. The courts have, more particularly, often had occasion to consider the lawfulness of administrative decision-making process in the context of statutory powers and administrative schemes of very different kinds.

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85 Namely where removal was desirable 'for the maintenance of good order or discipline or [the prisoner's] own interests.'

86 *McInnes* (n 45).

87 See citations at (n 46).

88 See citations at (n 47).

89 See citations at (n 48).

90 See citations at (n 49).

Three examples are particularly pertinent.[91] Consider, first, *Aylesbury Mushrooms*.[92] The main statutory background to this case was section 1 of the Industrial Training Act 1964,[93] subsection 1 of which read as follows:

> For the purpose of making better provision for the training of persons over compulsory school age for employment in any activities of industry... the Minister may make an order specifying those activities and establishing a board in relation to them.[94]

This statutory power is very different to those which formed the background to such cases as *Ridge* and *Bourgass*. It did not empower the Secretary of State to make a decision about how some specified individual should be treated, nor provide criteria by which such a decision was to be taken. The power it conferred, rather, was much more far-reaching: the Secretary of State became, by virtue of it, empowered to create orders establishing training boards with the purpose of overseeing training within whole industries and, furthermore, by virtue of section 4 of the same Act, to charge levies on employers within those industries for the purpose of financing the running of these boards.[95] The court, nonetheless, in *Aylesbury Mushrooms* was required to adjudicate upon the fairness of the procedure used by the Secretary of State in exercising this power and to decide, in particular, whether, in sending a letter which had never arrived, it has properly discharged its legal duty to consult those in a position to represent industries made subject to such an order.[96]

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91 Other examples could be given. The courts, for example, have had to decide procedural fairness challenges in the context of the planning regime (see especially discussion in chapter 3 and, for instance, *Hopkins* (n 70); *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 1 WLR 1255 (HL); *R (Tatham Homes Ltd) v First Secretary of State* [2005] EWHC 3538 (Admin), [2008] JPL 185; *R (Poole) v Secretary of State for Communities and Local Government* [2008] EWHC 676 (Admin), [2008] JPL 1774) and in the context of statutory powers to run public inquiries (see for example *Bushell v Secretary of State for the Environment* [1981] AC 75 (HL); *R v Lord Saville of Newdigate ex parte A* [2000] 1 WLR 1855 (CA); *R (Associated Newspapers Ltd) v Leveson* [2012] EWHC 57 (Admin), [2012] ACD 23).

92 *Aylesbury Mushrooms* (n 63).

93 Industrial Training Act 1964 (since repealed by Agricultural Training Board Act 1982).

94 Ibid, s1(1).

95 Ibid, s4.

96 Ibid, s1(4).

By way of a second example, consider, *Moseley*.[97] The statutory background to this case was section 13A(2) of the Local Government Finance Act 1992[98] which prescribes as follows:

> Each billing authority in England must make a scheme specifying the reductions which are to apply to amounts of council tax payable... by –
>
> (a) Persons whom the authority considers to be in financial need, or
> (b) Persons in classes consisting of persons whom the authority considers to be, in general, in financial need.[99]

This provision, again, is very different to the statutory provisions which sit in the background to such cases as *Ridge* and *Bourgass*. It does not, in particular, function by conferring on administrative decision-makers a power to make decisions concerning the proper treatment of some specified individual according to a prescribed set of criteria. It, rather, places administrative decision-makers under a legal duty to compile a scheme setting out in detail a generalised scheme for calculating council tax reduction. The chapter will return to the Supreme Court's judgment in *Moseley* in some detail below. For now, however, the key point is again that it is an example of the courts determining the lawfulness of an administrator's decision-making process in the context of a statutory power very different to that which forms the background to many of the classic procedural fairness cases.

By way of a third and final example consider *LH*.[100] This case arose against the background of section 29(1) of the National Assistance Act 1948[101] which provides as follows:

> A local authority may... make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons who are blind, deaf or dumb, or who suffer from mental disorder of any description and other persons who are substantially and permanently handicapped by illness, injury or congenital deformity.[102]

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97 *Moseley* (n 6).

98 Local Government Finance Act 1992 (as amended by the Local Government Finance Act 2012).

99 Ibid, s13A(2).

100 *LH* (n 69). For a similar example see also *Baker* (n 68).

101 National Assistance Act 1948, s29(1) (as amended by Local Government Act 1972, s195(6), Children Act 1989, Sch 13, para 11(2) and Mental Health (Scotland) Act 1960, Sch 4).

102 Ibid.

In *LH* itself, the local authority had originally made use of these powers in order to establish and maintain a day care facility. When it later decided to use the powers again to close the facility without running a specific consultation exercise in order to obtain the views of its users and staff, the applicant challenged its decision on grounds of procedural fairness,[103] a ground which the Court of Appeal accepted. For present purposes, the most important point about this case is that it is, once again, an example of a case in which the courts have considered the lawfulness of an administrative decision-making process in the context of a statutory provision conferring a very different kind of legal power to those at the background of such cases as *Ridge* and *Bourgass*. Section 29, in particular, does not purport to confer on local authorities a power to decide, according to a set of criteria, how a particular individual should be treated. It, rather, confers on local authorities a broad power to take measures, such as by deciding to fund day care centres, for the purpose of promoting the welfare of the vulnerable in its area.

B. Procedural Fairness Intervenes to Protect an Array of Values and Interests

The second sense in which the basic legal and normative components in play in the procedural fairness case law is the same as the second sense discussed in chapter 3: the courts, in this case law, are concerned to protect and promote an array of different values and interests. The clearest way in which to show this is to consider in some detail two important cases and to illustrate, in relation to each, the variety of values and interests which the courts sought to accommodate. The two cases which will be used are *Osborn*[104] and *Moseley*.[105] After discussing each of these cases in some depth, this section will conclude by offering some reflections on what their exploration shows about the values and interests in play in the procedural fairness case law more broadly.[106]

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103 *LH* (n 69), [29].

104 *Osborn* (n 60).

105 *Moseley* (n 6).

106 See further discussion in Timothy Endicott, *Administrative Law* (3rd ed, OUP 2015), chapter 4.

Taking first, then, *Osborn*,[107] it is helpful to begin with a brief statement of the relevant facts. Osborn had been convicted of a number of offences and sentenced to a period of six years' imprisonment.[108] Following the expiry of his minimum tariff, the decision was taken that he should be released on licence. On the day of his release, Osborn failed to arrive at a specific location by a specified time and, accordingly, the decision was taken that his licence should be revoked.[109] On learning of this decision, Osborn requested that he be given an oral hearing in which he could explain in person the reasons for which he had failed to comply with the licence conditions. The Parole Board, however, refused to provide this. The Supreme Court in deciding Osborn's case[110] took the opportunity to consider in general terms the question of 'the circumstances in which the Parole Board is required to hold an oral hearing.'[111] The most important point, for present purposes, is that the Supreme Court, in deciding this question, clearly recognised that there were an array of normative considerations and interests at stake and which it was required to seek to accommodate.

A helpful starting point, in considering this array of values, is with the perspective of the Parole Board. A clear concern on the part of the board concerned the financial and temporal costs of providing oral hearings.[112] The *public*, the Parole Board argued, had an important interest in the parole scheme being implemented in a way which was *efficient*. Given that the holding of oral hearings carried extra costs both in terms of money and time, the court should be slow to impose an onerous duty to provide oral hearings unless something exceptional about a case justified it.

As will be seen, the Supreme Court certainly recognised the importance of these 'public-regarding'[113] considerations and the importance of accommodating them in any conclusion reached by the court.[114] Lord Reed, however, took them to be offset by a second 'public-

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107 *Osborn* (n 60).

108 Ibid, [18].

109 Ibid.

110 And the cases of several other prisoners in the same position as Osborn: ibid, [1].

111 Ibid.

112 Ibid, [72]. See further Endicott (n 107), chapter 4.

113 Varuhas (n 1), 42.

114 *Osborn* (n 60), [72].

regarding'[115] concern: the public's interest in the accurate implementation of the administrative scheme. As his Lordship explained:

> There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested.[116]

This point needs some unpacking. We might say of *Osborn* the following: the background to *Osborn* was a detailed legislative[117] regime the purpose of which was to identify the circumstances in which it was deemed to be in the interests of the public that an offender's parole be revoked. This scheme was the product of a rigorous decision-making process in which a number of democratically elected decision-makers[118] had given close consideration to the problem of which criteria should be used to determine whether parole should be revoked in the case of a given individual. It might, further, be said that the imposition of a requirement to hold an oral hearing would often help to assist in the accurate implementation of these criteria by ensuring that all of the information, relevant to the administrator's decision, was brought to its attention.[119]

For Lord Reed, it seems, this second 'public-regarding'[120] consideration overrode the Parole Board's concern regarding costs in a particular way: the promotion of accuracy in the Parole Board's decision-making would, argued Lord Reed, in the long-run have the effect of alleviating the board's concerns regarding financial and temporal cost. Thus, as his Lordship explained:

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115 Varuhas (n 1), 42.

116 *Osborn* (n 60), [67].

117 See especially Crime (Sentences) Act 1997; Criminal Justice and Court Services Act 2000; Criminal Justice Act 2003; Criminal Justice and Immigration Act 2008; Parole Board (Amendment) Rules 2009 (SI 2009/408).

118 Including both Parliament and the Home Secretary.

119 See generally Kenneth Culp Davis, 'The Requirement of a Trial-Type Hearing' (1956) 70(2) Harvard LR 193.

120 Varuhas (n 1), 42.

> In the context of parole where the costs of an inaccurate risk assessment may be high... procedures which involve an immediate cost but contribute to better decision-making are in reality less costly than they may appear.[121]

One thing which is striking about the two clusters of interest or value discussed so far is that both relate to the interests of the *public*. The Supreme Court in *Osborn* however, clearly did not think of the only values at stake as being those in which the public had an interest. Indeed, Lord Reed suggested that a major purpose of procedural fairness in a case of this kind was the:

> ...avoidance of the sense of injustice which *the person who is the subject of the decision* will otherwise feel... Justice is intuitively understood to require a procedure which pays *due respect* to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions.[122]

This point, again, needs some unpacking. The literature and the case law, in particular, suggests that there are at least four senses in which imposition, in a case such as *Osborn*, of an obligation to afford to the individual fair notice and an opportunity to make representations can ensure that 'due respect' is paid to that individual's interests. The first concerns provision of 'fair notice'[123] to the individual prior to decision-making. The provision of such notice clearly helps to minimise damage to that individual's autonomy by enabling her to take early decisions about how to modify her life plans and about how she wishes to contribute to the decision-making process. Secondly, as Denis Galligan has emphasised, the propensity of a fair hearing to promote accuracy in the implementation of the administrative scheme is also closely related to the issue of respect.[124] It is, for Galligan, an important element of treating an individual with respect that her case is decided accurately in respect to the prevailing legal standards. Otherwise, Galligan notes,[125] there is a serious concern that these legal standards

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121 *Osborn* (n 60), [72].

122 Ibid, [68] (my emphasis).

123 See for example *R (Thamby) v Secretary of State for the Home Department* [2011] EWHC 1763 (Admin), Official Transcript, [67]; *NP (Sri Lanka) v Secretary of State for the Home Department* [2012] EWCA Civ 906, Official Transcript, [29].

124 Denis Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedure* (OUP 1997), 77-78.

125 Ibid.

will generate in the individual a 'legitimate normative expectation'[126] that she will receive a particular form of treatment which will be defeated in the event of inaccurate application. Thirdly, fair hearings have the propensity to allow an individual to act as *participant* in the course of decision-making, and not merely as the *object* of the decisions. As Lord Reed put it in *Osborn*:

> Respect entails that such persons ought to be able to participate in the procedure by which the decision is made… As Jeremy Waldron has written: '…respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves.[127]

A fair hearing, in other words, treats an individual about whom an important decision is being made as somebody who is capable of and entitled to *explain herself*, rather than as some inanimate object which can be used freely for the administration's purposes. Fourthly, Trevor Allan[128] has emphasised the capacity of a fair hearing to help an individual to *understand* why a decision having a substantial impact on her interests has been taken. The basic idea is that allowing an individual to participate in the decision-making procedure will enable her to understand more fully the reasons for which the decision has been made. This has value at both a legal and moral level. At a legal level, the individual who more fully understands the reasons for which the public authority has taken the decision will have a fairer opportunity to identify any legal flaws therein and to initiate a legal challenge.[129] At a moral level, Allan emphasises that it is an important part of treating an individual as a dignified and autonomous person that that a decision-making process is capable of 'commend[ing] the outcome to [her, as] a fellow-citizen who must suffer for the common good.'[130]

To summarise, then, at the heart of *Osborn* were at least three different clusters of normative values and interests which the Supreme Court sought to accommodate. Firstly, the public's interest in the parole scheme being implemented in a way which made efficient use of the

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126 Ibid, 77.

127 Ibid, [68] citing Jemery Waldron, 'How the Law Protects Dignity' [2012] CLJ 200, 210.

128 Trevor Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18(3) OJLS 497.

129 Ibid, 499. See also *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 (HL), 565.

130 Ibid, 515.

time and financial resources of the Parole Board. Secondly, the public's interests in the criteria laid down by the administrative scheme being accurately implemented. Thirdly, a concern to ensure proper respect for the individual. As has been explained, the Supreme Court in *Osborn* sought to accommodate all of these considerations. In its view, the conclusion that 'the board should hold an oral hearing... wherever fairness to the prisoner requires [it]' would thus have the long-term effect of managing the parole board's costs,[131] of helping to ensure accuracy in the implementation of the parole scheme and of guaranteeing due respect to the individual.

A second case which can be helpfully discussed is rather different to *Osborn*. As explained above, *Moseley*[132] arose against the background of the Local Government Finance Act 1992[133] which places local authorities under a legal duty to compile and publish the details of the council tax reduction scheme of which it will make use.[134] A further feature of this legislative scheme which was not discussed above but which must be mentioned now is Schedule 1A, paragraph 3(1)(c) which provides as follows:

> Before making a scheme, the authority must... consult such other persons as it considered are likely to have an interest in the operation of the scheme.[135]

The question arose in *Moseley* whether, having run a public consultation exercise in order to obtain the views of those likely to have an interest in the introduction of the new scheme, but having failed to disclose that it had already discarded a number of possible options, the local authority had acted awfully. The most important point about this case for present purposes is that there was an important disagreement between the two judges who offered judgments in *Moseley*[136] - Lords Wilson and Reed – as to the array of legal values which were at stake in the case where a public authority is placed, as the authority was in *Moseley*, under a statutory duty to consult.

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131 *Osborn* (n 60), [72].

132 *Moseley* (n 6).

133 Local Government Finance Act 1992.

134 Ibid, s13A(2).

135 Ibid, Sch 1A, para 3(1)(c).

136 *Moseley* (n 6),

Take, first, Lord Wilson's judgment. His Lordship focused a great deal on the idea of a 'common law duty of procedural fairness.'[137] Underlying this duty, for his Lordship, were a number of common law values, including the promotion of accuracy in decision-making and the importance of ensuring that the individual is treated with respect.[138] Importantly, however, for Lord Wilson there was also a third common law value at stake in a case such as *Moseley*: democracy, and the importance of citizens participating in public authority decision-making.[139] For his Lordship, the challenge for a court in a case such as *Moseley*, where a public authority engages in a public consultation exercise pursuant to a statutory duty, is to determine how best the common law value of democracy or participation can be promoted in the context of the particular case.

By contrast, Lord Reed preferred to express his conclusion 'in a way which [placed] less emphasis upon the common law duty to act fairly, and more upon the statutory context and purpose of the particular duty of consultation' which sat at the background to *Moseley*. Put simply, for Lord Reed, it was important to recognise that the normative task of the court in a case such as *Moseley* is very different from that in a case such as *Osborn.* While a substantial task of the court in cases of the latter kind, more particularly, was to lend legal protection to the individual by ensuring that she is treated with due respect, in the case of a statutory duty to run a public consultation exercise the task of the court is to identify the values and interests which it is the purpose of the *administrative scheme* to advance and to find the best way of giving effect to those values.[140] The chapter will return to the disagreement at the heart of *Moseley* shortly. The important point for present purposes however is that it is a case which clearly illustrates that there are an array of normative values and interest at stake in the procedural fairness case law to which the courts seek to give effect.

By way of concluding this section, it is helpful to offer some brief reflections on what the discussion herein shows about the basic normative and legal structures which are in play in the procedural fairness case law. The core point is this: the values and interests which are at stake in this case law are both complex and varied. There are, more particularly, two different

137 Ibid, [24].

138 Ibid.

139 Ibid.

140 Ibid, [38].

senses in which this is so. Firstly, the *origins* of the values at stake in the procedural fairness case law are complex and varied. Thus, on the one hand, as *Osborn* and Lord Reed's judgment in *Moseley* clearly illustrate, the courts in determining issues of procedural fairness will seek to accommodate to a large degree the particular aims of the administrative scheme. On the other hand, however, the courts clearly think of their role in the procedural fairness case law as being, at least partially, that of preserving certain common law values. As their Lordships' judgments across *Osborn* and *Moseley* clearly illustrate, for example, the courts have come to think of respectful treatment of the individual as a core common law value[141] which ought to be promoted by the courts in adjudicating upon matters of procedural fairness.

Two further complications ought to be noted on the subject of the origins of the values which the courts seek to accommodate in procedural fairness. In order to explain the first, it is important to draw upon a point made which will be made below: many of the statutory schemes in relation to which issues of procedural fairness arise include provisions requiring public authorities to provide an affected individual with notice and a fair opportunity to make representations.[142] Where this is the case, it seems inappropriate to say that respectful treatment of the individual is a legal value deriving only from the common law. On the contrary, surely the proper analysis is that respect is *both* a good protected by the common law and which is valued by the statutory scheme itself. The second important complication is clearly illustrated by their Lordships' judgment in *Moseley*:[143] there is no fixed agreement amongst the judiciary as to which values it is the purpose of the common law to protect and thus on which the courts may draw in adjudicating upon issues of procedural fairness. What divided their Lordships, in particular, in *Moseley*, was the question of whether there is

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141 See especially Dawn Oliver, 'The Underlying Values of Public and Private Law' in Michael Taggart (ed), *The Province of Administrative Law Determined* (Hart Publishing 1997); Dawn Oliver, 'Common Values in Public and Private Law and the Public/Private Divide' [1997] PL 630; *Doody* (n 130). (See further my discussion in Joanna Bell, '*Kent* and *Oakley*: A Re-examination of the Common Law Duty to Give Reasons in Relation to Grants of Planning Permission and Beyond' (2017) 22(2) JR 105 and *R (Hasan) v Secretary of State for Trade & Industry* [2008] EWCA Civ 1312; [2008] 3 All ER 539).

142 See for example the role played by Police Discipline Regulations 1952 (SI 1952/1705); Police (Discipline) (Deputy Chief Constables, Assistant Chief Constable and Chief Constables) Regulations 1952 (SI 1952/1706) and Police (Discipline) (Deputy Chief Constables, Assistant Chief Constable and Chief Constables) Regulations 1954 (SI 1954/1688) in *Ridge* (n 3).

143 *Moseley* (n 6).

something like a value of 'democracy' or 'participation' inherent in the common law, and which it is the courts' task to promote in consultation cases.

The second sense in which the values in play in the procedural fairness case law are diverse concerns the *focus* of these values. As explained in chapter 2, the public interest conception seeks to draw a distinction between 'individual-regarding'[144] values, which are the concern of such areas of private law[145] and human rights law,[146] and 'public-regarding'[147] values towards which administrative law is to be seen as oriented. One thing which clearly emerges from the analysis above, however, is that the courts in adjudicating upon matters of procedural fairness seek to accommodate *both* the interests of the public (such as the public's interest in having the parole scheme administered accurately) and those of the individual (such as respect). Furthermore, a final complication which can be seen is that the drawing of a line between a value which is 'public-regarding' and one which is 'individual-regarding' is not straightforward. Take, for instance, the value of *accuracy* in the implementation of the administrative scheme. One thing which emerges from the discussion in this section is that this idea can be understood as valuable from *either* the perspective of the public *or* the individual. Thus, one the one hand, we might say that we care about accuracy because it is important that the administrative scheme enacted by Parliament be implemented by the administrator reliably. On the other, however, we might say as Galligan urges[148] that accuracy is important because treating the individual in accordance with the prevailing standards is an integral part of treating her fairly.

C. Procedural Fairness is Concerned with Different Kinds of Legal Relationship

144 Varuhas (n 1), 42.

145 See especially Woolf (n 9).

146 See especially Varuhas (n 2).

147 Varuhas (n 1), 42.

148 Galligan (n 125), 77-78.

The third and final sense in which it was argued, in chapter 3, that the basic components of administrative law are both complex and varied concerns the *legal relationships* with which that body of law is concerned. Once again, this is a source of complexity which applies equally in the case of procedural fairness.

Thus, on the one hand, it is certainly the case that many of the legal duties to which the courts have given effect in the procedural fairness case law cannot plausibly understood as being 'individual-regarding'[149] by their nature, but must rather be understood as correlating with a right held either by the public as a collectivity,[150] or a subsection of the public. Two examples will suffice. Firstly, consider again *Moseley*.[151] The Supreme Court in this case held that the local authority was under a legal duty, in the course of running a public consultation exercise, to make clear that it had discarded a number of important options. This duty, importantly, cannot plausibly be understood as being owed to any one individual. Their Lordships' judgments, indeed, suggest different ways of thinking about the legal relationship at stake. For Lord Wilson, it would seem, the courts' task was to adjudicate upon the legal relationship which subsisted between the local authority and the *general public*, which held a collective interest in democracy and proper participation.[152] For Lord Reed, by contrast, the legal relationships at stake must be those which are defined by the statute which creates the statutory duty to consult.[153] Secondly, consider again also *LH*.[154] The Court of Appeal in this case held that the local authority was under a legal duty, prior to closing a day care facility to run a consultation exercise to obtain the views of the users of, and staff who worked within, that service. Again, this duty cannot plausibly be understood as a duty which is owed to any

149 Varuhas (n 1), 42.

150 See especially Jason Varuhas, 'The Reformation of English Administrative Law? "Rights", Rhetoric and Reality' (2013) 72 CLJ 369, 376.

151 *Moseley* (n 6).

152 Ibid, [24].

153 Ibid, [38].

154 *LH* (n 69).

one individual. It was rather an obligation which, in some sense,[155] was designed to benefit a particular *subsection* of the public.

On the other hand, however, it is also clearly the case that the procedural fairness case law is concerned to a significant extent with legal relationships which are thought of as being characterised by Hohfeldian individual right-duty correlativity. This is true in two more particular senses.

Firstly, it is not infrequently the case that the statutory and regulatory framework which forms the background to a procedural fairness case will explicitly frame the legal relationship in issue in terms of *individual* right-duty correlativity.[156] Take, for instance, rule 54 of the Prison Rules:[157]

> **54. Rights of prisoners charged**
>
> (1) Where a prisoner is charged with an offence against discipline, he shall be informed of the charge as soon as possible and, in any case, before the time when it is inquired into by the governor.[158]

This section expressly purports to lay out a series of 'rights of prisoners' which prison authorities are regarded as being legally obligated to act in accordance with. This section, in other words, places prison authorities under a series of legal duties which are expressly designated as being owed *to the prisoner*.

In a similar way consider regulation 7 of the Police (Conduct) Regulations 2012:[159]

> (1) The officer concerned *has the right* to be legally represented, by a relevant lawyer of his choice, at a misconduct hearing or a special case hearing.[160]

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155 See Thomas Leary, 'The Nature of Public Law Duty and Citizen Standing in English Law' available at: https://www.google.co.uk/?gws_rd=ssl#q=andrew+leary+the+nature+of+public+law+duty (accessed 29 November 2016).

156 See discussion in Craig (n 50).

157 Prison Rules (SI 1999/728), rule 54.

158 Ibid, s54.

159 Police (Conduct) Regulations 2012 (SI 2012/2632).

160 Ibid, reg 7(1) (my emphasis).

Again, the effect of this provision is to create a relationship of *individual* right-duty correlativity between an individual police officer and the decision-maker, to the effect that the latter is obligated to ensure that the former is given the opportunity of being legally represented.

Secondly, there is also a clear and consistent tendency on the part of both judges and scholars to speak of legal duties provide an individual with notice and an opportunity to make representations as being owed *to that individual*. There are endless examples of this tendency and relatively little to be gained from discussing more than a handful. Four, therefore, will be discussed, though many more can be found in the case law[161] and the literature.[162]

The first and second examples which it is helpful to discuss are two important case which have been drawn on at a number of places in the course of the argument of this chapter so far: *Ridge*[163] and *Osborn*.[164] The important point about these cases, for present purposes, is this: both of these cases contain clear dicta in which their Lordships speak of the duty to afford a fair hearing which arose those cases as one which was *owed to the individual*. Take, for instance, the following passage from Lord Hodson's judgment in *Ridge*:

> I have reached the conclusion... that this appeal should succeed on the ground that *the applicant was entitled to* and did not receive natural justice at the hands of the watch committee.[165]

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161 For examples of this discourse in the case law see especially *Attorney General v Ryan* [1980] AC 718 (PC), 727; *Al Fayed* (n 54), 787; *McNicholls v Judicial and Legal Service Commission* [2010] UKPC 6, Official Transcript, [42]; *R v CC of Thames Valley Police ex parte Cotton* [1990] IRLR 344 (CA); *R (Silus Investments) v London Borough of Hounslow* [2015] EWHC 358 (Admin), Official Transcript, [69]; *R (Trafford) v Blackpool BC* [2014] EWHC 85 (Admin), [2014] PTSR 989, 79; *Kanda v Malaya* [1962] AC 322 (PC), 337.

162 For further examples from the literature see especially Davis (n 120), 199 and 212; De Smith (n 20), 578; Paul Daly, 'Administrative Law: A Values-Based Approach' in John Bell, Mark Elliott, Jason Varuhas & Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016), 33; Matthew Groves & Greg Weeks, 'The Legitimacy of Expectations about Fairness' in John Bell, Mark Elliott, Jason Varuhas & Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016), 171.

163 *Ridge* (n 3).

164 *Osborn* (n 60).

165 *Ridge* (n 3), 127 (my emphasis).

Lord Hodson, in this passage, clearly speaks of the duty to afford a fair hearing as one which was owed to Ridge *as an individual*. Ridge, that is, is said to hold a *personal right* entitling *him* to have the duty performed.

This way of thinking about the nature of the duty to afford a fair hearing is also clearly reflected throughout Lord Reed's judgment (with which there was unanimous agreement amongst their Lordships) in *Osborn*.[166] The Supreme Court, for instance, issued their declaration to the effect that the Parole Board had acted unlawfully in the following terms:

> The board breached its duty of procedural fairness *to the appellant* by failing to offer him an oral hearing.[167]

Again, the clear idea underlying this declaration is that the duty to afford a fair hearing to which the court gave effect in *Osborn* was owed *to the individual prisoner*, and not to the public at large. Similarly, at another point in his judgment, Lord Reed says of the duty that:

> The right *of the prisoner* to request an oral hearing is not characterised as a right of appeal.[168]

Again, the clear idea is that the right which is correlative to the Parole Board's duty to afford a fair hearing is one which is vested in the hands, not of the public, but the *individual*.

A third example which clearly illustrates the prevalence of the tendency to think of the duty to afford a fair hearing in this way is another Supreme Court decision: *Bank Mellat*.[169] This case concerned a decision by the Treasury to issue, in relation to the applicant, an Iranian bank, an order[170] cutting off all communication with persons operating in the financial sector of the UK.[171] The applicant argued that, prior to the making of the order the Treasury was dutybound to provide it with fair notice and a fair opportunity to make representations, an

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166 *Osborn* (n 60).

167 Ibid, [116] (my emphasis).

168 Ibid, [2] (my emphasis).

169 *Bank Mellat* (n 70).

170 Financial Restrictions (Iran) Order 2009.

171 The order was issued under Counter-Terrorism Act 2008, s62.

argument which the majority of their Lordships accepted.[172] The most important point about the case for present purposes, however, is that much of their Lordships reasoning in both the majority and minority clearly accords with the idea that the duty to give notice and to receive representations correlates with a legal right held by the individual. Take, for example, the following passage from Lord Hope's (dissenting) judgment:

> The question then is whether *the Bank* has a common law right to be consulted before the making of the decision contained in the Order.[173]

Lord Hope, in this passage, clearly understands the applicant's argument as being that *it*, as an individual body held a personal legal right entitling it to make representations to the Treasury prior to the making of an Order. In a similar way, Lord Hope rejected (as part of the minority) the applicant's argument in the following terms:

> I would hold therefore that *the Bank* did not have a common law right to be consulted before the direction was given.[174]

Furthermore, Lord Hope's judgment is not the only judgment to speak of the duty to provide notice and receive representations as a duty correlative to individual right. The following passage, for instance, is taken from Lord Reed's (dissenting) judgment:

> Parliament has laid down in [legislation] a detailed scheme for the making of the orders… That scheme contains no provision *entitling the person designated in the order* to be given a hearing before the order … The absence of such provision does not in itself automatically entail that Parliament intended that there should be no such entitlement, but… it is a pointer towards such an intention.[175]

Again, this passage displays an understanding of the question in *Bank Mellat* according to which the task of the court was to determine whether the common law vested in *the bank* a personal legal entitlement to be given notice and an opportunity to make representations. In

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172 By a majority of 6:3, Lords Hope, Reed and Carnwath dissenting.

173 *Bank Mellat* (n 70), [146] (second judgment) (my emphasis).

174 Ibid, [152] (second judgment) (my emphasis).

175 Ibid, [56] (second judgment) (my emphasis).

a similar way, in the same case on the issue of whether it was open to the Supreme Court to make partial use of a closed material procedure, Lord Reed opined that:

> It is a fundamental principle of justice under the common law that *a party is entitled* to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party.[176]

Collectively, these three examples illustrate well the prevalence of the idea that the duty to afford a fair hearing is an 'individual-regarding'[177] legal duty in *judicial* thinking. It ought, also, to be briefly noted that the tendency to think of the duty in this way also pervades a good deal of *scholarly* literature. One example will suffice to illustrate. The writings of Paul Craig on procedural fairness are framed consistently through the idea of 'process rights.'[178] Craig, for instance, notes that:

> Common law is normally regarded, with justification, as the principal source of *process rights* in the UK, since it has historically determined the applicability and content of such rights.[179]

That Craig has in mind *individual* rights, as opposed to collectively held public rights, is clear from his statement of the key questions to be addressed in this area of law in terms of 'whether *individual* has a right to be heard before certain action is taken and if so the content of right.'[180]

To suggest, then, as the public interest conception does[181] that the 'duty to act fairly'[182] is a legal obligation owed to the 'public at large or a section of it,'[183] as opposed to any one individual is problematic for at least two reasons. Firstly, it ignores the point that that the

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176 Ibid, [133] (first judgment) (my emphasis).

177 Varuhas (n 1), 42.

178 Paul Craig, *Administrative Law* (8th ed, Sweet & Maxwell 2016), chapter 12 and Craig (n 50).

179 Craig (n 50) (my emphasis).

180 Craig (n 179), 339.

181 See especially Woolf (n 9); Varuhas (n 151).

182 Bamforth (n 9), 11.

183 Ibid.

common law principle of procedural fairness interacts closely, and becomes intertwined with the statutory and regulatory scheme which forms the background to the case, and that the provisions which form these regimes very often purport explicitly to create relationships of *individual* right-duty correlativity between the decision-maker and the subject of its decision. Secondly, it also fails to explain why there is a clear and consistent tendency on the part of both judges and scholars to speak of the duty to give notice and an opportunity to make representations to some individual as an obligation which is owed *to that individual*.

3. Using the Anatomical Approach to Construct an Explanation of Procedural Fairness

The previous part of the chapter engaged in an exercise in pulling apart the procedure fairness case law with the goal of exposing the basic legal and normative structures in play therein. Its core argument was that there are three core senses in which these structures are both complex and varied. Firstly, issues of procedural fairness arise in the context of statutory provisions of different kinds. Secondly, the courts in adjudicating upon issues of procedural fairness seek to accommodate an array of different values and interests. Thirdly, procedural fairness cases concern legal relationships of different kinds.

This argument is important for two core reasons. Firstly, it has important implications for the public interest conception. It, in particular, illustrates very clearly the deficiencies of this way of thinking in explaining procedural fairness: the courts in the procedural fairness case law are grappling with legal and normative complexities which the public interest conception does not come close to capturing. Secondly, this exercise marks an important first step towards illustrating the utility of taking an anatomical approach to the procedural fairness case law. The aim of this part of the chapter is to take the final major step in this regard by demonstrating how, by pulling apart the procedural fairness case law in the manner done above, it becomes possible to construct an explanation which captures the complexities with which the judges are grappling. The discussion herein will be divided into two sections. The first will draw out three implications which, it is argued, flow from the analysis above. The second will explain how, taken collectively, these three points offer an explanation of

procedural fairness which goes beyond the assertion that it is a 'protean concept'[184] and which is capable of providing meaningful guidance to judges and students of administrative law.

A. Three Implications of the Analysis

The first point to be made, then, is that three main implications for how we should understand procedural fairness flow out from the analysis undertaken in the previous part of this chapter.

The first is that many of the most well-known and influential procedural fairness cases arise in the context of a particular kind of a statutory provision, namely, a provision which confers on an administrative decision-maker the power of deciding, with regards to a prescribed set of criteria, whether some individual ought to be made subject to some burden or denied some benefit. Thus, for instance, as has been seen each of *Ridge*,[185] *Bourgass*,[186] *Bank Mellat*,[187] as well as many of the other important cases on procedural fairness cases, arose in the context of a statutory power of this kind. That so many procedural fairness cases arise in the context of such a provision is not especially surprising; as Sarah Nason has recently emphasised, around half of the Administrative Court's workload in general is made up of, what she calls, 'individual grievance'[188] cases.

The second important point which flows from the analysis above is that, when faced with a procedural fairness challenge in the context of a statutory power of this kind, the courts have a relatively settled view of what their normative and legal tasks are in adjudicating upon the case. Take, first, the *normative* strand to this assertion. The important point is this: the courts, in determining procedural fairness challenges arising in the context of such powers tend to view their task as that of ensuring that the administrative decision-maker treats the individual

184 *Moseley* (n 6), [24].

185 *Ridge* (n 3).

186 *Bourgass* (n 82).

187 *Bank Mellat* (n 70).

188 Sarah Nason, *Reconstructing Judicial Review* (Bloomsbury 2016), 143.

with respect, whilst also seeking to accommodate the aims of the background administrative scheme. This point is well illustrated by *Osborn*;[189] as explained, the Supreme Court in this case, intervened to ensure that the parole board's decision-making procedure is such that accords due respect to the individual, but was also careful to explain how, in its view, the imposition of a duty to afford an oral hearing would often serve to promote the aims of the parole scheme itself. In a similar way, consider *L*.[190] The Court of Appeal, in this case, held that, although there is in general a duty on health authorities to provide a mental health patient with the gist of the case against her and an opportunity to make representations prior to transferral to a higher security facility, this duty will be displaced where the concern of the Mental Health Act[191] to ensure the safety of patients and staff requires an especially 'urgent'[192] transfer.

That the courts tend to view their normative task in a case of this kind in this way is clear in two main ways. Firstly, as have been seen especially through the discussion of *Osborn*[193] above, in the course of reasoning it is common for judges to draw upon these considerations of respect[194] and of the need to ensure that the aims of the administrative scheme are not unduly hampered.[195] Secondly, and perhaps more importantly, that a concern to ensure respect for the autonomy of the individual is a major concern of the courts in these cases is clearly reflected in the *kinds of legal duty* to which the courts give effect therein. The important point, put simply, is this: the case law shows that the court will intervene to require that notice and an opportunity to make representations be given to only *certain individuals*, namely those who are the *subject* of the decision being taken. It is not the case, more broadly, that the courts will intervene in order to ensure that administrative decision-makers hear from *anyone* who has something valuable to say. This point, furthermore, is very difficult to

189 *Osborn* (n 60).

190 *L* (n 7).

191 Mental Health Act 1983.

192 *L* (n 7), [25].

193 *Osborn* (n 60).

194 See also *Doody* (n 130), 565; *L* (n 7), [77]; *R (Wright & Others) v Secretary of State for Health* [2009] UKHL 3, [2009] 1 AC 739, [34].

195 See also discussion of *L* (n 7) above.

explain without having recourse to the point emphasised above: that the courts, in cases of this kind, view their central normative task as being the protection of the individual against disrespectful treatment.

This argument is highly abstract and it is helpful to concretise it more through discussion of an example. Take, again, *Osborn*.[196] As explained above, the Supreme Court in this case concluded that the Parole Board is obligated to provide individual prisoners with oral hearings when taking decisions to revoke of deny them parole when 'fairness to the prisoner requires such a hearing in the light of the facts of the case and the importance of what is at stake.'[197] What is clear, however, is that the prisoner who is the *subject* of the decision is the *only* individual which the courts will regard the Parole Board as being obligated to hear from. Imagine, for example, that prior to release a prisoner speaks at length with a fellow inmate about her intentions relating to release. Imagine further that on being released the prisoner fails to comply with the terms of his licence and the Parole Board therefore becomes required to make an assessment of whether she ought to be recalled to prison on the basis that she lacks intention to comply with her licence. In the course of making that decision, the Parole Board would clearly benefit from hearing from the inmate with which the prisoner had spoken. It is also clear, however, that no duty to afford a hearing to this inmate would arise in such a case. The courts would not compel the Parole Board to provide notice to the inmate that a decision about *her fellow prisoner* was to be taken, nor to provide her with an opportunity to make representations on the matter.

This is a basic point which is very difficult to explain from a perspective which focuses solely on the interests of the public. This prisoner, in particular, clearly has something of value to contribute; the likelihood that the Parole Board would reach an *accurate* conclusion regarding the fate of Osborn would only be *increased* by hearing from this prisoner and this, in turn, would surely only have positive effects for *public trust*. The key to this puzzle, however, is to recognise that the courts, in adjudicating upon cases of this kind, have tended to view their normative task centrally in terms of ensuring the respectful treatment of the individual about whom the relevant decision is being taken.

196 *Osborn* (n 60).

197 Ibid, [2].

In those procedural fairness cases which arise in the context of a statutory provision which confers a power on an administrator to make a decision about how some *individual* is to be treated the courts, then, have tended to view their normative task in a particular way. Something similar is true of the courts' *legal* task. As the discussion above makes clear, more particularly, in cases of this kind there is a clear and consistent tendency on the part of judges to speak of the legal relationship in issue as being one which is characterised by individual right-duty correlativity. That is, the courts have tended to speak of themselves as being tasked with determining the content of the rights which the *individual* holds in relation to the administrative decision-maker.

The third important point which flows the discussion above, however, is that not every procedural fairness challenge arises in the context of a statutory power of the same kind. Furthermore, it is also clear that, where a procedural fairness challenge arises in the context of a statutory provision other than one which confers a power to take a decision about how some individual is to be treated, the courts have a much settled idea about what the normative and legal structures in play are. This is most clearly illustrated by the Supreme Court's judgment in *Moseley*.[198] As explained, Lords Wilson and Reed in that case adopted very different understandings of the normative and legal structures in play when the court is faced with a procedural fairness challenge in the context of an administrative scheme which places an administrative decision-maker under a statutory duty to run a public consultation exercise. Thus, on the one hand, for Lord Wilson, the court's normative task was to determine how best to promote the common law value of democracy or public participation and thereby to determine the content of the legal relationship which subsists between an administrator and the public at large.[199] Whereas, on the other hand, for Lord Reed, the role of the courts was to promote the normative values underlying, and determine the legal relationship embedded in, the logic of the administrative scheme itself.[200]

B. The Utility of the Anatomical Approach & Its Distinctiveness from a 'Protean' Understanding of Procedural Fairness

198 *Moseley* (n 60).

199 Ibid, [24].

200 Ibid, [38].

Taken collectively, these three implications provide an explanation of the procedural fairness case law which captures in a structured and helpful way the various kinds of legal and normative complexity with which judges must grapple therein. This final section of the chapter aims to illustrate this by offering some reflections on the difference between the understanding of procedural fairness these implications combine to produce and an understanding of procedural fairness which emphasises merely that it is a 'protean concept.'[201]

The first matter in need of discussion here concerns what it would mean to embrace an understanding of procedural fairness which emphasises merely that it is protean. 'Protean' is defined in the Cambridge dictionary as 'easily and continuously changing.' A protean account of procedural fairness would, accordingly, emphasise the context-dependent nature of the principle. It would, more particularly, suggest that the role procedural fairness plays in a case simply depends on the particular set of facts in issue, and the detail of the statutory scheme in relation to which those facts arise. This way of thinking about the nature of procedural fairness has had an important influence in the case law and the literature. Thus, for instance, in an oft-cited passage[202] in *Moseley*,[203] Lord Wilson opined that 'fairness is a protean concept, not susceptible of much generalised enlargement,'[204] Jason Varuhas has commented on the courts' use of the 'usefully protean blanket of fair procedure'[205] as a way of evading the strictures of *Wednesbury*[206] and MC Harris has explained how a 'protean idea

201 Ibid, [24].

202 Drawn on in, for example, *R (T) v Trafford MBC* [2015] EWHC 369 (Admin), Official Transcript; *R (Morris) v Rhondda Cynon Taf CBC* [2015] EWHC 1403 (Admin), (2015) 18 CCL Rep 550; *Keep Wythenshawe Special Ltd v University Hospital of South Manchester NHS Foundation Trust* [2016] EWHC 17 (Admin), (2016) 19 CCL Rep 19.

203 *Moseley* (n 6).

204 Ibid, [24].

205 Varuhas (n 151), 144.

206 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

of "fairness"'[207] has come to 'underpin Anglo-Australian administrative law in the area of the hearing rule of natural justice.'[208]

The second important point to be made, however, is that it has been pointed out that 'there are dangers' in thinking of review of decision-making processes exclusively in terms of 'a flexible notion of overarching fairness.'[209] Thus, for instance, the Court of Appeal in *L* explained that:

> A... danger of emphasising flexibility and saying no more is that to do so may lead to a modern version of Sir William Wade's nightmare of a Tennysonian "wilderness of single instances"... [To do so would] risk obscuring the overarching principle or stating it at a level of generality which is not of use as a practical tool to decision-making. The result could be undue uncertainty and unpredictability.[210]

An understanding of procedural fairness which emphasises that it is merely 'protean,' in other words, is problematic for two, closely related, reasons. Firstly, such a way of thinking is *impractical*; it fails to help judges, scholars and students to understand the difficulties which arise in a case and provide them with a useful framework through which they can approach those issues. Secondly, and consequently, such a way of thinking inevitably carries with it certain normative risks. Because, in particular, it fails to provide courts with a general framework which helps them to identify the contentious issues and to guide their search for answers, a 'protean' understanding fails to supply legal certainty and creates the risk that different judges will approach similar issues in from different directions.

The third important point which ought to be stressed, however, is that, while the understanding of procedural fairness which the three implications drawn out in the previous section combine to produce shares an important commonality with a protean approach in that it emphasises the importance of context, and especially statutory context, in the application of procedural fairness, it avoids collapsing into this 'Tennysonian wilderness of single

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207 MC Harris, 'Fairness and the Adversarial Paradigm: An Australian Perspective' [1996] PL 508, 525.

208 Ibid, 526.

209 *L* (n 7), [72].

210 Ibid.

instances.'[211] Indeed, it is an inherent part of the argument developed above that there *is* general structure to be found in the case law on procedural fairness and that this structure is capable of providing valuable guidance to judges and students of administrative law.

There are two more particular senses in which this is so. Firstly, it has been argued that where a procedural fairness challenge arises in the context of a statutory power of individualised decision-making the normative and legal structures in play are largely settled; the courts tend to view their normative task as being that of ensuring that the individual is treated with respect in a way which also accommodates the aims of the administrative scheme, and their legal task as being that of determining the content of the legal relationship which persists between decision-maker and the individual who is the subject of the relevant decision. Recognition of this is both important and helpful because it gives meaningful guidance to judges as to how to structure their inquiries in cases of this kind and helps students of administrative law to understand the difficulties with which the judges grapple in such cases. Secondly, even in cases, such as *Moseley*, in which the legal and normative structures in play are not settled, the anatomical approach for which this thesis argues provides an ordered set of inquiries by which judges and scholars can set about thinking about how to construct an approach to resolving such cases. They direct us, in particular, to think carefully about the nature of the legislative provisions which sit at the background to the case, about the values and interests which it is the courts' responsibility to protect and about the nature of the legal relationships which are in issue.

4. Conclusion

By way of concluding this chapter, it is helpful to offer some reflections on the relationship between the arguments developed herein and the broad and important question which this thesis set out to explore: how should we approach the development of an understanding administrative law?

211 Ibid.

As explained in the introductory chapter, one particular kind of approach – an approach which has been termed 'monism'– has had an important influence in administrative law. A scholar making use of this approach would seek to isolate a singular 'organising concept'[212] from which the legal area can be seen as flowing. The arguments developed in this chapter continue to demonstrate why administrative law is not a legal area which is amenable to this kind of analysis; the basic legal and normative components in play in administrative are both complex and varied in a number of different senses and a monistic approach to the material, such as that embodied in the public interest conception, fails to engage sufficiently with this complexity.

By contrast, this thesis argues in favour of a second kind of approach - an anatomical approach – which would pull administrative law apart, examine carefully the nature of the basic legal and normative structures in play, and use the information one gains to construct understandings of the doctrines within it. The previous chapter sought to demonstrate that, when we pull administrative law apart in this way, we quickly come to see that its basic legal and normative components are both complex and varied. This chapter, further, has been a first attempt to show that there is great utility in making use of this approach to the subject. Taking apart the procedural fairness case law, it has been argued, reveals a great deal which is important about the doctrine and helps us to construct a better idea of the legal and normative complexities with which the judges must grapple in giving effect to it.

212 Forsyth (n 8), [27].

Chapter 5

Legitimate Expectations

This chapter now turns to the second of three case studies through which this thesis aims to demonstrate the utility of taking an anatomical approach to administrative law. Its focus is on a second central ground of review: legitimate expectations. Like chapter 4, this chapter aims to show two main things in relation to this ground. Firstly, that the 'public interest conception' fails to provide a way of thinking about legitimate expectations which adequately captures the legal and normative complexities with which judges must grapple in giving effect to this doctrine. Secondly, that by taking an anatomical approach to the legitimate expectation case law, and exposing and thinking carefully about the basic legal and normative structures in play therein, it becomes possible to construct an explanation which better succeeds in capturing these complexities.

The chapter will be divided into three parts. The first offers an introduction to both the legitimate expectation case law and its relationship with the public interest conception. This part will be further divided into three sections. The first and second will discuss the early 'procedural' case law in which the language of legitimate expectations was invoked and the development of 'substantive legitimate expectations'[1] in English law in the landmark *Coughlan*[2] judgment respectively. The third will then discuss some of the struggles academics and judges have had in explaining the nature and operation of this ground of review. Two main matters will be discussed here. Firstly, it will be explained how, in the years immediately following the *Coughlan* decision, broad concepts, compatible with the public interest conception, such as 'abuse of power'[3] and 'good administration'[4] were drawn upon routinely to explain legitimate expectations but that, in recent years, there is coming to

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1 See for example Paul Craig & Soren Schonberg, 'Substantive Legitimate Expectations after *Coughlan*' [2000] PL 564.

2 *R v North & East Devon Health Authority, ex parte Coughlan* [2001] QB 213 (CA).

3 See for example ibid, [61]; *R v Secretary of State for Education & Employment, ex parte Begbie* [2000] 1 WLR 1115 (CA), 1130-1131.

4 See for example Soren Schonberg, *Legitimate Expectations in Administrative Law* (OUP 2000), 25.

be both decreasing satisfaction with these explanations[5] and an explicit recognition that legitimate expectations is a problem area for the public interest conception. Secondly, much of the recent case law and literature on legitimate expectations has been characterised by, what can be termed, a 'move towards plurality.' Partially as a result of the dissatisfaction with the earlier explanations, a number of judges and scholars have begun[6] to explore the possibility that the legitimate expectation case law is best explained as consisting of clusters of case in which distinct legal doctrines are in operation.

Part 2 will then turn once again to the anatomical approach for which this thesis argues. It will, in particular, engage in an exercise in pulling apart the legitimate expectation case law and examining the detail of the basic normative and legal structures in play therein. The core argument developed here will be that, like the procedural fairness case law, there are three core senses in which these basic structures are both complex and varied in ways not captured by the public interest conception. Firstly, the principle of legitimate expectations interacts with administrative schemes of different kinds. Secondly, the courts intervene, by way of the principle of legitimate expectations, in order to protect an array of normative values and interests. Thirdly and finally, the legitimate expectations case law is concerned with legal relationships of different kinds.

Part 3 will then seek to draw out the main implications for how we should understand legitimate expectations which flow from the exercise in deconstructing the case law undertaken in part 2. The argument developed here will be that, by pulling apart the legitimate expectations case law and thinking carefully about the legal and normative structures in play, we begin to see that there are at least four distinct clusters of legitimate expectation case, marked out by the fact that they share certain factual, normative and legal hallmarks. These categories of case can be termed the 'failure to apply policy to an individual' cases,[7] the 'directly communicated assurance' cases,[8] the 'change of policy direction at the expense of

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5 See for example Jack Watson, 'Clarity and Ambiguity: A New Approach to the Test of Legitimacy in the Law of Legitimate Expectations' (2010) 30(4) LS 633.

6 Although note that there were early attempts to separate distinct doctrines out from the legitimate expectation case law such as Richard Clayton, 'Legitimate Expectations, Policy and the Principle of Consistency' (2003) 62 CLJ 93.

7 See for example *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245.

8 See for example *Coughlan* (n 2).

a group' cases[9] and the 'public procedural promise' cases[10] respectively. By carving out these categories of case and thinking carefully about each in turn, it will be argued, it becomes possible to develop a clearer understanding of when courts will intervene on the basis of legitimate expectations to hold an administrative decision-maker to its words. The discussion in part 3 will be divided into five sections. The first four will each be concerned with one of the categories of case which it is argued flow out from the exercise in deconstructing legitimate expectations. The fifth will finally offer some reflections on what the arguments developed in this chapter suggest about the 'move towards plurality' discussed in part 1.

1. Introducing Legitimate Expectations & Its Relationship with the Public Interest Conception

This chapter, then, is primarily an exercise in demonstrating how, by making use of an anatomical approach to the legitimate expectation case law, it becomes possible to construct an explanation of legitimate expectations which captures the various complexities with which the judges grapple therein. It is, however, important to proceed slowly and to begin with a more basic introduction to legitimate expectations. Three main matters, in particular, ought to be discussed by way of introduction: the early 'procedural' case law, the development of the concept of substantive legitimate expectations in English law and the struggles which judges and scholars have had in finding a way of explaining the nature of judicial intervention on this ground.

A. The Early 'Procedural' Case Law

9 See for example *R (Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755, Official Transcript.

10 See for example *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin), [2007] Env LR 29.

The first point to be made is that the earliest case law in which the language of legitimate expectations was invoked – *Schmidt*,[11] *Liverpool Taxi Fleet*,[12] *Ng*,[13] *Khan*,[14] *O'Reilly*[15] - share an important similarity: they are all cases in which the idea of legitimate expectations was invoked in the course of justifying the imposition of a duty on an administrative decision-maker to follow some particular *process* in the course of taking a decision. Namely, by affording to some individual or organisation notice that a decision was to be taken and an opportunity to make representations.

Two examples of such cases will suffice. First, consider *Ng*.[16] The government of Hong Kong had offered a public assurance that illegal entrants from Macau would not be deported without their being given an opportunity to explain the individual circumstances of their case.[17] When a deportation order was issued in relation to Ng without him being afforded such an opportunity the principle of legitimate expectations was invoked by the Privy Council as the basis of its conclusion that the order was unlawful. The court, accordingly, accepted the applicant's argument that:

> ... a person is entitled to a fair hearing before a decision adversely affecting his interest is made by a public official or body, if he has a "legitimate expectation" of being accorded such a hearing.[18]

By way of a second example, consider *Khan*.[19] This case concerned a policy circular issued by the Home Secretary purporting to identify four criteria which would be used for the purpose of determining whether a child should be permitted to enter the UK for the purposes

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11 *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 (CA).

12 *R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators Association* [1972] 2 QB 299 (CA).

13 *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 (PC).

14 *R v Secretary of State for the Home Department, ex parte Khan* [1984] 1 WLR 1337 (CA).

15 *O'Reilly v Mackman* [1983] 1 AC 237 (HL).

16 *Ng* (n 13).

17 Ibid, 634.

18 Ibid, 636.

19 *Khan* (n 14).

of adoption.[20] The Home Secretary failed to apply this policy in relation to Khan who sought to bring his nephew into the UK for this purpose, and whose case met the four relevant criteria. Again, the Court of Appeal invoked the notion of legitimate expectations in the course of justifying recognition of a duty on the part of the Home Secretary to afford to Khan notice and an opportunity to make representations prior to departing from the terms of the published policy.[21]

There are broadly two different ways of thinking about these cases. According to one approach, these cases are best understood, not as legitimate expectation cases at all[22] but, as cases in which the courts developed and deployed the principle procedural fairness. This way of thinking, for example, is reflected in the fact that a number of leading textbooks[23] continue to locate these cases in their chapters on procedural review. According to a second approach, these decisions are best understood as cases in which the courts did two things. Firstly, began to develop a new ground of review – legitimate expectations – the function of which was to provide some kind of protection to those injured when a public authority departed from its word. Secondly, affirmed that the courts, in giving effect to this principle, could provide this protection in the form of imposing a procedural requirement on the public authority.

B. The Development of 'Substantive Legitimate Expectations'

Regardless of how these early procedural cases are best conceptualised, it is certainly the case that judicial recognition of the possibility that the courts could provide substantive protection through the concept of legitimate expectations did not crystallise for some time after these cases. Over the course of the 1980s and 1990s a number of important cases were decided in which the courts staked their positions on different sides of the line. Taylor J and

20 Ibid, 1340.

21 Ibid, 1344.

22 See especially Jason Varuhas, 'In Search of a Doctrine: Mapping the Law of Legitimate Expectations' in Matthew Groves & Greg Weeks, *Legitimate Expectations in the Common Law World* (Hart 2017).

23 See for example Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016), chapter 12.

Sedley J, in *Ruddock*[24] and *Hamble Fisheries*,[25] for instance, suggested that the option of substantively protecting an expectation was open to the court in the right case, though neither case was thought to provide circumstances appropriate for the courts to take that step. In *Richmond*[26] and *Hargreaves*,[27] by contrast, Laws J and the Court of Appeal respectively strongly opined that protection of legitimate expectations, as a matter of English law, was strictly confined to the provision of procedural protection and the application of orthodox grounds of review such as *Wednesbury*[28] unreasonableness, Hirst LJ in the latter case famously castigating Sedley J's suggestion in *Hamble Fisheries*[29] to the contrary as constitutional 'heresy.'[30] There were also a series of important articles written in this time period by such academics as Paul Craig[31] and Christopher Forsyth[32] encouraging the courts to embrace the possibility of substantively protecting expectations.

This invitation was finally accepted by the Court of Appeal in its landmark decision in *Coughlan*.[33] Miss Coughlan was a severely disabled woman whose local health authority had promised her that if she agreed to relocate to a residential care facility known as Mardon House she would have a 'home for life'[34] there. The authority, on later forming the view that the continued operations of Mardon House were no longer economically viable, took the decision to close the facility. Miss Coughlan challenged the decision to close Mardon House

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24 *R v Secretary of State for the Home Department, ex parte Ruddock* [1987] 1 WLR 1482 (QB).

25 *R v Ministry of Agriculture, Fisheries & Food, ex parte Hamble Fisheries Ltd* [1995] 1 CMLR 533 (QB).

26 *R v Secretary of State for Transport, ex parte Richmond-upon-Thames LBC (No 1)* [1994] 1 WLR 74 (QB).

27 *R v Secretary of State for the Home Department, ex parte Hargreaves* [1997] 1 WLR 906 (CA).

28 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

29 *Hamble* (n 25).

30 *Hargreaves* (n 27), 921.

31 See especially Paul Craig, 'Legitimate Expectations: A Conceptual Analysis' (1992) 108(1) LQR 79. See also Paul Craig, 'Representations by Public Bodies' (1977) 93 LQR 398.

32 Christopher Forsyth, 'The Provenance and Protection of Legitimate Expectations' (1988) 47(2) CLJ 238

33 *Coughlan* (n 2).

34 Ibid, [1].

on a number of grounds including breach of her legitimate expectation, an argument which the Court of Appeal accepted. Most importantly, for present purposes, Lord Woolf took the opportunity presented by *Coughlan* to put beyond any doubt that it was open to a court, in hearing a legitimate expectation case, to go beyond protecting that expectation by imposition of a duty to afford notice and an opportunity to make representations, and to provide substantive protection. The Court of Appeal did this, in *Coughlan*, by affirming a quashing order preventing the local authority from closing Mardon House.[35]

Since the *Coughlan* decision, case law and literature on substantive protection of legitimate expectations has proliferated. It seems fair to say that the focus has largely been on two legal questions which the courts are seen as having to determine in any given legitimate expectation case:[36] firstly, what an applicant must show in order to convince the court that she has a 'legitimate expectation,' secondly, if the applicant succeeds in showing this, what level of the protection the court should afford to the expectation.

The case law and literature collectively identify a number of important factors which are said to be helpful in determining the answers to these questions. There is little to be gained, for present purposes, from engaging in a detailed discussion of all of these factors and so the discussion which follows will be, for the most part, brief. That said, it is necessary to introduce a small handful of these factors in a little more detail because they will be drawn on considerably in the later parts of the chapter.

In terms of the first question – has the applicant demonstrated that she has a 'legitimate expectation?' – four considerations have shown themselves to be particularly important. Firstly, the courts have recognised that there are a number of different ways in which a substantive legitimate expectation can arise.[37] Two common possibilities are that the applicant has received some kind of differently communicated assurance from the

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35 Ibid, [4].

36 See for example *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453 and *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32, [2012] 1 AC 1 both of which were approached by the courts in this way.

37 See for example Craig and Schonberg (n 1). Note also that the line between a substantive promise and a procedural promise is not always clear. See for example *R (Ansar) v Secretary of State for the Home Department* [2014] EWHC 4361 (Admin), Official Transcript which concerned a promise to determine an application by a particular date. See further Philip Sales, 'Legitimate Expectations' (2006) 11(2) JR 186.

administrative decision-maker to the effect that she will be treated in some way,[38] or that the authority has issued a general statement of policy to the effect that it will follow some course of conduct.[39] Alternatively, however, the courts have also recognised that legitimate expectations may arise as a result of a long-standing non-verbal practice, on the part of an administrator.[40] Secondly, the courts pay close attention to the *clarity* of the relevant assurance or practice.[41] Thus, in an oft-repeated passage in *MFK*[42] the Court of Appeal opined that a legitimate expectation will only arise as a result of an assurance being communicated, or a policy being stated, when the representation is made in terms which are 'clear, unambiguous and devoid of relevant qualification.'[43]

The third and fourth factors warrant a little more explication because they are important to the discussion below. The third concerns the necessity, on the part of the applicant, of showing that she had *knowledge* of the relevant assurance, policy or practice at the time of departure. A handful of early cases suggested that knowledge was *not* a necessary requirement of a legitimate expectation.[44] This line of reasoning provoked a considerable amount of criticism in the literature.[45] To say, it was argued, that an applicant could have a legitimate expectation of something of which she was not aware was to unrealistically expand

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38 See for example *Liverpool Taxi Fleet* (n 12) for an early case.

39 See for example *Ng* (n 13) for an early case.

40 The classic cases are *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) and *R v Inland Revenue Commissioners, ex parte Unilever Plc* [1996] STC 681 (CA).

41 For recent cases illustrating the importance of this requirement see for example *Keep Wythenshaw Special Ltd v NHS Central Manchester* [2016] EWHC 12, Official Transcript; *R (Karia) v Leicester City Council* [2014] EWHC 3105 (Admin), [2015] ACD 21; *R (Kucherov) v Secretary of State for the Home Department* [2014] EWHC 3749 (Admin), Official Transcript; *R (Sagar) v NHS Health Education Yorkshire & Humberside* [2014] EWHC 3696 (Admin), Official Transcript; *R (Han) v Secretary of State for the Home Department* [2014] EWHC 4606, Official Transcript.

42 *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 (CA).

43 Ibid, 1570. See also, on the clarity of practices, *R (Davies) v Commissioners for Her Majesty's Revenue & Customs* [2011] UKSC 47, [2011] WLR 2625, [49].

44 See especially *R (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744, [2005] INLR 744 and *R (Nadarajah & Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, Official Transcript.

45 See for example Clayton (n 6); Jack Watson, 'Clarity and Ambiguity: A New Approach to the Test of Legitimacy in the Law of Legitimate Expectations' (2010) 30(4) LS 633; Paul Reynolds, 'Legitimate Expectations and the Protection of Trust in Public Officials' [2011] PL 330; Christopher Forsyth, 'Legitimate Expectations Revisited' [2011] JR 429.

the notion of an legitimate *expectation*. At least partly as a result of this criticism, a more recent line of cases has suggested that this early case law is better analysed in terms of a principle requiring consistent application of policy. Thus, their Lordships in both *Lumba*[46] and *Mandalia*[47] have suggested that where an applicant seeks to argue that a public authority, in failing to apply an existing policy in relation to her case had acted unlawfully even though she had no knowledge of the policy, her argument is better analysed as being founded on the general duty, on the part of public authorities, to 'follow... published policy... unless there are good reasons for not doing so,'[48] rather than on the principle of legitimate expectations.

A fourth factor concerns the problem of the 'ultra vires representation.'[49] Put simply, the courts have tended to adhere to the position that, where a public authority offers a statement to the effect that it will provide some benefit which it lies outside its statutory powers to provide that statement will be of no effect,[50] at least as a matter of domestic administrative law.[51] It is not *legitimate*, the line of thinking goes, for any individual to expect that a public authority will behave in a way in which it lacks the legal power to behave. The extent to which ultra vires representations should have effect in English administrative law is a deeply contentious issue. Thus, on the one hand, it has been argued by some[52] that the absolute ineffectiveness of ultra vires representations logically follows from the basic features of the UK's constitution, and especially from the sovereignty of Parliament.[53] On the other,

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46 *Lumba* (n 7).

47 *Mandalia v Secrteary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546

48 *Lumba* (n 7), [31].

49 See generally Mark Elliott, 'Unlawful Representations, Legitimate Expectations and Estoppel in Public Law' [2003] JR 71.

50 See especially *Begbie* (n 3), *Rowland v Environment Agency* [2003] EWCA Civ 1885, [2005] Ch 1.

51 See further Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), article 1 of Protocol 1; *Stretch v United Kingdom* (2004) 38 EHRR 12; *Rowland* (n 50); Maya Sigron, *Legitimate Expectations Under Article 1 of Protocol No 2 to the European Convention on Human Rights* (Intersentia 2014).

52 See especially Sarah Hannett & Lisa Busch, 'Ultra Vires Representations and Illegitimate Expectations' [2005] PL 729.

53 See especially Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (Liberty Fund 1982) reprint of (8th edn, MacMillan 1915); William Wade, 'The Basis of Legal Sovereignty' (1955) 13(2) CLJ 172; *Ellen Street Estates v Minister of Health* [1934] 1 KB 590 (CA); *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (PC).

however, other scholars[54] has emphasised the unfairness in which such an absolute rule can result for an individual who has detrimentally relied on an ultra vires representation.

A vast body of case law and literature, then, has amassed on the question of what an applicant must show in order to establish that she has a legitimate expectation. In relation to the second core question– what level of protection should the courts afford? – two main points fall to be made. The first is that the courts have continued to recognise since *Coughlan* the possibility that they may elect to protect a legitimate expectation by holding an administrative decision-maker to the precise terms of their representation.[55] Indeed, a considerable body of case law and literature has amassed on the question of the 'standard of review'[56] by which the court ought to set about determining whether a public authority should be held to its assurance.[57]

Secondly, however, it ought also to be noted the courts have also recognised that there are ways of meaningfully and substantively protecting legitimate expectations short of regarding an administrative decision-maker as bound to abide by the precise terms of its assurance. One possibility, for instance, involves placing the administrative decision-maker under a duty to *take into account* the fact that it has generated a legitimate expectation in the applicant and to demonstrate that it has given close consideration to the possible ways in which it could go about mitigating the harms of disappointment. This option was utilised by the Court of Appeal in *Bibi*.[58] A local housing authority has promised the applicant and his family that it would provide them with permanent housing within eighteen months. When the housing authority later withdrew from the promise, placing the family towards the bottom of its priority list, the applicant challenged the decision on the basis of a failure to comply with the principle of legitimate expectations. The Court of Appeal concluded that the appropriate way to protect the family's legitimate expectation was by emphasising that the housing authority was under a legal duty to 'properly take into account'[59] the legitimate expectation and by

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54 See especially Craig (n 22), chapter 22; Yasser Vanderman, 'Ultra Vires Legitimate Expectation: An Argument for Compensation' [2012] PL 85.

55 *Paponette* (n 36).

56 A term used in Craig (n 22), chapter 22.

57 See especially *Nadarajah* (n 44); Mark Elliott, 'Legitimate Expectations and the Search for Principle: Reflections on *Abdi & Nadarajah* [2006] JR 281.

58 *R (Bibi) v Newham LBC* [2001] EWCA Civ 607, [2002] 1 WLR 237.

59 Ibid, [51].

referring the decision as to where to place the Bibi family on its housing priority list back to the authority with directions to consider carefully the 'weight [which] should be given to the fact the promises were made.'[60]

A second possibility has received relatively little attention in the literature[61] but has played an important role in the case law. The basic point this: there may be, in any given case, certain 'midway' options available to a public authority which would serve to provide some comfort to the individual short of fulfilling the relevant assurance in full. The courts, importantly, have stressed on a number of occasions that it may be possible for a public authority to fulfil the requirements of the principle of legitimate expectations by making use of one of these 'midway' options.

Two examples of this possibility are particularly illuminating.[62] The first is *Coughlan*[63] itself. The issue which the Court of Appeal was seen as facing in this case is often thought of in rather 'all-or-nothing' terms; the court could decide that, in failing to fulfil its promise to the applicant in full the local authority had acted unlawfully, or that the authority was free to depart from its representation as it sought fit. The Court of Appeal however, clearly did not think of the issue in this way. Take, for instance, the following little-noted passage from Lord Woolf's judgment:

> Here... we do not know the quality of the alternative accommodation and services which will be offered to Miss Coughlan. We cannot prejudge what would be the result if there was on offer accommodation which could be said to be reasonably equivalent to Mardon House.[64]

The Court of Appeal in this passage, importantly, recognises the possibility that the local authority could fulfil the legal requirements of the principle of legitimate expectations by making use of a 'midway option.' That is, that there might have been a route open to the local

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60 Ibid, [50].

61 For an exception see Iain Steele, 'Substantive Legitimate Expectations: Striking the Right Balance?' (2005) 121 LQR 300.

62 See also *Bibi* (n 58), [59] where the Court of Appeal clearly envisages the possibility that the principle of legitimate expectations might require the local housing authority to provide 'cash or other aid' to the disappointed family.

63 *Coughlan* (n 2).

64 Ibid, [89].

authority, short of delivering to Miss Coughlan the precise terms of what she was promised, which would still constitute lawful action; namely the arrangement for Miss Coughlan, on closing Mardon House, of reasonably equivalent accommodation in a more economically viable facility.

By way of a second example, consider further Sedley LJ's discussion of the possibility that an authority may discharge an obligation arising as a result of a legitimate expectation by offering to make a payment of monetary compensation to the relevant individual in *F&I*:[65]

> ...such a payment of money is not an anticipatory payment of damages: it is a practical means of eliminating unfairness which a policy change is otherwise going to inflict. In such a case there will be, in the end, no justiciable abuse of power.[66]

Again, Sedley LJ in this case clearly recognises the possibility that an administrative decision-maker may fulfil any requirement imposed by the principle of legitimate expectations by making use of a 'midway option': the payment of monetary compensation to an individual who will be affected by the change of position.

C. The Struggle to Make Sense of Legitimate Expectations

Having introduced both the early procedural case law on legitimate expectations, and the development of substantive legitimate expectations in English law, this part of the chapter can now turn to the final matter which warrants discussion by way of introducing legitimate expectations: the struggles that judges and scholars have had in explaining this ground. One point which emerges very clearly from the discussion above is that legitimate expectations is a relatively new ground of judicial review. Indeed, the major judgment in relation to this ground – *Coughlan*[67] - was decided only in 1999. Judges and scholars, accordingly, have had much less time to make sense of the legitimate expectation case law than they have with a ground such as procedural fairness which, as was explained in the previous chapter, has its

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65 *F&I Services Ltd v Commissioners of Customs and Excise* [2001] EWCA Civ 762, Official Transcript.

66 Ibid, [72].

67 Ibid.

origins in the natural justice case law decided in the 1800s and well before.[68] Two main matters fall to be discussed here: firstly, the relationship between the public interest conception and legitimate expectations and, secondly, a recent trend which has characterised the recent case law and literature on the subject which can be termed 'the move towards plurality.'

i. The Public Interest Conception & Legitimate Expectations

On the subject of the relationship between the public interest conception and legitimate expectations three main points fall to be made. The first is that much of the case law and the literature which immediately preceded *Coughlan* drew upon broad and 'public-regarding' normative values by way of explaining the existence and operation of legitimate expectations. Two examples of this discourse are particularly illuminating. First, consider Soren Schonberg's explanation of the normative rationale underlying the protection of legitimate expectations in 2000:[69]

> Administrative power is more likely to be perceived as legitimate authority if it is exercised in a way which respects legitimate expectations. Perceived legitimate authority is more efficacious because it encourages individuals to participate in decision-making processes, to cooperate with administrative initiatives, and to comply with administrative regulations.... The acceptance of principles of administrative law, which require authorities to respect legitimate expectations, is therefore not merely in the interest of individuals. It is, very much, in the interest of the administration itself.[70]

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68 See for instance *Bagg's Case* (1615) 11 Co Rep 93b; *R v University of Cambridge* (1723) 1 Stra 557; *Capel v Child* (1832) 2 C & J 558.

69 Soren Schonberg, *Legitimate Expectations in Administrative Law* (OUP 2000). Note this is one of only a handful of books specifically dedicated to the subject of legitimate expectations. For others see Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Bloomsbury 2000) and, more recently, Matthew Groves & Greg Weeks, *Legitimate Expectations in the Common Law World* (Hart 2017).

70 Ibid, 25.

According to this explanation, the rationale underlying judicial protection of legitimate expectations should be seen as lying in it propensity to improve 'good administration.'[71] Legitimate expectations, in other words, ought to be seen as normatively grounded in a concern, not to protect the individual against unfairness but, to preserve trust in administrators and therefore their effectiveness in implementing administrative schemes.

Such ideas of 'good administration,'[72] and also of 'abuse of power,'[73] were invoked often in the case law and the literature which immediately followed the *Coughlan* decision. The second important point to note, however, is that there has been in more recent years decreasing satisfaction with explanations of legitimate expectations which are grounded in such broad concepts.[74] This sense of dissatisfaction can be seen in both the case law and the literature. Laws LJ in *Begbie*,[75] for instance, said of abuse of power that it was at base only a 'root concept or first principle'[76] and that the 'difficulty' or 'challenge'[77] in reality lay in the problem of 'translating [that idea] into hard clear law.'[78] In a similar way, Paul Reynolds has forcibly argued that 'principles of fairness, abuse of power and good administration'[79] 'sit at such a high level of abstraction'[80] 'to be of any use in 'delimit[ing] the doctrine's scope... [or] offer[ing] practical guidance [to a judge] actually dealing with a legitimate expectation case.'[81]

The third noteworthy point is that there has been a clear sense of recognition in some of the recent literature that the legitimate expectation case law poses a particularly significant

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71 Ibid, 24.

72 See especially *R v Inland Revenue, ex parte Preston* [1985] AC 835 (HL), [71]; *Nadarajah* (n 44), [68].

73 See especially *R (Reprotech) v East Sussex CC* [2002] UKHL 8, [2003] 1 WLR 348, [34].

74 See for example citations at (n 45).

75 *Begbie* (n 3).

76 Ibid, 1130.

77 Ibid.

78 Ibid.

79 Reynolds (n 45), 352.

80 Ibid, 332.

81 Ibid.

problem for the public interest conception as a way of thinking about administrative law. This is particular evident in Jason Varuhas' recent contribution to the subject of legitimate expectations.[82] As has been emphasised in earlier chapters, one of Varuhas' major contributions to the administrative law discourse has been the articulation of the 'public interest conception,' a way of thinking Varuhas thinks has been 'dominant'[83] since the procedural reforms of 1977.[84] Varuhas has, furthermore, drawn on the public interest conception as the basis from which to make certain practical arguments such as that there is no room for the courts to make use of proportionality in the purely domestic administrative law context.[85] On the subject of legitimate expectations, however, Varuhas' contribution is markedly different. Put briefly, Varuhas' argument is that, when we look closely at the legitimate expectation case law, we see two core things. Firstly, that many of the cases in which the language of legitimate expectations has been invoked can be straightforwardly explained by reference to more traditional or 'ordinary grounds of review'[86] such as procedural fairness[87] and rationality.[88] Secondly, that when strip all of these cases away we are left with a 'paradigm case'[89] of legitimate expectations. This paradigm case, for Varuhas, is the case in which 'an authority makes an express premise, assurance or undertaking to an individual or group of individuals that the authority will act or omit to act in some way.'[90] Importantly, the courts concern in this case for Varuhas is:

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82 Varuhas (n 22). See also Jason Varuhas, 'Taxonomy and Public Law' forthcoming in Mark Elliott, Jason Varuhas & Shona Wilson Stark, *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perpsectives* (Hart 2017) abstract available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2891890.

83 Jason Varuhas, 'Judicial Review at the Crossroads' (2015) 74(2) CLJ 215, 216.

84 Jason Varuhas, 'The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications' in John Bell, Mark Elliott, Jason Varuhas & Phillip Murray, *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016)

85 Jason Varuhas, 'Against Unification' in Mark Elliott & Hanna Wilberg, *The Intensity and Scope of Substantive Review: Traversing Taggart's Rainbow* (Hart 2015).

86 Varuhas (n 22).

87 Ibid.

88 Ibid.

89 Ibid.

90 Ibid.

> ...that an authority should stand by its word, and this concern is distinct from that underpinning other grounds of review. It is the failure to stand by its promise, which would reasonably induce individuals to rely and found an expectation that the promised conduct will be undertaken, which afford the normative and legal ground for judicial intervention so as to prevent the authority from reneging on its commitment.[91]

For Varuhas, in other words, at the heart of the 'paradigm' legitimate expectation is a concern to protect the *individual*. Specifically, to protect her against the harms of detrimental reliance. The core of legitimate expectations, then, is coming to be recognised as evading analysis from the perspective of the public interest conception.

ii. The Move Towards Plurality

In light of the concerns discussed in the previous section, much of the recent case law and literature has been characterised by a particular trend. This trend, which can be aptly labelled 'the move towards plurality,' seeks to emphasise that it is possible to carve out, from the mass of legitimate expectation case law, distinct clusters of case characterised by the fact that they share certain distinct legal and normative features. The move towards plurality, in other words, encourages us not to think in terms of a monolithic 'doctrine' of legitimate expectations but to recognise that the courts, in giving effect to this principle, are performing different tasks.

This move towards plurality can be seen at two different levels. At the specific level, the idea, alluded to above, that there is a distinct 'principle of consistency'[92] in operation in the legitimate expectation case law is quickly gaining the status of orthodoxy.[93] Thus, as explained, their Lordships in two important Supreme Court decisions - *Lumba*[94] and

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91 Ibid.

92 Clayton (n 6).

93 See for example Mark Elliott & Jason Varuhas, *Administrative Law* (5th edn, OUP 2016), chapter 6.

94 *Lumba* (n 7).

Mandalia[95] - suggested that where an applicant seeks to argue that a public authority, having articulated a generalised policy, is obligated to apply that policy to the facts of her case her argument should be understood in terms, not of legitimate expectations but, of a requirement that public authorities 'follow... published policy... unless there are good reasons for not doing so.'[96] The speed with which this way of thinking is coming to be recognised as orthodox is well illustrated by the *Project Management Institute* case. When heard in the Administrative Court,[97] the applicant's argument was framed in legitimate expectations terms. By the time, however, that the case reached the Court of Appeal[98] the argument had been reframed so as to invoke the *Lumba* principle.

At a more general level, a number of recent attempts to comprehensively explain the principle of legitimate expectations and the case law in which that principle is invoked have proceeded by attempting to divide the case law up into distinct strands. One example of such an attempt has already been discussed: Jason Varuhas' attempt to 'map'[99] the legitimate expectations case law. Two further examples are particularly worthy of note. The first is Rebecca Williams' recent argument to the effect that there is not one 'doctrine' of legitimate expectations but 'multiple doctrines.'[100] Williams more particularly argues that close analysis of the case law shows that there are three distinct types of legitimate expectation case - the 'almost-contract'[101] case, the responsible use of policy[102] and the 'equality/consistency'[103] case – in which the courts are making use of the idea of legitimate expectations to serve different ends. The second is Lord Carnwath's judgment in the Privy Council's decision in

95 *Mandalia* (n 47).

96 *Lumba* (n 7), [31].

97 *R (Project Management Institute) v Minister for the Cabinet Office* [2014] EWHC 2438 (Admin), Official Transcript.

98 *R (Project Management Institute) v Minister for the Cabinet Office* [2016] EWCA Civ 21, [2016] 1 WLR 1737.

99 Varuhas (n 22).

100 Rebecca Williams, 'The Multiple Doctrines of Legitimate Expectations' (2016) 132(3) LQR 639.

101 Ibid.

102 Ibid, 647-648.

103 Ibid, 659.

United Policyholders Group.[104] In this judgment his Lordship suggests that close analysis of the legitimate expectations case law reveals that there are, in reality, two distinct principles in operation: firstly, a principle which points against 'inconsistency in the application of policy'[105] and, secondly, the 'basic rule of law and human conduct that promises relied on by others should be kept... unless the authority can show good policy reasons in the public interest for departing from their promise.'[106]

This chapter will return to the 'move towards plurality' which is taking place in the literature and case law on legitimate expectations in part 3. Here, some reflections will be offered on the matter of what the arguments developed in this chapter suggest about the trend. Before moving on, however, it is important to say something finally on two themes, which will be important in the later discussion, which have characterised the move towards plurality.

The first such theme concerns the reason for which certain scholars have advocated a move towards plurality in understanding legitimate expectations. There is a clear sense in certain portions of the literature that the motivation behind the abandonment of a monistic account in favour of plurality is the belief that there is, at present, such a lack of predictability and consistency in the legitimate expectations case law that a wholesale change of direction is necessary. This theme can be seen, for instance, in Williams' writings. Williams 'multiple doctrines' approach is advocated largely as an *alternative* approach to resolving legal disputes and one which would amount to a considerable 'improvement on the unpredictability of the current law.'[107] Farah Ahmed & Adam Perry too have characterised the trend towards 'doctrinal disaggregation'[108] as a reflexive response to a belief that the

104 *United Policyholders Group v Attorney General of Trinidad and Tobago* [2016] UKPC 17, [2016] 1 WLR 3383 (for comment see Joanna Bell, 'The Privy Council and Doctrine of Legitimate Expectations Meet Again' (2017) 75(3) CLJ 449).

105 Ibid, [116].

106 Ibid, [118].

107 Williams (n 100), 655.

108 Farah Ahmed & Adam Perry, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73(1) CLJ 61, 62.

legitimate expectations principle is collapsing into an 'unnecessary envelope capable of being placed around intervention on any ground'[109] and one which ought to be resisted.

The second important theme which ought to be noted is that certain portions of the literature on the move towards plurality demonstrate a belief that such a move is necessary because what the courts have been doing, largely unrecognised, in certain clusters of the case law is giving effect to doctrines of *private law*, under the guise of legitimate expectations. The clearest example of this trend[110] again is Williams' writings. In, what she calls, 'almost contract' cases such as *Coughlan*[111] in which an administrative decision-maker offers a directly communicated promise to an individual Williams claims that the courts have been 'reinventing a wheel which has already been well developed in the context of private law'[112] by intervening to protect individuals who either offer something in exchange for the promise or rely to their detriment on the decision-maker's word.

To summarise, the aim of this part has been to introduce in some detail both the case law and literature on legitimate expectations. To that end, it has discussed three things: the early 'procedural' case law in which the language of legitimate expectations was invoked, the development of the idea of substantive legitimate expectations and the struggles experienced by judges and scholars to explain judicial intervention on the basis of this ground.

2. Taking an Anatomical Approach to the Legitimate Expectations Case Law

Having introduced the legitimate expectation ground in some detail, this chapter can now turn to its two major preoccupations: demonstrating the explanatory deficiencies of the public interest conception and the utility of making use of an anatomical approach to understanding this ground of review. This part of the chapter takes the first important step in doing both of these things: it engages in an exercise in pulling apart the legitimate expectation case law and

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109 Mark Elliott, 'Legitimate Expectations, Consistency and Abuse of Power: The *Rashid* Case' (2005) 10 JR 281, 283.

110 Although note also that both Varuhas (n 22) and Lord Carnwath's judgment in *United Policyholders Group* (n 104) can be understood in this way.

111 *Coughlan* (n 2).

112 Williams (n 100), 646.

examining the basic legal and normative structures which are in play. The argument developed herein will be that these structures, like those in play in the procedural fairness case law, are both complex and varied in three core senses which are simply not captured by the public interest conception. Each section of this part will discuss one of these three senses in turn.

A. Legitimate Expectations Cases Arise Against the Backdrop of an Array of Different Administrative Schemes

The first sense in which it was argued in chapter 3 that the basic components of administrative law are complex and varied is that administrative law interacts with an array of different administrative schemes. This is something which is equally true of the more specific doctrine of legitimate expectations.

The important point is this: at the background to every case will be a particular administrative scheme and the administrative decision-maker (assuming that it has acted in good faith, not for an improper purpose,[113] has ignored irrelevant considerations,[114] etc) will have changed direction on the basis that it believes its new course of conduct will better promote the aims of that scheme than sticking to the terms of its original assurance or continuing to follow past practice would. Two important points flow from this. Firstly, it will be important for the court, in any given legitimate expectation case, to have a clear understanding of both the purposes of the administrative scheme and the reasons for which the administrative decision-maker has come to the conclusion that a change of direction would better advance those purposes. Secondly, that the purposes of the relevant administrative scheme and the reasons for the administrator's change of direction will be different in every case.

A brief comparison of two cases can, in the first place, help to emphasise this point. Consider, first, *Hamble Fisheries*.[115] The background to this case was the European Union's Common

113 *Wheeler v Leicester CC* [1985] AC 1054 (HL).

114 *Wednesbury* (n 28).

115 *Hamble* (n 25).

Agricultural Policy,[116] the Sea Fish (Conservation) Act 1967[117] and the policies which the Minister for Agriculture, Fisheries and Food (MAFF) had adopted in relation to the Act. Put simply, a major function of the Common Agricultural Policy is to allocate to member states, including the UK, a fishing quota and to require said member states to lay down 'detailed rules for the utilisation of'[118] that quota. The domestic legislative scheme at the background to *Hamble Fisheries* did this in part by making it a criminal offence for a British registered vessel to fish in the sea areas surrounding the UK without a licence[119] and by publishing detailed policies identifying the circumstances in which a licence to be granted. For many years, those policies functioned in a particular way: expressed briefly, if a company wished to trawl in the North Sea there were two main ways in which it could obtain a licence. Firstly, it could apply to MAFF directly, or, secondly, it could acquire other vessels which were already licenced and transfer the licencing units over. At the time of its adoption, MAFF was of the view that this policy best promoted the aims of the background administrative scheme: an appropriate allocation of the UK's EU fishing quota. At a later stage, however, it became apparent that the existing licencing arrangements were resulting in the overfishing of pressure stock within the North Sea. MAFF accordingly altered the content of its licencing policy for the purpose of responding to this problem, in particular by removing the option to transfer licencing units over to a new vessel.

The administrative schemes which form the background to other legitimate expectation cases, however, can be very different from that in *Hamble Fisheries*. By way of a second example, consider *Badger Trust*.[120] The administrative scheme in the background of this case was constituted by two main Acts: the Protection of Badgers Act 1992[121] and the Natural Environment and Rural Communities Act 2006.[122] Section 10(2)(a) of the former conferred

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116 See especially Council Regulation (EEC) No 170/83 of January 1983 establishing a Community system for the conservation and management of fishery resources.

117 Sea Fish (Conservation) Act 1967

118 Council Regulation 170/83 (n 116), art 5(2).

119 Sea Fish (Conservation) Act 1967, s4.

120 *R (Badger Trust) v Secretary of State for the Environment, Food & Rural Affairs* [2014] EWCA Civ 1405, [2015] Env LR 12.

121 Protection of Badgers Act 1992.

122 Natural Environment and Rural Communities Act 2006.

on the Secretary of State a power to issue a licence permitting the culling of badgers 'for scientific or education purposes or for the conservation of badgers.'[123] The Secretary of State made use of s78 of the 2006 Act to transfer this power to Natural England, a statutory body established by that same Act,[124] though retained a power to issue non-binding guidance to Natural England relating to the exercise of that power.[125] In the course of responding to a bovine tuberculosis crisis in 2011, the Secretary of State directed Natural England to run a culling programme in two counties within the UK and, in doing so, set up a body known as the 'independent panel of experts' (IEP) to advise on the programme. The guidance issued to Natural England, the applicant argued, created the impression[126] that culling to other areas would not be extended without the approval of this panel. At a later stage, however, the Secretary of State indicated that the IEP would be dismantled and Natural England would extend culling to other counties. The reason for the change of direction, in other words, was that Natural England had determined that its statutory duties to conserve the badger population were better fulfilled by it departing from the Secretary of State's earlier non-binding guidance, something the Court of Appeal held that it was free to do.[127]

What the discussion of these three cases hopefully shows is that, at the background to every legitimate expectation case will be a particular administrative scheme and a particular set of reasons for which the authority has decided a change of direction is better in accordance with the aims of that scheme. Precisely because of the breadth of variety of both the schemes involved and the reasons for departure, it is difficult to say anything helpful in general terms on this matter. Having said that, one point which can be noted is that it is possible to see in the case law a few recurring broad clusters of reason on the basis of which administrative decision-makers decide to change course. Four, in particular, are worthy of mention.

Firstly, there are a handful of cases in which, at least to a large degree, the reason for which the decision-maker elects to change direction is that it has, in carving out its initial position,

123 Protection of Badgers Act 1992, s10(1)(a).

124 Natural Environment and Rural Communities Act 2006, ss1-2.

125 Ibid, s15

126 Though note that the Court of Appeal concluded that the guidance was insufficiently clear to give rise to a legitimate expectation: *Badger Trust* (n 120), [43].

127 Ibid, [44]-[46].

misinterpreted the detail of the administrative scheme. The well-known cases of *Bibi*[128] and *Begbie*[129] are both neat illustrations of this. Secondly, as illustrated by *United Policyholders Group*[130] there are also certain cases in which the reason for the change of direction is, at least in part, because the *constitution of the administrative decision-maker* tasked with implementing the relevant scheme has changed, usually due to an election. Thirdly, and relatedly, as illustrated by *Badger Trust*,[131] it is also sometimes the case that the change in direction is the result, at least partially, of the initial policy statement *coming from an authority whose statements do not bind the administrative decision-maker* and whose word the responsible authority has opted to depart from.[132]

The fourth and final category of reason is probably the most important in practice in the sense that most legitimate expectations involve a change of direction of the basis of a consideration of this kind. Put simply, in this category fall cases in which either there has been a change in the social facts, or new information has come to light about existing social facts, in a way which causes the decision-maker to rethink the justifiability of its original decision. *Hamble Fisheries*,[133] as has been seen, was a case of this kind: MAFF changed its licencing policies on the basis that new information had come to light about the effectiveness of its original policy position in preserving pressure stock. *Coughlan*[134] would also fall into this category given that the reason for the local authority's decision to close Mardon House was that it had become economically unviable.

This list of categories of reason for which an administrative decision-maker may decide to change direction is in no way meant to be exhaustive. It is hoped, rather, that it does something to further illustrate the main point which has been emphasised through this section of the chapter: that at the background to every legitimate expectation will be an administrative

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128 See for example *Bibi* (n 58).

129 *Begbie* (n 3).

130 *United Policyholders* (n 104).

131 *Badger Trust* (n 120).

132 On this see further *R (BAPIO) v Secretary of State for the Home Department* [2008] UKHL 27; [2008] 1 AC 1003 and comment in Christopher Knight, 'Expectations in Transition: Recent Developments in Legitimate Expectations' [2009] PL 15.

133 *Hamble* (n 25).

134 *Coughlan* (n 3).

scheme with a particular cluster of aims and a particular set of reasons for which the administrative decision-maker has elected to change its mind.

B. The Courts Intervene to Protect an Array of Different Values and Interests

Turning, now, to the second sense in which it was argued in chapter 3 that administrative law's basic components are complex and varied: administrative law intervenes to protect an array of different values and interests. The important point to be made here is that a similar thing is true of the legitimate expectation ground. Three more specific, but broad, points fall to be made here.

The first is that, as with procedural fairness,[135] it is certainly the case that the courts will pay close attention to and, in many cases at least, seek to accommodate the aims of the background administrative scheme and the reasons for which the decision-maker has decided to change course. Perhaps the clearest example of this is the courts' position, discussed above, to the effect that an ultra vires representation has no legal effect; the courts will not permit a public authority to go beyond the aims of the background administrative scheme by promising to do something it has no legal power to do. Another clear example of the courts striving to accommodate the aims of the administrative scheme is *Hamble Fisheries*.[136] As explained above, MAFF in this case had decided to change the content of its fishing licence policy in order to preserve pressure stock in the North Sea. The applicant in *Hamble Fisheries* was a fishing company which, in reliance on the terms of the original policy, had purchased a large vessel on the assumption that it would later be able to accumulate licencing units in relation to it and to thus beam trawl in the North Sea. It argued that MAFF could not lawfully change its policy direction without making accommodation for the legitimate expectations of companies in its position. The Court of Appeal rejected this argument:

> The minister... had to give effect to the United Kingdom's share in preserving pressure stocks in the North Sea from extinction. He was in my view entitled to draw a line as tightly around the existing fleet as could fairly be done... Fairness did not, in

135 See discussion in chapter 4.

136 *Hamble* (n 25).

> my judgment, require the perceived need for a swift limitation of North Sea beam trawling for pressure stock to be sacrificed in favour of a class wheose expectations... might well have eventually subverted the policy.[137]

The effect, in other words, of accepting the applicant's argument would be to risk wholly undermining the minister's reason for changing direction and the aims of the administrative scheme more broadly. This was something which the court was not prepared to risk by intervening to protect the expectations of the applicant.

The second point which ought to be made, however, is that there are also clearly values and interests derived from outside of the logic of the administrative scheme which the courts will, in certain contexts, intervene to protect. Three such values and interests are particularly worthy of mention. The first has already been discussed at a number of points above: 'consistency.' The classic type of case in which the courts will draw upon this value is one, such as *Nadarajah*[138] or *Khan*,[139] in which a public authority explicates a policy laying down the criteria by which it will make decisions about whether an individual should be granted a benefit, or made subject to some burden, only to fail to apply those criteria in the case of an individual. As has been explained, the idea that the courts in resolving such a case should do so by drawing on the 'principle of consistency,'[140] rather than legitimate expectations, is quickly acquiring status as orthodoxy.

A second set of interests which the courts have sought to protect via the principle of legitimate expectations are the interests of individuals who have *detrimentally relied* on an assurance or policy. Thus there are clearly cases in which the courts have intervened on the basis of legitimate expectations for the purpose of protecting some individual or group of individuals against the material harms of detrimental reliance. A clear example of this is *Patel*.[141] The background to *Patel* was the Medical Act 1983[142] which gave the responsibility for registering doctors as eligible to provide medical services within the UK to the General

137 Ibid, [59].

138 *Nadarajah* (n 44).

139 *Khan* (n 14).

140 Clayton (n 6).

141 *R (Patel) v General Medical Council* [2013] EWCA Civ 327, [2013] 1 WLR 2801.

142 Medical Act 1983

Medical Council (GMC). The GMC has initially elected to make use of this power by adopting a policy to the effect that any questions relating to whether an individual's primary medial qualification was sufficient to enable her to practice would be resolved by asking whether the qualification appeared in the World Health Organisation (WTO) Directory. In response to the uncovering of a number of system abuses,[143] however, the GMC later changed its policy to disqualify any persons whose primary qualifications 'involved a course of study undertaken wholly or substantially outside the country that awarded the [qualification.]'[144]

The problem with this was that there were a group of individuals,[145] including the applicant Patel, who, in reliance on the terms of the original policy, had incurred a substantial amount of financial expenditure enrolling on, and dedicated a considerable amount of time studying for, a long distance medical degree on the assumption that this would qualify them to practice within the UK. The question accordingly arose whether the GMC's change of direction was lawful. The Court of Appeal concluded that it was not:

> It was not open to the GMC to change its policy... without adopting some transitional provision that would cater for the case of this claimant [and others in the group]... There was considerable discussion before us as to what form that transitional provision should have taken. [Counsel for the applicant] identified three possible options: the application of the [original policy] to candidates who commenced a course included in the WHO Directory before 2006, consideration of each individual case on its merits... and delayed introduction of changes to allow affected students to plan... [The precise form of the transitional provision] should be a matter for the GMC.[146]

The principle of legitimate expectations, in other words, would intervene to protect that group of individuals who had detrimentally and substantially relied on the terms of the GMC's

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143 *Patel* (n 141), [8].

144 Ibid, [9].

145 Note that there is some difficulty identifying in the Court's reasoning which group of individuals it understood the challenge as referring to: all those individuals who had detrimentally relied on the original policy, or all of those individuals who had extracted an assurance from the GMC that the relevant long-distance learning course would be recognised.

146 Ibid, [85]-86].

original policy against material loss by placing the GMC under a legal duty to make some kind of provision to accommodate the special case of this group.

A third value or interest which the doctrine of legitimate expectations has been used to protect is closely related to detrimental reliance. It is articulately explained by Schiemann LJ in the following passage from his judgment in *Bibi*:[147]

> The present case is one of reliance without concrete detriment. We use this phrase because there is moral detriment, which should not be dismissed lightly, in the prolonged disappointment which has ensued... These things matter in public law... because they go to fairness... To disregard the legitimate expectation because no concrete detriment can be shown would be to place the weakest in society at a particular disadvantage. It would mean that those who have a choice and the means to exercise it in reliance on some official practice or promise would gain a legal toehold inaccessible to those who, lacking any means of escape, are compelled simply to place their trust in what has been represented to them.[148]

A third value or interest which the legitimate expectation ground will sometimes intervene to protect, in other words, is that of *individual autonomy.* Put simply, the idea is this: when an assurance is offered to an individual it will often be the case that the individual will plan her life on the basis that that assurance will be fulfilled.[149] The effect of later failing to deliver that content, then, will often be that of rendering the individual unable to realise her own life plans. Joseph Raz, indeed, would go further and say that resiling from a clear assurance can often amount to an 'insult'[150]; it treats the individual as an object about whom decisions can be freely made rather than as an autonomous and rational human being capable, and deserving, of deciding how herself how she wishes to live her life. It is important, as Schiemann LJ explains, that the principle of legitimate expectations safeguard individuals against harm to autonomy; the confine intervention only to cases of detrimental reliance

147 *Bibi* (n 58).

148 Ibid, [55].

149 See Joseph Raz, *The Morality of Freedom* (OUP 1986).

150 See Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009), chapter 11.

would be to fail to protect those who were not in a position to materially change their position in reliance on an assurance.

To summarise the discussion so far, then, it is clear that the courts in resolving legitimate expectations cases will consider and seek to promote a broad array of normative values and interests. Thus, cases such as *Hamble Fisheries*[151] and the ultra vires representations cases clearly illustrate the importance the courts place on promoting the aims of the background administrative scheme. Meanwhile, it is also the case that the courts clearly intervene in order to promote consistency and to protect groups of individuals against the harms of disappointed detrimental reliance[152] and damage to autonomy.[153]

This summary might be thought to paint rather a simple picture of the normative structure of the legitimate expectations case law. It might seem to set up a set of scales by which the courts seek to balance two clear clusters of values: the 'public-regarding'[154] values which underlie the statutory scheme, on the one side, and a cluster of 'individual-regarding'[155] values thought to be inherent in the common law,[156] on the other. The third main point which should be noted about the values and interests at stake in the legitimate expectation case law, however, is that matter are not this simple for at least two reasons.

The first is that the values and interests which it is the purpose of the administrative scheme to promote may not be straightforwardly characterised as 'public-regarding.'[157] The following passage from the Court of Appeal's judgment in *Bibi*[158] is a clear example of this complexity:

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151 *Hamble* (n 25).

152 *Patel* (n 141).

153 *Bibi* (n 58).

154 Varuhas (n 84), 42.

155 Ibid.

156 See especially (on the value of autonomy) Dawn Oliver, 'The Underlying Values of Public and Private Law' in Michael Taggart, *The Province of Administrative Law Determined* (Hart Publishing 1997) and (on the value of consistency or 'integrity') Ronald Dworkin, *Law's Empire* (Hart Publishing 1986).

157 Varuhas (n 84), 42.

158 *Bibi* (n 58).

> [The] applicants have been high on the list of applicants for accommodation of the type they require for some time... but then lost their place to someone else. This must have been bitterly disappointing for them. However, the allocation scheme clearly envisages that this may happen. A needy applicant may have to yield his place in the queue to people... whose housing need is even more than his.[159]

The purpose of the administrative scheme at the background to *Bibi*,[160] in other words, could not be straightforwardly described as the advancement of the *public*'s interest. Its aim, rather, was to provide a fair system by which the relative needs of *individuals* could be ranked against one another. The interests to be weighed against the 'moral detriment'[161] done to Bibi, in other words, was not a public interest but the importance of ensuring that the local housing authority diverted its limited resources to those individuals most acutely in need of them.

Secondly, there are also cases in which the value or interest which the courts have intervened to protect cannot be plausibly thought of as relating to *the individual*. One such example has already been discussed – *Patel*.[162] As explained above, the court in this case intervened to protect, not only the *individual applicant*, but the subsection of the public to which he belonged, namely that group which had enrolled on a long-distance learning course in reliance on the GMC's original policy, against the material harms associated with disappointed detrimental reliance. A stronger example again is *Greenpeace*.[163] The Administrative Court in this case held that the Secretary of State was prohibited, by the principle of legitimate expectations, from going back on an assurance offered to the *public* that it would not proceed with a policy of building new nuclear power stations without first undertaking 'the fullest public consultation.'[164] The normative basis of this conclusion was clearly not a concern to protect some interest held by, or value relating to, any specific individual. This, surely, was rather a decision designed to protect some collective interest

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159 Ibid, [45].

160 Housing Act 1996.

161 *Bibi* (n 58), [55].

162 *Patel* (n 141).

163 *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin), Env LR 29.

164 Ibid, [9].

such as maintenance of trust in the government,[165] or the public's interest in having such an important decision taken by use of rigorous process.[166]

To summarise, then, as with procedural fairness, the values and interests at stake, and which the courts seek to promote, in the legitimate expectation case law are complex and varied. Thus it has been explained that the courts in this case law are concerned both to ensure that the aims of the administrative scheme, and reasons for the public authority's change of direction, are not undermined and that certain values, commonly thought to be inherent in the common law,[167] such as autonomy and consistency, are respected. It has, furthermore, been argued that the legitimate expectation case law is not universally characterised by a normative structure whereby the courts weigh the 'public-regarding'[168] aims of the administrative scheme against the 'individual-regarding'[169] values of the common law; there are a number of factors which make matters a good deal more complex than this.

C. The Legitimate Expectations Case Law Concerns Different Kinds of Legal Relationship

The third and final sense of complexity and variety highlighted in chapter 3 concerned the variety of legal relationships with which the courts grapple in administrative law. This is a sense of complexity which also characterises the legitimate expectation case law.

A good starting point in discussing this matter is to note that there are least two types of case, within the legitimate expectation case law, in which the courts have clearly understood themselves to be adjudicating on the relationship between *the individual applicant* and the *administrative decision-maker*. That is, as adjudicating upon a relationship characterised by

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165 See further Phillip Sales & Karen Steyn, 'Legitimate Expectations in English Public Law: An Analysis' [2004] PL 564.

166 See further Denis Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedure* (OUP 1997).

167 See citations at (n 156).

168 Varuhas (n 84), 42.

169 Ibid.

Hohfeldian individual right-duty correlativity.[170] In cases within the first such category the individual applicant has been offered a tailored and directly communicated assurance to the effect that *she* will be treated in some particular way. Where facts of this kind are in issue, the courts have commonly framed the issue in terms of the 'rights' of the *individual*. Take, for instance, the following passage from Simon Brown LJ's judgment in *Baker*:[171]

> Sometimes the phrase [legitimate expectation] is used to denote a substantive right: an *entitlement* that the claimant asserts *cannot be denied him*... *the claimant's right* will only be found established when there is a clear and unambiguous representation.[172]

The clear idea underlying this passage is that, in those legitimate expectation cases where an individual applicant is able to show that she was given a 'clear and unambiguous representation'[173] the question the court will have to determine is what the content of *her* legal rights are. In a similar way, the Court of Appeal in *Capital Care*[174] clearly understood the legal relationship at stake in that case, in which the Home Secretary had offered a directly communicated assurance to the effect that they would continue to hold a licence for a four year period as that which persisted between the individual applicant and the public authority:

> The appellants have referred... to the common law doctrines of estoppel by representation and estoppel by convention... whatever the scope of those doctrines to the exercise of public functions by public authorities, they cannot confer any greater *rights on the appellants* than they might enjoy by force of the public law principles of legitimate expectation.[175]

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170 See especially Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (The Law Book Exchange 2010).

171 *R v Devon County Council, ex parte Baker* [1995] 1 All ER 73 (CA).

172 Ibid, 88 (my emphasis).

173 Ibid.

174 *R (Capital Care Services UK Ltd) v SSHD* [2012] EWCA Civ 1151, Official Transcript.

175 Ibid, [15] (my emphasis).

Again, the assumption underlying this passage is clearly that, to the extent the principle of legitimate expectation applied in the case, it functioned by conferring legal rights *on the individual applicant*.

By way of a third and final example,[176] consider the following passages taken from Stuart-Smith J's judgment in *Alasnsi*[177] in which a local housing authority offered a direct assurance to the applicant that she would retain priority homeseeker status if she accepted a housing offer:

> It is now well established that where a claimant is relying on a promise or representation by a public authority as *giving rise to a substantive right* the court will not be limited to a Wednesbury irrationality challenge.[178]
>
> It is clear... that a *person who asserts* that a promise or representation has given rise to a *substantive right* may rely on either substantive or procedural fairness.[179]
>
> It might at first blush be expected that *a claimant who asserts what amounts to a substantive right* on the basis that a public authority's representation or assurance has given rise to a situation akin to estoppel or contract would have to show reliance.... However, this is not so.[180]

Again, Stuart-Smith J in each of these passages clearly characterises the legal relationship at the heart of the case as being one which served to confer *personal* legal rights on the individual applicant.

What all of these examples illustrate it that there is a clear tendency on the part of judges to think of the legal relationship on which they must adjudicate in a case where a public authority offers a directly communicated and tailored assurance to an individual as being one which persists personally between those two parties. A second cluster of legitimate expectations cases in which the courts clearly think of the relevant legal relationship in such terms is that category of case, alluded to above, in which a public authority fails to apply

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176 See also *Rowland* (n 50), [28] and [32].

177 *R (Alansi) v Newham LBC* [2013] EWHC 3722 (Admin), [2014] PTSR 948.

178 Ibid, [26] (my emphasis).

179 Ibid, [28] (my emphasis).

180 Ibid, [32] (my emphasis).

published policy in the case of an individual. Importantly, the two leading Supreme Court has on this type of case have both expressed the legal duty placed on public authorities to give effect to published policy in such cases as being *owed to the individual applicant*. Thus consider, for instance, the following passage from Lord Dyson's judgment in *Lumba*:[181]

> The *individual has a basic public law right* to have his or her case considered under whatever policy the executive sees fit to adopt.[182]

The clear assumption underlying this passage is that, in such a case, the applicant relies on a *personal entitlement* against the public authority. In a similar way, the Supreme Court in *Mandalia*[183] opined that:

> ...*the applicant's right* to the determination of his application in accordance with policy is now generally taken to flow from a principle, no doubt related to the doctrine of legitimate expectation but free-standing... [that] "where a public authority [which] has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is a good reason not to do so."[184]

There are, then, at least two clusters of case within the legitimate expectation case law where the courts clearly understand themselves to be adjudicating on the content of the legal relationship which persists between the individual applicant and the public authority. It is important to note, however, that not every case in which the courts have intervened on the basis of legitimate expectations can be understood as concerned with a relationship of that kind. Two examples are particularly pertinent.

Firstly, consider again both *Hamble Fisheries*[185] and *Patel*.[186] As explained above, the applicants in both of these cases sought to make a similar argument: that in changing policy direction the relevant public authority was legally obligated to put in place some sort of

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181 *Lumba* (n 7).

182 Ibid, [35].

183 *Mandalia* (n 47).

184 Ibid, [29].

185 *Hamble* (n 25).

186 *Patel* (n 141).

transitional provision for the purpose of accommodating a *group* of individuals who had relied on the terms of the original policy. As is made clear from the following passage from Sedley J's judgment in *Hamble Fisheries*[187] the court, in hearing that argument, was being invited to adjudicate upon the legal relationship between that *group* of individuals and the administrative decision-maker, as opposed to the legal relationship which subsisted between *the individual applicant* and the decision-maker:

> [The applicant] puts his expectation in a broad and a narrow form. The broad expectation was the pipeline provisions would be introduced for undertakings which had acquired licences for aggregation onto a donee vessel... The narrow expectation was that on the particular facts of the applicants' case the [original policy] would continue to be applied to the applicant. The second of these expectations seems to me, with respect, untenable. If such an exemption were to be made for the applicant, it could not be made without making it for all undertakings in a similar situation.[188]

In order to resolve the dispute at the heart of *Hamble Fisheries*, in other words, the court was required to identify the content of the legal duty which MAFF owed to that group of individuals that had detrimentally relied on the original licencing policy

Secondly, the *Greenpeace*[189] case discussed above is another clear example of a case in which the legal relationship in issue could not be plausibly analysed as one which was owed to a singular individual. As explained, the court in this case concluded that the Secretary of State was dutybound to abide by its assurance that the 'fullest public consultation' would take place before pursuing a policy of building new nuclear power stations. This duty was clearly not designed to benefit one individual but is, rather, more plausibly analysed as a duty which was owed to the public as a collectivity.

To summarise this part of the chapter, then, the basic normative and legal components in play in the legitimate expectation case law, like those in play in procedural fairness and in administrative law more broadly, are both complex and varied in three core senses. Firstly, at the background to every legitimate expectation case will be an administrative regime with a particular set of purposes and an administrative decision-maker which will have changed

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187 *Hamble* (n 25).

188 Ibid.

189 *Greenpeace* (n 163).

direction for a particular set of reasons. These purposes and these reasons will be different in every case. Secondly, the courts in adjudicating upon the legitimate expectation case law engage with, and seek to promote, an array of values and interests including those interests which it is purpose of the statutory scheme to promote, values derived from outside of the scheme and both 'individual-regarding'[190] and 'public-regarding'[191] considerations. Thirdly, the courts in deciding legitimate expectations case law adjudicate upon a variety of legal relationships. Thus, as has been seen in this section, the courts think of their legal task in at least two clusters of case as being that of determining the content of the legal relationship which subsists between the individual applicant and the public authority. Importantly, however, not every case in which the legitimate expectation ground is invoked can be plausibly analysed in such terms.

3. Using the Anatomical Approach to Construct an Understanding of Legitimate Expectations

The previous part of the chapter engaged in an exercise in pulling apart the legitimate expectations case law and examining the detail of the basic legal and normative structures in play. Its core argument was that – as with the procedural fairness case law – there are three core senses in which these structures are both complex and varied in ways which are simply not captured by the public interest conception.

The pulling apart of the legitimate expectations case law in this way was an important first step in demonstrating the utility of making use of the anatomical approach in understanding legitimate expectations. This third part of the chapter now aims to take the second and final step in this regard. It engages in an exercise in drawing out some of the implications of the analysis above for how we should understand legitimate expectations. Its core argument is that this exercise is valuable because it enables us to see that, within the legitimate expectation case law, are at least four distinct clusters of case, each marked out by the fact that the cases within it share certain factual, normative and legal features. By demarcating

190 Varuhas (n 85), 42.

191 Ibid.

out and reflecting separately on these clusters of case, it is argued, we develop a clearer idea of the legal and normative complexities with which judges grapple when giving effect to the principle of legitimate expectations and the circumstances in which they will intervene to hold an administrator to its word.

The discussion in this part will be divided into five further sections. Each of the first four will be focused on a cluster of cases which it is argued emerges from the analysis above. The fifth and final section will then return again to the 'move towards plurality' discussed in part 1 above, and offer some reflections on what the analysis in this chapter suggests about that trend.

A. Category 1: Cases of a Failure to Apply Established Policy to an Individual

The first cluster of case which emerges from the analysis above is the 'case of a failure to apply established policy to an individual.' As noted above, it is quickly coming to be a matter of orthodoxy[192] in the case law and literature on legitimate expectations that this cluster of case *is* distinctive and, furthermore, is best analysed quite apart from the principle of legitimate expectations as a body of case law in which a 'principle of consistency'[193] is invoked.

Put briefly, this category of case has three main hallmarks. Its *factual* hallmark is that a public authority, tasked with making a decision about whether individuals should be granted some benefit or made subject to some burden, publicises a policy which purports to lay down the criteria by which such decisions will be taken. The decision-maker then fails to apply those criteria in the case of an individual who complains to the court. The *normative* hallmark of this case is that, as the Supreme Court recognised in *Mandalia*,[194] the main task of the court is to find a way of striking a balance between two main sets of considerations: firstly, the reasons for which the decision-maker has decided to depart from the content of the established policy and, secondly, considerations of consistency, in both of the senses

192 Reflected in, for example, Elliott & Varuhas (n 93), chapter 6.

193 Clayton (n 6).

194 *Mandalia* (n 47).

discussed above. The *legal* hallmark of this cluster of case is that, as discussed above, the courts have tended to view the legal relationship in issue in a case of this kind as that which subsists between *the individual applicant* and the administrative decision-maker.[195] That is, they have tended to understand the legal question in issue as that of what legal rights are held by the individual applicant.[196]

Having identified the main hallmarks of this variety of case, this section can now turn to the task of exploring when the courts tend to intervene in the context of such a case. Three main points fall to be made here. Firstly, the courts have tended to approach such cases through the idea that the public authority is under a prima facie duty to give effect to its published policy.[197] Thus, for instance, Lord Dyson in *Lumba*[198] opined that 'a decision-maker must follow his published policy... unless there are good reasons for not doing so.[199] Secondly, it also seems to be the case that the courts regard the prima facie weight of this duty as a very strong one. Thus, it is very difficult to find a case in which the courts, having concluded that a public authority departed from its published policy in the case of an individual, has done anything other than issue a remedial order effectively requiring the content of the policy to be applied.[200] One possible exception in this regard is *Khan*.[201] As explained above, rather than concluding in this case that the Home Secretary was obligated to give effect to the terms of the policy by allowing Khan's nephew into the UK, the Court of Appeal concluded that the Home Secretary was dutybound:

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195 Note that *PMI* (n 98) is a rather complex exception in this regard. In this case, a company was regarded as having standing to challenge an alleged failure to apply published policy in the case of a rival economic operator in determining its application for Chartered status. The important point, however, is that *PMI* concerned an unusual policy which was designed, not only to provide criteria by which applications for Royal Charter would be determined, but to confer a variety of protections on companies, such as PMI, which would be adversely affected by grant of Charter. See further discussion in chapter 3.

196 *Lumba* (n 7).

197 See Lord Carnwath's judgment in *United Policyholders* (n 104).

198 *Lumba* (n 7).

199 Ibid, [26].

200 See for example *Ng* (n 13); *Rashid* (n 44); *Mandalia* (n 47).

201 *Khan* (n 14).

> ...if he considers it desirable to operate the new policy, to afford the applicant a full opportunity to make representations why, in his case, it should not be follow.[202]

It is important to note, however, that *Khan* was a case decided before *Coughlan*[203] and thus in a time when it was unclear whether the courts could afford substantive protection to individual expectations. As a result, were the facts of *Khan*[204] to arise nowadays it seems highly likely the case would be decided by application of the *Lumba*[205] principle

The third important point which ought to be noted about the case of a 'failure to apply policy to the case of an individual' is that, where complexity arises, it usually concerns the question of whether the decision-maker has indeed departed from the terms of the policy in the case of the relevant individual. This is especially so because public authority policy may often contain criteria which are capable of being interpreted in different ways and even provisions which explicitly accommodate for the possibility of departure by providing, for example, that the criteria would 'normally'[206] apply. It is this reason, for example, that the bulk of the Court of Appeals' reasoning in both *Nadarajah*[207] and *Project Management Institute*[208] is preoccupied by such questions as whether the relevant individuals in those cases fell within the terms of the published policies, and whether the decision-maker could be said to have departed from their content.

To summarise, then, the first category of case which flows from the use of an anatomical approach to the legitimate expectation case law is characterised by three main hallmarks: it concerns the publication of generalised criteria followed by a failure to apply those criteria in the case of an individual, it requires the court to seek to accommodate the aims of the administrative scheme and considerations of consistency and the courts clearly think of their task as being that of determining the legal relationship between the individual and the

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202 Ibid, 1348.

203 *Coughlan* (n 2).

204 *Khan* (n 14).

205 *Lumba* (n 7).

206 See for example *PMI* (n 98), [9].

207 *Nadarajah* (n 44).

208 *PMI* (n 98).

decision-maker. As has been explained, by focusing on this cluster of case, we can begin to develop a clearer idea of when and how the courts intervene in relation to them. It has, more particularly been argued that the courts have recognised a strong prima facie duty to apply such policies in the case of the individual but that complexity is injected into the picture when questions as to whether authority can truly be said to have departed from its policy arise.

B. Category 2: The Directly Communicated Assurance Case

The second cluster of case which emerges from the analysis above can be referred to as the 'directly communicated assurance' case. Cases within this category, again, have three main hallmarks. Their factual hallmark is that they involve a particular kind of communication between an administrative decision-maker and an individual. The former, in particular directly communicates to the latter a tailored[209] assurance to the effect that they would be treated in some way, only to depart from that assurance at a later stage. Classic examples of directly communicated assurance cases include *Coughlan*,[210] *Bibi*[211] and *Paponette*.[212] The *normative* hallmark of this class of case is that the courts must seek to reconcile two broad sets of interest or normative consideration. On the one hand there are the aims of the administrative scheme and the reasons for which the decision-maker has opted to change direction, on the other there are considerations relating to the protection of the autonomy of the individual who has received the representation and likely made her life plans on the basis of it, and the safeguarding of her against the harms of detrimental reliance. The third, *legal* hallmark of this category of case is that, as explained above, the courts have tended to view their legal task in a case of this kind in a particular way – as that of determining the content of the legal relationship which subsists between the individual recipient of the directly communicated assurance and the administrative decision-maker.

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209 Compare *Coughlan* (n 2) to, for example, *Ansar* (n 37) in which a letter was sent to the applicant merely restating existing policy.

210 *Coughlan* (n 2).

211 *Bibi* (n 58).

212 *Paponette* (n 36).

Having identified this cluster of case, this section can now turn to its second aim: that of offering some reflections on the circumstances, and manner, in which the courts tend to intervene in relation to it. The first point which ought to be made on this matter is that there has been a tendency within the 'move towards plurality' discussed in part 1 to carve out this category of case as distinctive and, where this has been done, to understood the courts' approach therein as being characterised by two key characteristics. Firstly, the courts have tended to be thought of as facing a *binary* choice between two options. On the one hand the court could concluded that the administrative decision-maker is dutybound to abide by the strict terms of its assurance. On the other, however, the court could determine that the decision-making is wholly free to depart from its word. This binary way of thinking, for instance, is reflected in Lord Carnwath's suggestion that this underlying this category of case is the 'basic rule... that promises relied on by others should be kept.'[213] Secondly, the tendency has also been to see the courts' concern in this category of case as that of protecting the individual against the harms of *detrimental reliance*. That is, the principle of legitimate expectations has been said to only bite in a case of this kind when the applicant can show she has materially changed her position in reliance on the assurance.[214]

It is important to note, however, that, what flows out from the analysis above is that the courts have tended to think of their tasks in such cases in a substantially different way. Thus, firstly, the courts in a series of cases, including *Coughlan*[215] itself,[216] have clearly recognised the possibility that an administrator may be able to discharge its legal duty in a case of this kind by making use of a 'midway' option such as by offering to assist the individual in a way which falls somewhat short of fulfilling the content of the assurance in full. Secondly, the Court of Appeal has also emphasised in *Bibi*[217] that the courts' concern in such cases goes beyond that of protecting the individual from material harm, and includes protecting her against the 'moral detriment'[218] which ensues from a broken assurance.

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213 *United Policyholders* (n 104), [118].

214 See especially Varuhas (n 22); Williams (n 100).

215 *Coughlan* (n 2).

216 See further *Bibi* (n 58), [55]; *F&I* (n 65), [72].

217 Ibid.

218 Ibid, [55].

What emerges from the case law, accordingly, is that, in determining directly communicated assurance cases, the courts do not view their task as being that of deciding whether *either* the administrative decision-maker must be held to the specific terms of its assurance or is to be regarded as wholly free to depart from it. Nor do they view their task as being limited to the protection of the individual against detrimental reliance. The courts, rather, will explore, and require the administrative decision-maker to demonstrate that it has explored, any available 'midway options' which would serve to provide some cushion to the individual against the harms of detrimental reliance *and* damage to her autonomy whilst still, in some way, accommodating the aims of the administrative scheme.

This has important implications for the problem of ultra vires promises. As Sarah Hannett & Lisa Busch have explained[219] the core rationale underlying the courts' general position that ultra vires promises are of no legal effect is that of Parliamentary Sovereignty, conceived in the orthodox sense as requiring that the courts give effect to the clearly expressed will of Parliament.[220] This basic constitutional premise, Hannett and Busch argue, prevent the courts from requiring an administrative decision-maker to fulfil an assurance when Parliament has explicitly denied them the power to do so. Judicial recognition of the possibility that there may be certain 'midway options' of which an administrative decision-maker may be required to make use prior to departing from a directly communicated assurance, however, suggests that it may be possible in some cases of an ultra vires promise for the courts to ensure some level of protection for the representee; it may, in particular, be possible for the courts to conclude that departure from an ultra vires promise, without giving consideration to the possibility of deploying such a midway option, was unlawful.[221]

C. Category 3: The Case of a Change of Policy Direction at the Expense of a Group

The first and second category of case discussed in this part of the chapter share two important similarities: the courts in adjudicating upon them are required, to a large degree, to determine

219 Hannett & Busch (n 52).

220 See citations at (n 53).

221 See further *Rowland* (n 50), [140]; Vanderman (n 54).

the level of protection to be afforded to the individual and the courts have thus commonly understood their legal task as being that of determining the content of the legal relationship which subsists between the administrative decision-maker and the individual. The third category of case which flows from the analysis in part 2, by contrast, is markedly different. It can be termed the 'change of direction at the expense of a group' case.

Once again, this category of case has three main hallmarks. Factually, cases within this category have two main stages. Firstly, an administrative decision-maker adopts a particular policy position whereby it lays down criteria by which it will exercise its power. Secondly, the decision-maker then opts to change course by replacing its original policy with a new one which is substantially less generous to a particular subsection of the public. A member or representative of this group then initiates legal proceedings in order to argue, on legitimate expectation grounds, that the change of policy direction in a way which did not accommodate the interests of this group, was unlawful. There are many legitimate expectations cases which fall within this category. In each of *Hargreaves*,[222] *Hamble Fisheries*,[223] *Niazi*,[224] *Patel*[225] and *BAPIO*,[226] for instance, the applicant sought to argue that a public authority was under a legal duty to make some sort of 'transitional provision'[227] for the purpose of cushioning the blow of policy change to this group. The normative hallmark of this case, accordingly, is that the courts in deciding such a case must seek to strike some sort of balance between the reasons for which the administrator has opted to change the direction of its policy, and the interests of that subsection of the public which loses out under the new policy. The legal hallmark, relatedly, is that the courts in adjudicating on such cases understand themselves to be determining the content of the legal relationship between the administrative decision-maker and the group.[228]

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222 *Hargreaves* (n 27).

223 *Hamble* (n 25).

224 *Niazi* (n 9).

225 *Patel* (n 141).

226 *BAPIO* (n 132).

227 Williams

228 See discussion of *Hamble* (n 25) above.

Having identified the features which mark out this cluster of cases, it is now possible to offer some reflections on the circumstances in which the courts will intervene in relation to them. Two main points fall to be made here. The first is that the courts will not generally intervene in the context of such a case that it is certainly not sufficient for the applicant to show that she, and others in the subsection of the public which loses out, was *disappointed* by the change of policy. Thus consider, for example, *Hargreaves*.[229] The applicant in this case was one of a considerable number of prisoners who, on commencing their sentence, had been informed that the Home Secretary's existing policy would regard them as eligible for temporary release, provided that they were of good behaviour, following the expiry of one-third of their sentence. At a later stage, the Home Secretary revised the policy, increasing the minimum proportion of the sentence which must be served to one-half. Hargreaves sought to argue that the Home Secretary could not lawfully disappoint prisoners in this way. The Court of Appeal rejected this argument in the clearest possible terms:

> The most that a convicted prisoner can legitimately expect is that his case will be examined individually in the light of whatever policy the Secretary of State sees fit to adopt... Any other view would entail the conclusion that the unfettered discretion conferred by the statute upon the minister can in some cases be restricted so as to hamper, or even prevent, changes of policy.[230]

The proper starting point, in other words, was with a recognition that administrative decision-makers had freedom to alter their policies and the disappointment of a subsection of the public which loses out is not sufficient to displace this possibility.

That said, the second important point which ought to be made is that the courts have imposed on public authorities a duty to put in place some kind of transitional provision in certain, relatively limited, circumstances; namely, where the relevant group has *materially* and *irreversibly* relied on the original policy and where the introduction of a transitional provision would not *wholly undermine* the reasons for policy change. Thus, for instance, in both *Patel*[231] and *BAPIO*[232] the court held that the administrative decision-maker could not

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229 *Hargreaves* (n 27).

230 Ibid, 918 (citing from *In re Findlay* [1985] AC 318, 338).

231 *Patel* (n 141).

232 *BAPIO* (n 132).

lawfully introduce its new policy without making special provision for a group of persons which had materially and irreversibly relied on its original policy position.

A number of points about this statement are in need of unpacking. Take, first, the point that the relevant group must have *materially* relied on the terms of the original policy. The important point is that one thing which distinguishes those cases in which the courts have intervened from those in which they have not is that in the former the relevant subsection of the public has materially changed its position, that is it has detrimentally relied, on the assumption that the original policy would continue to be in place. Compare, for instance, *Hargreaves*[233] with *Patel*.[234] The prisoners in the first case had made no adjustment to their behaviour on the assumption that they would be eligible for release after the expiry of one-third of their sentence. As a result, when the policy was changed, they suffered no material harm as a result. By contrast, the students in the second case had incurred a very substantial amount of financial expenditure on the assumption that long-distance learning courses would continue to be regarded as sufficient to qualify a person to practice medicine in the UK. The result, accordingly, of the change of policy in *Patel*[235] had the court not intervened would have been that these students were encumbered with a vast amount of needless financial debt.

The second point which is in need of unpacking is that the relevant reliance placed by the relevant group on the original policy must seemingly have been *irreversible*. *Bhatt Murphy*[236] is a clear illustration of this point. In this case, the independent assessor took the decision to alter its policy on the recovery of legal fees by victims of miscarriages of justice. The terms of the new policy were substantially less generous to representing solicitors who would, as a result, be able to charge clients only at 'Legal Help' costs.[237] In her new policy, the independent assessor made special provision for solicitors' work in relation to claims which had already been submitted to the independent assessor[238] and in relation to claims on which solicitors had commenced work prior to the date of the policy change announcement. The

233 *Hargreaves* (n 27).

234 *Patel* (n 141).

235 Ibid.

236 *Niazi* (n 9).

237 Ibid, [1].

238 Ibid [19].

policy, however, stopped short of providing any sort of exemption for solicitors who had been *retained* in relation to a miscarriage of justice claim but had not yet commenced work. The applicants, 'six firms possessing specialist professional skills in this field'[239] which had been retained in relation to a number of applications, argued that the failure to make any provision for this group was unlawful. On this matter, Laws LJ said the following:

> The argument... focused on the solicitors' claim for larger transitional provisions, such that in all cases where the solicitor had been retained before [the date of the policy announcement] he would in the event of a successful outcome have been paid at private client rates... This might have given me pause if the effect of the costs change... had been that solicitors thereafter remained, under the new regime, subject to unavoidable obligations to continue representing clients... But that is not the case... the solicitors would have been entitled to terminate their retainers, had they chosen that course, in light of the costs change announced.[240]

In other words, although the group of solicitors were able to demonstrate that they had *materially* changed their position on reliance of the original policy (by entering into retainers on the assumption that they would be entitled to reimbursement at the higher rates) this change of position was *reversible* (it was open to the solicitors to terminate the retainers). As such, no legal duty to cushion the blow of policy change on the part of the independent assessor had arisen.

The third and final point from the above statement which should be further explicated is that the courts will not regard a duty to put in place transitional provisions as arising where the effect of doing so would be to wholly unravel the rationale of policy change. This is clearly illustrated by *Hamble Fisheries*.[241] The group to which the applicant belonged in this case could demonstrate that they had materially and irreversibly relied on the terms of the original policy, namely by purchasing vessels for the purpose of beam trawling in the North Sea. As explained above, however, the court rejected the suggestion that MAFF was obligated to put in place a transitional provision in changing its policy to the effect that the original policy should continue to apply to this group. The reason for this was that putting in place a

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239 Ibid [2].

240 Ibid [60].

241 *Hamble* (n 25).

transitional provision of this size would almost wholly undermine the very purpose of policy change which was, as explained, to ensure that swift limitations were introduced on trawling in the North Sea so as to protect pressure stock.[242] By contrast, consider *Patel*.[243] The Court of Appeal considered that the introduction of a provision to accommodate students who had enrolled on long-distance learning course in reliance on the terms of the original policy would not significantly undermine the aims of the GMC's policy change. In the first place, the number of students who had done this was likely to be quite small and, in the second, the GMC's reasons for changing policy were not urgent.

To summarise, then, it seems to be generally very difficult for an applicant to persuade the court to intervene in order to require an administrator to put in place transitional provisions for the purpose of cushioning the blow of policy change to an affected subsection of the public. That said, the courts have demonstrated a limited willingness to intervene in those rare cases the following three conditions apply: firstly, the subsection of the public has materially relied on the terms of original policy, secondly, that reliance is irreversible and, thirdly, making special accommodation for this group would not wholly undermine the reasons for the change of policy direction.

D. Category 4: The Public Procedural Promise Case

The fourth and final category of case which emerges from the analysis in part 2 can be termed the 'public procedural promise case.' It is relatively rarely that a case of this kind arises,[244] but where they do they are again characterised by three main hallmarks. Firstly, the factual hallmark of this case is that an administrative decision-maker offers an assurance to the public at large that, in the course of taking some decision in which the public is taken as having an especially important interest, it will follow some specific process for the purpose of obtaining the views of the public, only to later resile from that promise. Two examples of such cases

242 Ibid, [59].

243 *Patel* (n 141).

244 Indeed, this category of case receive no discussion, for instance, Williams (n 100).

are firstly, *Greenpeace*,[245] discussed above, in which the Secretary of State publicly promised to run the 'public consultation'[246] prior to introducing a new policy of building nuclear power stations and, secondly, *Wheeler*,[247] in which the Prime Minister offered a public assurance to the effect that, prior to ratifying further European Union treaty change, a public referendum would first be held. Secondly, the normative hallmark of this category of case is that the court must grapple with questions concerning how the interests of the public would be best advanced and whether, in particular, requiring a public authority to proceed via a process which it had previously promised it would use, or regarding it as free to proceed without making use of that process, would best promote those interests. As explained above determining a question of this kind requires the courts to engage with such matters as public trust[248] and the extent to which the public has an interest in the use of a rigorous decision-making process. The third and final legal hallmark of this case is that, as explained above, it cannot be plausibly analysed as a case in which the court must determine the content of the legal relationship between the public authority and any one individual. It is, rather, more naturally thought of as a class of case in which the court determines the content of the legal relationship which subsists between the decision-maker and the public at large.

Turning next to the question of when the courts tend to intervene in order to hold the public authority to its word in the context of these cases, the first point to note is that there is simply not enough case law to generate a reliable answer to this question. Having said that, one important point which emerges very clearly from *Wheeler* is that there would seem to be a difference, in the eyes of the courts, between a promise to run a public consultation exercise and a promise to hold a referendum. The latter, in particular, are deemed to fall centrally within 'the realm of politics'[249] with the result that the courts are very hesitant to intervene for the purpose of holding the government to its word. Thus, for instance, in *Wheeler* itself the court concluded that:

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245 *Greenpeace* (n 163).

246 Ibid, [9].

247 *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin), Official Transcript.

248 See further Sales & Steyn (n 165).

249 *Wheeler* (n 247), [16].

> The subject-matter, nature and context of [the promise to hold a referendum] placed it in the realm of politics, not of the court, and the question whether the government should be held to such a promise was a political rather than a legal matter... A promise to hold a referendum lay so deep in the macro-political field that the court should not enter the relevant area at all.[250]

E. Some Concluding Reflections on the 'Move Towards Plurality'

What emerges from the discussion in this part of the chapter so far is a particular understanding of legitimate expectations. According to it, there are, within the mass of case law, at least four distinct clusters of case in which the judges grapple with four distinct sets of legal and normative problem. Firstly, there is the 'failure to apply policy to an individual' case. Here the courts recognise administrators as being under a strong prima facie legal duty to give effect to policy, but often incur difficulties in terms of interpreting policies and determining whether there has been a departure in the first place. Secondly, there is the 'directly communicated assurance' case. Here, the courts will explore, and require the administrator to explore, the various 'midway options' which may provide relief to individuals to whom directly communicated and tailored assurances have been offered. Thirdly, there is the 'change of policy direction at the expense of a group' case. Here the courts will determine whether the relevant group has materially and irreversibly relied on the terms of an original policy and whether there is a way of accommodating the interests of this group without wholly undermining the purposes of policy change. Fourthly there is the 'public procedural promise' case. Here the courts must grapple with the problem of whether the interests of the public are best served by requiring a decision-maker to proceed via the process it has promised to follow or the process it now considers best.

With this understanding of legitimate expectations in mind, this chapter can now turn to its final task: that of offering some reflections on what the analysis developed herein suggests about the 'move towards plurality' taking place in the recent case law and literature and discussed in part 1.

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250 Ibid.

Three main points fall to be made here. The first can be simply put: the arguments developed in this chapter clearly illustrate why the move towards plurality is a step in the right direction. Contrary to the writings of scholars such as Farrah Ahmed and Adam Perry[251] who doubt the necessity of 'doctrinal disaggregation,'[252] this chapter has sought to show that the legal and normative structures in play in the legitimate expectations case law are both too complex and too varied to be helpfully captured by a monistic approach to the subject.

The second and third important points which ought to be noted concern the two themes, noted in part 1, which have characterised the case law and literature on the 'move towards plurality.' The first of these is the belief that the move towards plurality is necessary because the existing legitimate expectation case is so lacking in consistency and predictability that a wholesale change of direction is necessary. Thus, as was explained above, Rebecca Williams for instance presents her account of the 'multiple doctrines of legitimate expectations'[253] largely as an *alternative* to the existing judicial approach.[254] What, then, do the arguments developed in this chapter suggest about this mode of defending a pluralistic approach? Put simply, these arguments suggest that the concern which motivates such authors as Williams is rather overblown. Close analysis of the legitimate expectation case law, it has been argued, shows that there is *already* structure and a significant level of predictability to what the courts do when adjudicating upon this ground. Thus take, for instance, the third category of case alluded to above: the 'change of policy direction at the expense of a group' case. It was shown above that by reflecting closely on the existing cases which fall within this category it becomes possible to see that there is a relatively clear set of criteria which determine when courts will intervene to protect the relevant group, namely material and irreversible reliance on the part of the relevant group and the possibility of accommodating the interests of this group without wholly undermining the reasons for policy change. A move towards plurality, in other words, is desirable, not because it offers a preferable *alternative* to the approach courts currently take but, in order to capture that which the judges are already doing.

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251 Ahmed & Perry (n 108).

252 Ibid, 62.

253 Williams (n 100).

254 See especially ibid, 655.

The second theme alluded in part 1 was the suggestion that the move towards plurality is necessary because it is important to recognise that what the judges have been doing in certain categories of case is giving effect, under the guise of legitimate expectations, to doctrines which in actuality originate in private law. Thus, as was explained, Williams has argued that in, what she calls, 'almost contract' cases such as *Coughlan*[255] the courts have been 'reinventing a wheel which has already been well developed in the context of private law.'[256] The arguments developed in this chapter suggest that there is reason to be cautious about seeking to analyse the legitimate expectations case law through the lens of private law and there are two main reasons why this is so. Firstly, there are simply categories of legitimate expectation case – such as the 'change of policy direction at the expense of a group' case and the 'public procedural promise' case – which bear very little resemblance to a contract or estoppel claim.[257] As explained above, the factual hallmarks of these cases are very different to the facts which arise in a contract claim and the courts have understood themselves as adjudicating on a legal relationship other than one characterised by Hohfeldian individual right-duty correlativity. Secondly, and perhaps most importantly, even in those cases which most closely resemble a private law case – the directly communicated assurance case – there are important differences between how the doctrines of contract and estoppel, on the one hand, and legitimate expectations, on the other, operate.

This last point is in need of some unpacking. Consider again *Coughlan*.[258] There are, it is clear, at least two important senses in which this case bears a resemblance to a claim in, for instance, contract. Firstly, there is a factual analogy; in both *Coughlan* and a classic contract case a directly communicated promise has been offered by the defendant party to the applicant or claimant. Secondly, the courts have tended to understand themselves as adjudicating on the same kind of legal relationship in both types of case; thus, as explained above, the courts in 'directly communicated assurance' cases have tended to understand their legal task as being that of determining the content of the legal relationship which persists between the administrative decision-maker and the individual applicant. These similarities, however, ought not to disguise the point that there are also important *differences* in how

255 *Coughlan* (n 2).

256 Williams (n 100), 646.

257 Williams of course recognises this.

258 *Coughlan* (n 2).

contract operates and how the principle of legitimate expectations functions. Two differences, in particular, emerge from the analysis above. Firstly, as is well illustrated by Schiemann LJ's judgment in *Bibi*,[259] the principle of legitimate expectations may intervene to protect a recipient of a directly communicated assurance against the 'moral detriment'[260] which follows from a failure to fulfil the assurance alone; it may not be necessary for the individual to show that she has offered anything in exchange, nor that she has changed her position in reliance on, the promise.[261] Secondly, as the discussion of *Coughlan*[262] and *F&I*[263] above illustrates, the court, in determining a directly communicated assurance case, will pay close attention, and require the administrator to pay close attention, to the various 'midway options' which might provide a way of alleviating the harm done to the individual whilst leaving the administrator free to depart from the full meaning of its assurance. Exploration of such midway options, by contrast, is not a feature of adjudication in a contract claim.

Conclusion

By way of conclusion, it is helpful to offer some final reflections on the relationship between the arguments developed in this chapter and the broader narrative of this thesis. As explained in the introductory chapter, this thesis is concerned to explore a single, but broad and important question: how should we approach the development of an understanding administrative law?

Two main options were discussed in the first chapter. In the first place we could, as those who make use of the influential public interest conception do, take a *monistic* approach to the subject whereby we seek to identify some singular 'master idea or principle'[264] which is capable of lending unity to the legal area. The arguments of this chapter continue to illustrate

259 *Bibi* (n 58).

260 Ibid, [55].

261 See further Williams (n 100).

262 *Coughlan* (n 2).

263 *F&I* (n 65).

264 Stephen Smith, *Contract Theory* (OUP 2004), 11.

why administrative law is not amenable to analysis of this kind: the basic legal and normative structures in play in this field are too complex and too varied to be captured by a single 'organising concept.'[265]

The second option – use of an 'anatomical approach' – is markedly different. One making use of this approach would seek to pull apart administrative law, closely examine the legal and normative structures in play and use the information one finds to construct an understanding of the area. This chapter has been concerned with the second of three case studies through which this thesis seeks to demonstrate the utility of making use of such an approach. Its focus has been on legitimate expectations and it has sought to show how by taking an anatomical approach to the case law in which this ground is invoked it becomes possible to construct an understanding which better captures the legal and normative complexities with which the judges must grapple in giving effect to it.

[265] Language used in, for instance, Christopher Forsyth, 'The Rock and the Sand: Jurisdiction and Remedial Discretion' (2013) 18(4) JR 360, [27].

Chapter 6

Standing

This chapter is focused on the final of three case studies of central doctrines within modern administrative law through which this thesis aims to demonstrate two things. Firstly, that the 'public interest conception,'[1] discussed in chapter 2, fails to provide a way of thinking about the doctrine which captures the legal and normative complexities with which judges must grapple in giving effect to it. Secondly, that by making use of the 'anatomical approach' outlined in chapter 3 it becomes possible to construct an explanation which succeeds in capturing these complexities. Its focus is on standing.

The chapter will be divided into three parts. The first is concerned with the relationship between standing in administrative law and the public interest conception. It is helpful to approach this discussion by telling a story which is very commonly told about the development of standing and which can be labelled, to borrow a phrase used by Mark Elliott and Jason Varuhas the story of 'the triumph of the public interest conception.'[2] As will be explained, this narrative has four main chapters. The first explains how, prior to the procedural reforms of 1977, the law on standing in administrative law was characterised by three main features: complexity, inconsistency and a focus on individual legal rights.[3] The second chapter explains how, following an important report by the Law Commission,[4] Parliament in 1977[5] enacted reforms which included the introduction of a simplified 'sufficient interest'[6] test of standing. The third chapter concerns their Lordships' judgment

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1 Jason Varuhas, 'The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications' in John Bell, Mark Elliott, Jason Varuhas & Phillip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016).

2 Mark Elliott & Jason Varuhas, *Administrative Law* (5th ed, OUP 2016), 565.

3 Ibid, 548.

4 Law Commission, 'Report on Remedies in Administrative Law' (Law Comm No 73, 1976).

5 Rules of the Supreme Court (Amendment No 3) (SI 1977, No 1955).

6 Senior Courts Act 1981, s31(3).

in *Fleet Street Casuals*[7] and especially Lord Diplock's emphasis on the importance of ensuring that 'outdated technical rules of locus standi'[8] did not prevent the courts from 'vindicat[ing] the rule of law.'[9] The fourth and final stage then explains how, in the long run, Lord Diplock's approach 'won out.'[10] Two broad matters fall to be discussed here. Firstly, the courts' development of the concept of 'public interest standing.'[11] Secondly, two themes which have tended to characterise the modern literature: the suggestion that the courts in recent decades have endorsed an increasingly 'liberal'[12] approach to standing and the related suggestion that the courts have interpreted the 'sufficient interest' standing test as laying down an approach which is fundamentally different from the 'rights-based standing rules'[13] of private law[14] and human rights law.[15]

Having told this story, the second part of the chapter then turns once again to the anatomical approach to administrative law for which this thesis argues. This part of the chapter begins with an important observation: there is a very close relationship between the story of the 'triumph of the public interest conception'[16] outlined in part 1 and the basic 'normative' and 'legal-structural' presuppositions at the heart of the public interest conception which were discussed in chapter 2. The story of standing's development set out in part 1, in particular, proceeds from a particular set of highly simplistic assumptions about the basic legal and normative structures in play in administrative law and, as a result, focuses in on that particular cluster of the standing case law in which those structures appear. The main argument

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7 *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed* [1982] AC 617 (HL).

8 Ibid, 644.

9 Ibid.

10 Elliott & Varuhas (n 2), 554.

11 See especially Peter Cane, 'Standing up for the Public' [1995] PL 276; David Feldman, 'Public Interest Litigation and Constitutional Theory in Comparative Perspective' (1992) 55 MLR 44.

12 See for example John McGarry, 'The Importance of an Expansive Test of Standing' (2014) 19(1) JR 60.

13 Jason Varuhas, 'Against Unification' in Mark Elliott & Hanna Wilberg, *The Intensity and Scope of Substantive Review: Traversing Taggart's Rainbow* (Hart 2015), 101.

14 See for example *Brushmoor UK Ltd v BP Raffinaderij Rotterdam BV*, 24 February 2014 (QB) (unreported).

15 See especially Human Rights Act 1998, s7; Joanna Miles, 'Standing under the Human Rights Act 1998' (2000) 59(1) CLJ 133.

16 Elliott & Varuhas (n 2), 565.

developed in part 2, by contrast however, is that if we take the case law in which courts have had to grapple with questions of standing as a whole, and begin to pull apart that case law and to examine the detail of its constituent parts in accordance with the anatomical approach, we quickly begin to see that the legal and normative structures in play are both complex and varied in ways simply not captured by the story of the 'triumph of the public interest conception' and that this has important implications for standing.

The third and final part of the chapter seeks to draw out from the arguments developed in part 2 the main implications for how we *should* understand standing in administrative law. This part of the chapter argues, more particularly, that what emerges from these arguments is that standing in administrative law is *ground-dependent*, an assertion which is made up of three further propositions. Firstly, there is not one singular 'test' of standing in English administrative law; the courts, rather, make use of different approaches in relation to different legal duties on which applicants seek to rely. Secondly, and contrary to the public interest conception, there *is*, in certain contexts, room in administrative law to make use of an approach to standing which is analogous to that used in private law and human rights law. To be clear, the courts do not and should not make use of such an approach on a generalised basis. There are, it will be argued however, certain legal duties arising in this field in relation to which either the courts do, or there is reason to believe the courts would, regard standing as being confined to the individual who holds the right which is correlative to that duty. Five such duties in particular will be discussed. Thirdly and finally, it does not logically follow from the conclusion that an applicant has standing to challenge a decision on one legal ground that she has standing to rely on all. It is, in other words, a perfectly logical possibility that an applicant may be found to have standing to rely on one ground, but lack standing to rely on another.

Before turning to these arguments, it is important to note a handful of caveats which apply to any discussion of standing within administrative law. Production of scholarship on this issue is always difficult and there are a number of reasons for which this is so. Firstly, much judicial consideration of the issue of standing takes place at the 'permission'[17] stage of an application for judicial review. It is unclear what proportion of permission decisions are reported[18] and

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17 Civil Procedure Rules 1998, Part 54, rule 4.

18 I have found it very difficult to find accurate data on the number of permission decisions which are reported. However, for very insightful empirical discussion of the judicial review process see Varda Bondy & Maurice Sunkin, 'The Dynamics of Judicial Review Litigation: The Resolution of Public

so there is a strong possibility that many important judicial decisions relating to standing do not make their way into the law reports. Secondly, it has been noted that the willingness of counsel to raise arguments based on standing is very much a matter of fashion;[19] it is therefore likely that there are cases in which interesting issues of standing might have arisen which went by unquestioned by both counsel and the court.[20] Thirdly, it is also entirely possible that a good deal of what might be called 'behind-the-scenes shuffling' takes place, whereby counsel seeks ensures that the applicant in whose name an application is brought is one whose standing is uncontentious.[21] This tendency, if it exists, would serve to prevent 'borderline' cases of standing from very often finding their way before a court. It is always important to bear these difficulties in mind when discussing standing in administrative law and the chapter shall allude back to them at a number of points, where they become especially important for particular matters under discussion.

1. The Story of the 'Triumph of the Public Interest Conception'[22]

With these caveats in mind, the chapter can now turn to the task of developing its core arguments, beginning with a discussion of the relationship between standing in administrative law and the public interest conception. In discussing this relationship, it is helpful to proceed by telling a story which is very commonly told about the development of standing in modern administrative law and which can be titled, to borrow a phrase from Mark

Law Challenges Before Final Hearing' (Public Law Project 2009) and Varda Bondy, Lucinda Platt & Maurice Sunkin, 'The Value and Effects of Judicial Review: The Nature of Claims, Their Outcomes and Consequences' (Public Law Project 2015).

19 See for example Konrad Schiemann, 'Locus Standi' [1990] PL 342, 345.

20 Take for example *R (Project Management Institute) v Minister for the Cabinet Office* [2014] EWHC 2438 (Admin), Official Transcript. Here the important issue of standing was not raised by counsel for the public authority but by Mitting J in the Administrative Court.

21 A classic example of this is *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1994] 2 WLR 409 (HL). For examples of the courts speaking about reshuffling of this kind (albeit for the purpose of obtaining legal aid rather than avoiding a locus standi challenge) see for example *R(WB) v Leeds Organisation Committee* [2002] EWHC 1927 (Admin), [2003] ELR 67 and *R (Edwards) v Environment Agency & Another* [2013] UKSC 78, [2014] 1 WLR 55.

22 Elliott & Varuhas (n 2), 565.

Elliott and Jason Varuhas, the story of the 'triumph of the public interest conception.'[23] This story has four main stages.

A. Standing Pre-1977: Complexity, Inconsistency & A Focus on Individual Legal Rights

The first stage in the story of the 'triumph of the public interest conception' concerns the pre-1977 standing case law. As was explained in chapter 2, at this time there was no purpose-built procedural route by which an applicant wishing to challenge the lawfulness of administrative decision-making could proceed. The result was that counsel representing such applicants at this time[24] had sought to creatively repurpose procedural routes which had originated for the purpose of providing a relief in a very different set of specific circumstances. Challenges to public authority conduct at this time were, in particular, commonly brought as an application or claim for one or more of five main remedies: the three prerogative writs[25] - certiorari, mandamus and prohibition - or the private law remedies of the declaration and injunction.

On the matter of how the courts resolved issues of *standing* at this time[26] it is helpful to take the following passage from Mark Elliott & Jason Varuhas' textbook[27] as a springboard for discussion:

> Up until at least the late 1970s three features characterised the law on standing. First, different rules of standing applied to different remedies. Second, judicial review generally and the law of standing specifically more closely adhered to the rights-based

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23 Ibid.

24 See especialy Stephen Sedley, *Lions Under the Throne: Essays on the History of English Public Law* (CUP 2015), chapter 1.

25 See especially Stanley De Smith, 'The Prerogative Writs' (1951) 11(1) CLJ 40; Edith Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (HUP 2013).

26 On this see generally Stanley De Smith, *Judicial Review of Administrative Action* (Stevens, 1951); Law Commission (n 4); Paul Craig, *Administrative Law* (8th ed, Sweet & Maxwell 2016), chapter 25.

27 Elliott & Varuhas (n 2).

> or private law model of review rather than to the public interest model. Third, the law on standing was characterised by inconsistency.[28]

It is helpful to expand a little on each of these three suggested themes, beginning with the first and third themes. On these themes, the important point is this: as emphasised in chapter 2, the repurposing of the prerogative writs and the claim for declaration and injunction proved far from straightforward. As noted above, these procedural routes had originated for the purpose of providing relief in cases which had a very specific set of features and difficult questions arose as to whether, and the extent to which, these routes were available in cases which were not characterised by these features. Most importantly, for present purposes, many of these complexities arose in the form of questions about the *standing* of the applicant.[29] One example, concerning mandamus and repeated from chapter 2, will suffice to illustrate. As explained, the application for mandamus was developed originally in order to provide relief to individuals who had been removed from offices, and denied statuses, which they had a personal legal entitlement to hold.[30] When, from at least the late 1800s[31] applicants thus sought to make use of the remedy for the purpose of enforcing statutory duties which were designed to benefit, not one identifiable individual, but the public at large or some smaller group, the difficult question arose: to what extent was mandamus available for the purpose of enforcing such a legal duty? Most importantly, for present purposes, this problem often took the form of a question about standing: to what extent, if any, did an applicant who was unable to show that she had a personal legal right to relief have locus standi to apply for mandamus? The case law on mandamus illustrates the difficulties the court had in developing a coherent answer to this question.[32]

The most difficult, and also the most important for present purposes, of the themes identified by Elliott and Varuhas is the second: 'judicial review generally and the law of standing

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28 Ibid, 548.

29 Note that not all of the complications arose as issues of standing. See for example discussion in chapters 2 and 4 of certiorari and the judicial-administrative distinction to which it gave rise. See further Philip Murray, 'Process, Substance and the History of Error of Law Review' in John Bell, Mark Elliott, Jason Varuhas and Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016).

30 See especially De Smith (n 25), 55; *Bagg's Case* (1615) 11 Co Rep 93b.

31 See especially *R v Guardians of the Lewisham Union* [1897] 1 QB 498 (DC).

32 See for example ibid; *R v Russell ex parte Beaverbrook Newspapers Ltd* [1969] 1 QB 342 (DC); *R v Commissioners of Customs & Excise, ex parte Cook* [1970] 1 WLR 450 (QB); *R v Hereford Corporation, ex parte Harrower* [1970] 1 WLR 1424 (QBD).

specifically more closely adhered to the rights-based or private law model of review rather than to the public interest model.'[33] The idea posited in this passage is simple: it is possible to carve out two broad ways of thinking about the nature of administrative law and about how issues of standing should be approached. According to the first, the 'rights-based model':

> ...the principal concern of judicial review is to ensure protection of and grant remedies for invasion of the individuals' personal rights and interests. Within this model standing would be limited to the holders of those legal entitlements and interests which are the object of the law's protection.[34]

This model of administrative law, in other words, sees the normative goal of administrative law as being the identification and protection of goods in which *the individual* is taken as having a fundamental interest. It, furthermore sees standing in administrative law as being thus confined to those individuals who are able to show that, in the course of decision-making, the administrator has infringed substantially on such an interest. By contrast, according to the second, the 'public interest conception,':

> ...the principal function of judicial review is to ensure that administrators exercise their powers properly in accordance with... the public purposes for which parliament has conferred those powers... On this account, a rights-based test [of standing] would... unduly constrain the courts' ability to intervene where an authority had clearly acted unlawfully and deviated from public goals.[35]

Importantly, for Elliott and Varuhas, the pre-1977 law on standing 'more closely adhered to' the first way of thinking. That is, the judiciary at this time tended to conceive of the purpose of administrative law as being the protection of the individual, rather than the public as a collectivity, and shaped their approach to standing accordingly. This is in accordance with Varuhas' suggestion elsewhere that there was, at this time, in operation an 'old'[36] vision of administrative law 'which ha[d] individual rights and interests at its heart.'[37]

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33 Elliott & Varuhas (n 2), 548.

34 Ibid, 546.

35 Ibid.

36 Jason Varuhas, 'Judicial Review at the Crossroads' (2015) 74(2) CLJ 215, 215.

37 Ibid.

There is certainly pre-1977 case law which seems quite natural analysed in these terms. The clearest example of this is probably *Lewisham Union Guardians*[38] which was discussed at some length in chapter 2. As was explained there, the Divisional Court refused to consider granting a mandamus for the purpose of enforcing the public authority's duties to safeguard the public against the spread of infectious disease under the Vaccination Act.[39] The reason given by the court was that an 'applicant, in order to entitle himself to a mandamus, must first of all shew that he has a legal specific right to ask for the interference of the Court'[40] and that the court:

> ...would be far exceeding its proper functions if it were to assume jurisdiction to enforce the performance by public bodies of all their statutory duties without requiring clear evidence that the person who sought its interference had a legal right to insist upon such performance.[41]

That said, however, the suggestion that the pre-1977 standing case law 'more closely adhered to' the rights-based model of administrative law is difficult for two reasons. Firstly, there were substantial strands of judicial reasoning in the pre-1977 case law which much more naturally adhered to the public interest conception of administrative law and standing articulated by those Elliott & Varuhas. Consider, for instance, *Blackburn*.[42] The applicant in this case sought to rely on section 1(1) of the Obscene Publications Act[43] as grounds for requesting a prohibition, preventing a licencing authority from publicly showing an allegedly indecent film. On the question of whether the applicant has standing to apply for a prohibition on this ground Lord Denning opined as follows:

> It was suggested that Mr Blackburn has no sufficient interest... On this point I would ask: who then can bring proceedings when a public authority is guilty of misuse of power? Mr Blackburn is a citizen... His wife is a ratepayer. He has children who may

38 *Lewisham* (n 31).

39 Vaccination Act 1871.

40 *Lewisham* (n 31), 500.

41 Ibid.

42 *R v Greater London Council, ex parte Blackburn* [1976] 1 WLR 550 (CA).

43 Obscene Publications Act 1959, s1(1).

> be harmed by the exhibition of pornographic films. If he has no sufficient interest, no other citizen has.[44]

The clear idea underlying this passage is that, when faced with a 'public-regarding'[45] statutory duty of the type contained in the Obscene Publications Act, the court's main concern when approaching issues of standing should be on ensuring that it is not 'unduly constrained'[46] from protecting the public's interest and, as such, a broad approach to standing was appropriate.

Secondly, and more broadly, there is a significant difficulty in analysing the pre-1977 standing case law in terms of 'models' of administrative law and standing. This form of analysis, in particular, encourages one to view the complexities which existed at this time solely in terms of competing background visions of the nature of administrative law. That is, to say of the different views expressed in *Lewisham Union Guardians*[47] and *Blackburn,*[48] for instance, that they were simply the result of different judges approaching issues of standing from different background perspectives on administrative law. To think in this way, however, is to fail to recognise the point emphasised in chapter 2: much of the complexity which pervaded the case law at this time was *procedural*. Issues of administrative law, in particular, arose as claims for five different remedies, each of which has their own rich legal history. The reality, accordingly, was probably that apparent differences of opinion in the case law at this time were only to a small degree due to judges operating from differing visions of administrative law. The 'difference,' for example, between the courts' response in a case such as *Lewisham Union Guardians*[49] and a case such as *Blackburn*[50] was likely to a large degree due to the fact that these cases were brought as applications or claims for different remedies; in the former case, a mandamus, in the latter, a prohibition.

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44 *Blackburn* (n 42), 558. See also *Attorney General (McWhirter) v Independent Broadcasting Authority* [1973] QB 629 (CA).

45 Varuhas (n 1), 42.

46 Elliott & Varuhas (n 2), 546.

47 *Lewisham* (n 31).

48 *Blackburn* (n 42).

49 *Lewisham* (n 31).

50 *Blackburn* (n 42).

Bearing in mind this complication, however, the key point is that the first stage in the story, which is commonly told, of the 'triumph of the public interest conception' explains how, pre-1977, the law on standing was characterised by three main themes. The most important of these was a focus on the individual; the courts were said to make use of an approach which focused on whether the individual was able to demonstrate that she had a personal right to, or interest in, claiming relief.

B. The Law Commission Report & The 1977 Procedural Reforms

The next usual stage in the story of the 'triumph of the public interest conception' concerns the Law Commission Report of 1976[51] and the procedural reforms of 1977. In response to the complexity discussed in the previous section, the Law Commission published an influential report on procedure and remedies in administrative law. This report, importantly, recommended substantial change. At the core of the recommendations was the suggestion that legislation be enacted to create a unified process known as the 'application for judicial review'[52] by which an applicant could claim any one, or combination, of certiorari, mandamus, prohibition, declaration and injunction. The application for judicial review procedure, as recommended by the Law Commission, would have two main stages. Firstly, the applicant would be required to apply to the High Court in order to obtain permission.[53] Secondly, if permission were granted, there would then be a hearing stage in which the court would consider whether the applicant's grounds of unlawfulness were made out.

Of most interest, for present purposes, were the Law Commission's recommendations as to standing. Two main points should be emphasised here. Firstly, the Law Commission recommended, to an extent, a change of direction in how the courts approached issues of standing. The Law Commission, in particular, recommended that the question which the courts should address in each case, regardless of the remedy which the applicant sought to claim, was whether she had demonstrated 'such interest as the Court considered sufficient in

51 Law Commission (n 4).

52 Ibid, [43]-[44].

53 Ibid, [46].

the matter to which the application relates.'[54] The second important point concerns the *reasons* for which the Law Commission recommended this formulation. It may be tempting to think of these recommendations that their aim was to create a rigid *unification* of standing in administrative law,[55] so that the courts would use precisely the same approach in each case. This characterisation of the Law Commission's intentions, as recognised by Varuhas,[56] however, is rather far away from the reality. It is worth citing the Law Commission's reasoning in this this regard in full:

> The predominant view expressed in the consultation on our Working Paper... was that any attempt to define in precise terms the nature of the standing requirement would run the risk of imposing an undesirable rigidity... We appreciate this danger, and think that what is needed is a formula which allows for further development of the requirement of standing by the court having regard to the relief which is sought.[57]

The Law Commission's endorsement of the 'sufficient interest' formulation, in other words, was based on two closely related considerations. Firstly, the Law Commission was of the view that it would be inappropriate to try to define in the abstract the precise standing criteria which should apply in every case. The virtue of the 'sufficient interest' test was considered to be that it was sufficiently vague so as to effectively delegate to the judiciary the task of developing, through a close consideration of case law, a more precise approach or set of approaches. Secondly, and relatedly, the Law Commission made no presupposition that the courts would, or ought to, make use of a singular approach to determining standing in all cases. On the contrary, the Law Commission clearly envisaged that the courts would 'have regard' to the precise form of relief sought by the applicant in determining the approach to standing which was appropriate.

The Law Commission's recommendations proved to be influential. The application for judicial review procedure was introduced in 1977 through an amendment to the Supreme Court Rules[58] and was incorporated into primary legislation in 1981.[59] Parliament,

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54 Ibid, [48].

55 See further *Fleet Street Casuals* (n 7), 631.

56 Varuhas (n 1).

57 Law Commission (n 4), [48].

58 (n 5).

59 Senior Court Act 1981.

furthermore, accepted the Law Commission's recommendation as to standing by providing that, in determining permission issues, 'the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.'[60]

C. The *Fleet Street Casuals* Case

The third major stage in the story of the 'triumph of the public interest conception' concerns the House of Lords' decision in the *Fleet Street Casuals*.[61] In this case the House of Lords was faced for the first time with the question of what should be made of the newly enacted 'sufficient interest' test of standing. The case concerned a challenge by a representative organisation to a decision by the tax authorities to grant an 'amnesty'[62] to a group of casual workers, exempting them from paying tax for previous years in exchange for a commitment to follow a particular tax declaration procedure in the future. The applicant, in particular, sought a declaration to the effect that the granting of this amnesty was unlawful[63] and a mandamus compelling the proper collection of tax from these workers. The tax authorities, in turn, argued that the federation lacked a 'sufficient interest' to apply for this relief.

The most important points about this case, for present purposes, is that their Lordships took the opportunity to consider the approach which should be taken to the interpretation of the sufficient interest test and that their judgments suggested subtly different approaches. Their Lordships, in particular, can be divided into three groups.

In the first group was the majority – Lords Wilberforce, Fraser and Roskill. Three broad themes in their Lordships' judgments are particularly worthy of mention. Firstly, for their Lordships, it was not part of the intention underlying the enactment of the sufficient interest test that there should be a singular approach to standing which the courts were to deploy

60 Ibid, s31(3).

61 *Fleet Street Casuals* (n 7).

62 Ibid, 629.

63 Ibid.

identically in every case. The courts' approach to standing, rather, was to be shaped by the argument the applicant sought to make. Thus, for instance, Lord Wilberforce opined that:

> The fact that the same words are used [in the sufficient interest test] to cover all the forms of remedy allowed by the rule does not mean that the test is the same in all cases... The interest of a person seeking to compel an authority to carry out a duty [therefore] is different from that of a person complaining that a judicial or administrative body has, to his detriment, exceeded its powers.[64]

Secondly, and relatedly, for their Lordships where an applicant sought, as the federation did in the present case, to argue that a public authority had failed to comply with the duties under which it was placed by a statute it was important to consider closely the precise detail of the statute. It was, in particular, important to consider the purpose and terms of the legislative framework in order to determine whether there was anything in that framework of relevance to the question of whether the applicant's interest was sufficient.[65]

Thirdly and finally, their Lordships were of the view that, when one undertook this exercise in the context of the legislative background[66] to the *Fleet Street Casuals* case the clear answer which was generated was that the applicant, and indeed taxpayers more broadly, *lacked* a sufficient interest to challenge the decision on the part of the tax authorities to grant the tax amnesty. Three considerations, in particular, played an important role in their Lordships' reasoning.[67] Firstly, the tax framework, unlike the rate framework,[68] did not make explicit provision for taxpayers to challenge the lawfulness of decisions made by the administrators responsible for implementing the scheme. Secondly, the legislation made clear that the duties contained therein were owed *to the Crown*, rather than to members of the public. Thirdly, the legislation made explicit provision for the absolute confidentiality of the affairs of an individual taxpayer. The recognition of an ability, on the part of a third party taxpayer, to challenge the lawfulness of the level of tax paid by another, was thought to undermine this provision.

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64 Ibid, 631.

65 See especially bid, 646.

66 Especially Inland Revenue Act 1890; Taxes Management Act 1970.

67 See especially *Fleet Street Casuals* (n 7), 633.

68 Especially General Rate Act 1967.

The second opinion expressed in the *Fleet Street Casuals* case was that of Lord Scarman. Though his Lordship ultimately would have recognised the standing of the federation had he been convinced that their grounds were arguable, his judgment bore a great deal of similarity with the view of the majority. Lord Scarman, in particular, accepted both the first and second of the themes which characterised the majority's judgments.[69] Where his Lordship differed from the majority, however, was on the question of what precisely an exploration of legislative scheme suggested about whether the federation had a sufficient interest to challenge the tax authorities' decision. Two points, in particular, convinced Lord Scarman that this legislative regime necessitated recognition of the standing of the federation. Firstly, Lord Scarman rejected Lord Wilberforce's characterisation of the tax authorities' duties as being owed to the Crown. Secondly, and more pertinently, Lord Scarman concluded that the legislative scheme, when read in light of the common law, included a 'legal duty owed by the revenue *to the general body of the taxpayers* to treat taxpayers fairly.'[70] The federation, as a representative of taxpayers, was regarded by Lord Scarman as having standing to invoke this duty.

The third and final opinion expressed in *Fleet Street Casuals* was that of Lord Diplock. In an oft-cited passage his Lordship opined the following:

> It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.[71]

This passage is frequently taken as advocating a fundamentally different approach to that taken by the rest of their Lordships in *Fleet Street Casuals*. Mark Elliott and Jason Varuhas, for instance, have said of Lord Diplock's judgment that it 'entails a wholesale embrace of the public interest model of standing.'[72] The basic idea is this: his Lordship, in determining how the 'sufficient interest' test ought to be interpreted, proceeded from a particular way of thinking about the nature of administrative law. According to this way of thinking, administrative law is grounded in a concern to advance the interests of the public as a

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69 See especially *Fleet Street Casuals* (n 7), 648-649.

70 Ibid, 651.

71 Ibid, 644.

72 Elliott & Varuhas (n 2), 533.

collectivity, as opposed to any one individual.[73] This, in turn, informed his Lordship's recommendations as to how the courts ought to approach issues of standing in administrative law. The courts, in particular ought to begin by recognising that the public has a general interest in 'vindicat[ing] the rule of law' and, in light of this, to recognise the value of allowing 'pressure groups' and 'public-spirited taxpayers'[74] capable of advancing arguable cases of unlawfulness easy access to the courts.

D. Post *Fleet Street Casuals*: How Lord Diplock's Approach 'Won Out'[75]

The final stage in the story which is commonly told of the development of the law on standing in administrative law concerns the case law and the literature which follows from their Lordships' judgment in *Fleet Street Casuals*. The main theme which is often said to have characterised the case law and the literature of this period is the 'winning out'[76] of Lord Diplock's approach over and above that used by the rest of their Lordships in that case.

Two broad matters in this regard are particularly worthy of discussion. The first is an important cluster of cases in which Lord Diplock's emphasis on the importance of vindicating the rule of law, and of an inclusive approach standing, have had a substantial influence. In this cluster of case law a representative organisation[77] or 'public-spirited'[78] individual[79] has sought relief for the purpose of enforcing some statutory duty designed to promote some good in which the public as a collectively, as opposed to any one individual, is taken as having an especially important interest. In these cases, the courts have often invoked the idea

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73 On the influence of Lord Diplock on the formation of modern administrative law see further Richard Wilberforce, 'Lord Diplock and Administrative Law' [1986] PL 6.

74 *Fleet Street Casuals* (n 7), 644.

75 Elliott & Varuhas (n 2), 554.

76 Ibid.

77 See for example *R v Inspectorate of Pollution ex parte Greenpeace (No 2)* [1994] 2 CMLR 548 (QB).

78 *Fleet Street Casuals* (n 7), 644.

79 See for example *R v HM Treasury, ex parte Smedley* [1984] QB 657 (CA); *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] QB 522 (QB); *R v Somerset Country Council, ex parte Dixon* [1998] Env LR 111 (QB); *Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51.

of 'public interest standing'[80] by way of recognising the sufficiency of the applicant's interest in making the legal challenge and, in doing so, have often made reference to Lord Diplock's judgment in *Fleet Street Casuals*.[81]

One example will suffice to illustrate: *World Development Movement*[82] which was discussed in some detail in chapter 3. As was explained, the applicant non-governmental organisation in this case sought to argue that the Secretary of State, in electing to make a grant from the foreign aid fund in relation to an 'economically unsound'[83] project, was failing to fulfil her legal duty under section 1 of the Overseas Development and Co-operation Act 1980.[84] The Divisional Court accepted without great difficulty that the applicant organisation had standing to make this challenge: factors such as 'the importance of vindicating the rule of law'[85] and 'the prominent role of these applicants in giving advice, guidance and assistance with regard to aid'[86] meant that the court should hear the organisation's case and grant relief if that case was made out.[87]

The second general point which ought to be made on the subject of the post-*Fleet Street Casuals* case law and literature, and the purported 'triumph of the public interest conception' is that the modern literature on standing in administrative law has tended to be characterised by two themes. Firstly, an assertion that the courts in recent decades as making use of an increasingly 'liberal' approach to standing. Take, for example, the following passage written by John McGarry:[88]

> It is [the] perceived need to hold the Government to account that underlies the courts' development of the *current liberal approach* to the question of standing. The ruling

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80 See citations at (n 11).

81 *Fleet Street Casuals* (n 7).

82 *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement* [1995] 1 WLR 386 (QB).

83 Ibid, 402.

84 Overseas Development and Co-operation Act 1980 (since repealed by International Development Act 2002).

85 *WDM* (n 82), 395.

86 Ibid

87 For further examples citations at (n 79); *Greenpeace* (n 77); *R v Poole BC, ex parte Beebee* [1991] JPL 642 (QB).

88 McGarry (n 12).

> of the House of Lords in *Fleet Street Casuals* may be seen as the beginning of that approach.[89]

In a similar way, SH Bailey has said of the Supreme Court's judgment in *Walton*[90] that the:

> ...observations [of their Lordships]... are generally consistent with the *flexible, and relatively liberal,* approach to standing to be found in the cases on standing from that jurisdiction.[91]

The second, closely related, major theme which is particularly worthy of mention is the suggestion that the courts' interpretation of the 'sufficient interest' test has given rise to an approach to standing which is fundamentally different from the 'rights-based standing rules'[92] which apply in private law[93] and human rights law.[94] As was explained in chapter 2, issues of standing in these fields tend to be resolved by asking whether the applicant is the individual who holds the right which is correlative to the legal duty on which she seeks to rely. Importantly, there has been an influential tendency in the modern literature on standing in administrative law to deny that this way of thinking has any role to play in this legal field; issues of standing in administrative law, it is said, must be resolved by making use of a fundamentally different approach.

Chapter 2 discussed two important examples of discourse according with this way of thinking and they can be briefly summarised here. The first was Lord Reed's judgment in *AXA*.[95] As explained, his Lordship in this judgment drew a distinction between the argument which a claimant makes in a private law case and the argument which an applicant makes in an administrative law case. In the former, Lord Reed suggested, the claimant seeks 'to vindicate a right vested in [her],'[96] while, in the latter, the applicant 'request[s] the court to supervise the actings of the public authority so as to ensure that it exercises its functions in accordance

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89 Ibid, [13] (my emphasis).

90 *Walton* (n 79).

91 SH Bailey, 'Reflections on Standing for Judicial Review in Procurement Cases' (2015) 4 PPLR 122, 128.

92 Varuhas (n 13), 101.

93 See for example *Brushmoor* (n 14).

94 See especially Human Rights Act 1998, s7.

95 *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868.

96 Ibid, [159].

with the law.'[97] The result of this, for Lord Reed, is that issues of standing must be resolved in the two fields by making use of different approaches. In particular, for his Lordship, the concept of standing in administrative law 'cannot be based on the concept of rights but must… be based on the concept of interests.'[98] The second was a chapter written by Jason Varuhas.[99] As explained, Varuhas in this chapter suggests that the nature of administrative law, and its inherent focus on ensuring 'the proper exercise of public power in the public interest,'[100] precludes the use of the 'rights-based approach' to standing used 'in other fields.'[101] Instead, for Varuhas it would seem, issues of standing in administrative law must be determined by focusing on the *motive* of the applicant; if the court finds that she acts out of a sincere'[102] or 'genuine concern'[103] that the public authority had acted unlawfully, it would seem, the court should conclude that she has standing. If, on the other hand, she acts for some 'ill motive,'[104] such as by initiating legal proceedings for the purpose of pressing a public authority to increase its offer of monetary compensation,[105] then she is to be denied standing.[106]

By way of concluding this part of the chapter it is helpful to offer a brief summary of its discussion. This part has sought to tell a four-part story which is commonly told of the development of standing in administrative law. The first stage concerns the pre-1977 position which is said to be characterised by three main themes: complexity, inconsistency and a focus on individual rights and interests.[107] The second explains how, following the recommendations of the Law Commission,[108] legislative change in 1977 introduced the

97 Ibid.

98 Ibid, [170].

99 Varuhas (n 13), 101.

100 Ibid.

101 Ibid.

102 *Rees-Mogg* (n 79).

103 *R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWCA Civ 1546, [2004] 1 WLR 1761, [23].

104 Ibid. See for example *Morbaine Ltd v First Secretary of State* [2004] EWHC 1708 (Admin), [2005] JPL 377, [15].

105 Ibid.

106 See further *Dixon* (n 79), 121.

107 Elliott & Varuhas (n 2), 565.

108 Law Commission (n 4).

application for judicial review procedure and the accompanying 'sufficient interest' test of standing. The third explains how their Lordships in *Fleet Street Casuals*[109] carved out a number of possible directions the courts could take in interpreting this test, and the fourth how the 'public-regarding'[110] approach of Lord Diplock eventually 'won out.'[111] There is, thus, an important cluster in the modern case law which, drawing on Lord Diplock's reasoning, has developed the concept of 'public interest standing,' and the modern literature has tended to be characterised by two themes: the suggestion that the courts' have made use of an increasingly 'liberal' approach to standing, and the suggestion that the courts' interpretation of the sufficient interest test means that issues of standing in administrative law are resolved in a fundamentally way to the way in which they are resolved in private law.

2. Taking an Anatomical Approach to the Standing Case Law

The previous part of the chapter told the story of the 'triumph of the public interest conception,' an influential narrative which is often told about the development of standing in administrative law. The purpose of this part, however, is to begin to shed doubt on the extent to which this story provides an accurate or helpful way of thinking about standing in administrative law. It does so, as in previous chapters, by engaging in an exercise in pulling apart the standing case law and closely examining the legal and normative structures in play therein. Its core argument is that there are three core senses in which these structures are both complex and varied in ways which are simply not captured by the public interest conception. As will be seen, each of these senses of complexity and variety have important implications for how the courts approach issues of standing.

Before turning to this exercise, one further point about the story of the triumph of the public interest conception ought to be noted: underlying this story is a particular set of presuppositions concerning the nature of the basic legal and normative components in play in administrative law. There is, thus, a close relationship between, on the one hand, the story of the 'triumph of the public interest conception' and, on the other, the answers that the public

109 *Fleet Street Casuals* (n 7).

110 Varuhas (n 1), 42.

111 Elliott & Varuhas (n 2), 554.

interest conception suggests to the 'normative' and 'legal-structural' questions discussed in chapters 1 and 2. Take, for instance, the legal-structural presupposition: it is easy to see how the idea that legal duties in administrative law are owed, not to any one individual but, to the public at large is linked with the idea that the courts must approach issues of standing in administrative law by making use of a 'liberal' approach fundamentally different from the 'rights-based standing rules'[112] of private law and human rights law. If, in particular, legal duties in this field *are* owed to the public, then to make use of a 'rights-based approach'[113] is to require an individual to show that she personally holds the right correlative to a legal duty which is owed to no one individual alone.[114] The result of this is that the story of the triumph of the public interest conception tends to focus on a particular subset of the standing case law: namely those cases in which the normative and legal structures in play are those which fit neatly with the public interest conception. As will be seen, however, the courts have been required to consider issues of standing in relation to cases of a fundamentally different kind and this has important implications for standing.

The discussion in this part of the chapter, as in previous chapters, will be structured around an explication of three core senses in which the legal and normative structures in play in the standing case law are both complex and varied. The aim in each case will be to explain the sense of complexity and to illustrate its implications for standing.

A. Issues of Standing Arise Against the Backdrop of an Array of Different Administrative Regimes

The first core sense in which the legal and normative structures in play in the standing case law are complex and varied in ways not captured by the public interest conception concerns the role that is played by the background administrative regime. Put briefly the important point is that the legislative background to an administrative law challenge plays an important role in how issues of standing are resolved. One important example of this point has already

112 Varuhas (n 13), 101.

113 Ibid.

114 Note that Schiemann J appeared to suggest an approach to standing to this effect in *R v Secretary of State for the Environment, ex parte Rose Theatre Trust Co* [1990] 2 WLR 186 (QB) though the suggestion was rejected in *Dixon* (n 79).

been discussed: the majority's judgment in *Fleet Street Casuals*.[115] As explained, four of their Lordships in this case set about determining whether the federation had standing by examining the detail of the legislative scheme, and considering closely its purposes and the legal relationships to which it gave rise. The story of the 'triumph of the public interest conception' characterises the majority approach as a first step in a direction which was never ultimately pursued by the judiciary. To think in this way, however is to fail to notice the important role that the detail of the legislative framework continues to play in the resolution of standing issues in the decades following *Fleet Street Casuals*.

Three especially pertinent examples will suffice, though there are many more.[116] Consider first *Williams*.[117] This case concerned a challenge to the decision by a local authority to reorganise the provision of library services in its area by closing 52 branch libraries and replacing them with a system based on a 'Community Partnership Model.'[118] The applicant in the case was an individual who resided outside of the area for which the local authority had responsibility.[119] She sought to challenge the local authority's library policy on the basis of a failure to comply with the Public Sector Equality Duty contained in section 149 of the Equality Act[120] which placed the authority under a duty to, in the course of decision-making to 'have due regard to the need to eliminate discrimination... [and] advance equality of opportunity between persons.'[121] On the question of whether the applicant had standing to make this argument, the Administrative Court reasoned as follows:

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115 *Fleet Street Casuals* (n 7).

116 See especially *R (Hussein) v Secretary of State for Defence* [2014] EWCA Civ 1087, Official Transcript and *Al Bazzouni v Prime Minister* [2012] 1 WLR 1389, Official Transcript; *Gibraltar Betting & Gaming Association Ltd v Secretary of State for Culture, Media and Sport* [2014] EWHC 3236 (Admin), [2015] 1 CMLR 28; *R v Secretary of State for Employment, ex parte Seymour-Smith (No 1)* [1996] All ER 1 (CA). On the specific problem of what the administrative regime relating to public procurement means for how the courts should approach issues of standing see especially *R (Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA 1011, [2010] PTSR 749; *Wylde v Waverley BC* [2017] EWHC 466 (Admin), Official Transcript; Bailey (n 91); Eleanor Aspey, 'The Search for the True Public Law Element: Judicial Review of Procurement Decisions' [2016] PL 35.

117 *R (Williams) v Surrey CC* [2012] EWHC 867 (Admin), Official Transcript.

118 Ibid, [1].

119 *R (Williams) v Surrey CC* [2012] EWHC 516 (Admin), Official Transcript, [14].

120 Equality Act 2010, s149.

121 Ibid, s149(1).

> It is true that the statutory duties imposed by the libraries legislation are expressly stated to be owed to those living... within the area of the local authority... but the Equality Act duties *are not subject to any such restriction*... the duties owed under the Equality Act *are owed to a much wider range of persons and interest groups*... [and the Act] is expressly intended to further equality and the equality of opportunity across *the community as a whole*.[122]

Williams, in other words, had standing to rely on the relevant provision in the Equality Act because the clear intention of that section was to confer a benefit on 'the community as a whole'[123] namely by requiring public authorities to undertake a rigorous assessment of equality issues prior to enacting major changes in policy. To deny Williams standing in a case where she had the 'financial means'[124] to bring a challenge would be to undermine this collective interest. It is noteworthy, however, that had Williams' challenge been based on the 'libraries legislation'[125] rather than the Equality Act the courts' answer to the question of whether she had standing would have been different: this legislation 'expressly stated'[126] that the duties contained therein were 'owed to those living... within the local authority.'[127] As Williams was not a member of this group the clear suggestion by the courts seems to have been that she lacked standing to rely on these duties.

One thing which is noteworthy about this decision is that scrutiny of the detail of the Equality Act ultimately lead the court to conclude that a 'liberal' or inclusive approach to standing was a proper one: a 'public-spirited'[128] citizen, seeking to represent the interests of the public, ought to be permitted to make a challenge under the equality legislation. It is, however, importantly not the case that the background legislative scheme always shapes the courts' approach to standing in this way.

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122 *Williams* (n 119), [12]-[13].

123 Ibid.

124 Ibid, [14].

125 See for example Public Libraries and Museums Act 1964.

126 Williams (n 119), [12].

127 Ibid.

128 *Fleet Street Casuals* (n 7), 644.

Thus consider, by way of a second example, *Millard & Connolly*.[129] This case centred on the Housing Benefit (General) Regulations 1987,[130] a piece of secondary legislation designed to regulate the payment, by local authorities, of housing benefit to those eligible for assistance. The most important part of these Regulations for present purposes is Part XI. This part purported to lay down a set of legal duties relating to the procedure to be followed by a housing authority in the course of assessing how much housing benefit to pay to an individual. These duties included a duty to provide notice,[131] a duty to receive representations,[132] a duty to receive requests for reasons[133] and a duty to receive requests a for a further determination.[134] The most important point for present purposes, however, is that the Regulations stipulated that these legal duties were owed to a set of individuals in particular: namely, those who were 'affected'[135] by the determinations of the local housing authority. There is some important discussion in *Millard & Connolly* on the subject of *who* counts as an 'affected' individual for the purpose of the Regulations.[136] The answer given by the court, very briefly, was that in the vast majority of cases the duty would be owed to the *recipient* of housing benefit alone. That is, that in most cases the effect of these Regulations was to create a relationship of 'individual right-duty' correlativity between local housing authority and the recipient of the benefit.

In *Millard & Connolly* the argument was made that the Birmingham City Council had failed to comply with its procedural duties under Part XI of the Regulations. Importantly, however, *neither* Millard nor Connolly, the applicants in the case, were the *recipients* of housing benefit. They were, rather, the *private landlords* of the relevant recipient. The important

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129 *R v Birmingham CC, ex parte Millard & Connolly* (1994) 26 HLR 551 (QB).

130 Housing Benefit (General) Regulations 1987 (1987/1971). Since repealed by the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006 (2006/217).

131 Ibid, reg 77.

132 Ibid, reg 78.

133 Ibid, reg 80

134 Ibid, reg 81.

135 Ibid, reg 77. Defined by reg 2.

136 *Millard & Connolly* (n 129), 562.

question accordingly arose: did these applicants have standing to rely on the housing authority's legal duties under the Regulations? The court's answer to this was as follows:

> The landlord here has no sufficient interest... To permit him to mount such a challenge in all the circumstances would be to defeat the statutory scheme... The applicants were not entitled to review of the quantum of housing benefit which they sought. Only the tenant had the right to such a review.[137]

The detail of the statutory scheme, in other words, and in particular the very explicit designation of the *tenant* as the beneficiary of the procedural duties listed in the Housing Regulations were thought to necessitate a particular approach to standing: standing, more particularly, was properly confined to the *individual* who held the right which was correlative to the housing authority's duties. Given that neither Millard nor Connolly held this right, their application ought to be dismissed for want of standing.

The chapter will return to *Millard & Connolly* shortly. For now, however, the important point is that it is a clear illustration of two main things. Firstly, the role that background legislation continues to play in shaping the approach courts take to determining issues of standing. Secondly, the way in which such background legislation has sometimes led courts to the conclusion that the proper approach to be taken to the issue of standing in a particular case is one which regards standing as being confined to an individual right-holder.

The court's judgment in *Bateman*,[138] the third helpful example, is to a similar effect.[139] This case concerned the Civil Legal Aid (General) Regulations 1989.[140] These Regulations in part placed the Legal Aid Board under a series of procedural duties to be followed in the course of making a determination of the amount of tax to be paid by a solicitor in relation to a client's bill. Of most importance is regulation 114 which provided as follows:

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137 Ibid, 559.

138 *R (Bateman) v Legal Aid Board* [1992] 1 WLR 711 (QB).

139 See also *Wb* (n 21).

140 Civil Legal Aid (General) Regulations 1989 (1989/339). Since repealed by Civil Legal Aid (General) (Amendment) Regulations 2000 (2000/451).

> Where the assisted person or his solicitor, as the case may be, is dissatisfied with the decision of the taxing officer… *the solicitor* shall apply to the board for authority to have the taxation reviewed.[141]

The most important point to note about this regulation is that it clearly purports to confine the relevant legal duties to *the solicitor* who issued the bill. Thus, as Nolan LJ explained:

> The first thing to observe about these regulations is that [a client]… has no right to take part in it… The only person who is entitled to make representations and to be heard is the solicitor.[142]

The applicant in *Bateman*, however, *was* a client and not a solicitor. As in *Millard & Connolly*, the important question accordingly arose as to whether Bateman had standing to rely on these duties. The court's answer was as follows:

> The crucial feature of the present case is that the *principal, if not the only party directly affected by the refusal of authority* is the firm [of solicitors]… [The central question is whether] Bateman has a sufficient interest in [the application's] subject matter… the inevitable answer to the question, in my judgment, is "No."[143]

The detail of the Regulations, in other words, necessitated a particular approach to standing: only the individual designated as being the holder of the right correlative to the relevant duties, in particular, was to be regarded as having a 'sufficient interest' to rely on those duties in legal proceedings.

To summarise, then, two main points emerge from the discussion in this section. Firstly, contrary to the story of the 'triumph of the public interest conception,' the courts continue, as the majority did in *Fleet Street Casuals*,[144] to have regard to the detail of the background legislative scheme in determining whether the applicant has a 'sufficient interest' to make her challenge. Secondly, different background legislative regimes have led the courts to make use of different approaches to standing. Thus, for instance, scrutiny of the Equality Act 2010

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141 Ibid, reg 114 (my emphasis).

142 *Bateman* (n 138), 716.

143 Ibid, 717.

144 *Fleet Street Casuals* (n 7).

in *Williams*,[145] led the court to conclude that it was proper to make use of a liberal approach which recognised the applicant's standing as a representative of the public interest. By contrast, in *Millard & Connolly*[146] and *Bateman*[147] the regulatory schemes were thought of by the courts as necessitating the use of an approach which confined standing to the individual designated as holding the right which was correlative to the public authority's legal duty.

B. Issues of Standing Arise in Relation to Legal Duties Designed to Protect an Array of Normative Values

The second sense in which legal and normative structures in play in the standing case law, in a way not captured by the public interest conception, concerns the normative values in play in the standing case law. In explaining this point, it is helpful to begin by returning to a point emphasised in chapter 2: the public interest conception takes a particular position on the question of the values and interests which administrative law intervenes to protect. According to this way of thinking, administrative law is grounded in a concern to advance goods in which the public as a collectivity, as opposed to any one individual, has an especially important interest.[148]

Two points about this way of thinking, and its implications for standing, are especially important. The first is that there are clearly cases in which judicial intervention *is* grounded in a concern to promote some vision of the public interest and where a recognition of this plays an important role in shaping the courts' approach to issues of standing. One important example of this was discussed above: *World Development Movement.*[149] As explained, the applicant in this case sought to argue that the administrative decision-maker had failed to act in accordance with the terms of a statutory duty which was enacted so as to promote some

145 *Williams* (n 119).

146 *Millard & Connolly* (n 129).

147 *Bateman* (n 138).

148 See for example Harry Woolf, 'Public Law – Private Law: Why the Divide? A Personal View' [1986] PL 220.

149 *WDM* (n 82). For a further example see *Greenpeace* (n 77).

interest in which the public as a collectivity was taken as having an important interest. The court concluded that the public's interest in having this duty enforced and the 'rule of law' vindicated[150] justified recognition of the standing of the applicant organisation.

The second important point which ought to be emphasised, however, is that, as has been argued throughout this thesis, the public interest conception vastly oversimplifies the variety of values and interests at stake in administrative law and that this has important implications for how the courts approach standing.

A discussion of two examples will suffice to illustrate this point. Consider again, firstly, *Millard & Connolly,*[151] discussed above. As explained, the applicant landlords in this case sought to argue that the court should grant a remedy requiring the local housing authority to, in accordance with a statutory duty, conduct a review of the amount of housing benefit to be paid to their tenants. The terms of the statutory duty, however, made clear that this duty was owed to the *tenants* alone. The important point which ought to be made about this case for present purposes is as follows: the statutory duty in issue in *Millard & Connolly* is a clear example of a legal duty which was *not* created for the purpose of advancing some vision of the public interest. Its normative aim, rather, was clearly to confer a form of legal protection on a particular class of individuals, deemed to be especially vulnerable. There may, furthermore, have been good normative and practical reasons for so confining the duty. The resources of housing authorities, in particular, are scarce and it is entirely possible that the decision to draft the Housing Regulations in this way was the product of a deliberate balance-striking exercise, designed to ensure that these resources were directed to those most in need. These complexities, furthermore, clearly had important implications for the approach taken by the courts to standing; only the tenant should be regarded as having standing to rely on the legal duty because to hold otherwise would be to 'defeat the statutory scheme'[152] and the delicate balance struck therein.

By way of a second example, consider the following passage from their Lordships' judgment in *Durayappah*:[153]

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150 Ibid, 393.

151 *Millard & Connolly* (n 129).

152 Ibid, 559.

153 *Durayappah v Fernando* [1967] 2 AC 337 (PC).

> If in *Ridge v Baldwin* the appellant Ridge, who had been wrongly dismissed because he was not given the opportunity of presenting this defence, had preferred to abandon the point and accept the view that he has been properly dismissed, their Lordships can see no reason why any other person… should have any right to contend that Mr Ridge was still the Chief Constable of Brighton…. If a person in the position of Mr Ridge had not felt sufficiently aggrieved to take any action by reason of the failure to afford him his strict right to put forward a defence… no one else should have any right to complain.[154]

The idea expressed by their Lordships in this passage is simple: where a decision that an individual should be granted some benefit or made subject to some burden is challenged on the basis of a failure to afford that individual with a fair hearing issues of standing ought to be approached in a particular way. The individual alone, in particular, ought to be regarded as having locus standi to rely on the legal duty as grounds for relief.

Two important points ought to be noted about this case and this idea. The first is, for present purposes, the most important: there are *good normative considerations* which point in favour of this view. Three are especially worthy of discussion. The first relates to a point developed in chapter 4: in cases such as *Ridge*[155] the courts have tended to view their normative task in a particular way. They have, in particular, tended to see their normative role as that of finding a way of ensuring that *the individual* is treated as an autonomous agent and with respect, while still promoting the aims of the statutory schemes. This point, furthermore, has important implications for standing: if judicial intervention in fair hearings cases is predicated on a concern to protect the *individual* and her *autonomy* it is very difficult to see why any other applicant ought to be permitted to challenge a failure to afford a fair hearing if the individual elects not to.

A second, and related, normative consideration in play concerns *privacy*.[156] The hearing of a challenge to a dismissal decision in a case like *Ridge* entails the courts considering in close detail personal information concerning the individual. There are significant difficulties with the suggestion that a third party should be permitted to request the courts to do this when the

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154 Ibid, 352-353 citing *Ridge v Baldwin* [1964] AC 40 (HL).

155 *Ridge* (n 154).

156 See Elizabeth Fisher & Jeremy Kirk, 'Still Standing: An Argument for Open Standing in Australia and England' [1997] Australian Law Journal 370, 384.

individual who is the subject of the decision has elected not to initiate legal proceedings in her own name. A further, and final, set of considerations concerns consistency across the law. Put briefly, the important point is that were the challenge to Ridge's dismissal to be framed in human rights terms,[157] or as a claim for breach of contract,[158] then it is clear that standing would be confined to Ridge alone.[159] It is difficult to see how it can be justifiable to make use of a fundamentally different approach to standing merely because the argument is framed in administrative law terms.

The second point which ought to be noted about their Lordships' conclusion in *Durayappah* is that, although this case was decided in 1967, prior to the procedural reforms of 1977,[160] there is good reason to think that this passage continues to reflect the proper legal position. This is so for at least two reasons. Firstly, at least one leading textbook[161] continues to speak of the case as having this effect. Thus William Wade and Christopher Forsyth offer the following explanation of who has standing to rely on a failure to provide a fair hearing:

> It seems plain that denial of a fair hearing is a wrong which is personal to the party aggrieved. If he waives the objection and does not complain, it is not the business of other people to do so, for against them there is nothing wrong with the decision.[162]

Secondly, there does not seem to be a case in which a person other than the individual subject has been permitted to rely on the duty to afford a fair hearing in legal proceedings,[163] a point which the chapter will return to shortly.

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157 See especially Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), art 6. For examples of challneges brought under this article see for instance *Kingsley v UK* (2001) 33 EHRR 13; *R (G) v X School Governors* [2011] UKSC 30, [2011] 3 WLR 237.

158 Because, for instance, the right to be heard was contained in the employment contract which subsisted between applicant and administrative decision-maker.

159 See especially Human Rights Act Section 7 and *Brushmoor* (n 14).

160 Rules of the Supreme Court (Amendment No 3) 1977 (1977/1955).

161 William Wade and Christopher Forsyth, *Administrative Law* (11th edn, OUP 2015).

162 Ibid, 427.

163 Note that although *R (Grierson) v OFCOM* [2005] EWHC 1899 (Admin), Official Transcript overruled *Durayappah* in some regards it left the proposition regarding the standing of a person in the position of Ridge intact. Note that one exception to the point that there is no case law in which a person other than the individual might be thought to be *Police Superintendents Association of England & Wales v Chief Constable of Bedfordshire* [2013] EWHC 2173 (Admin), Official Transcript. It is clear,

To summarise, this section has sought to emphasise a second sense of variety and complexity in the standing case law which is not captured by the story of the 'triumph of the public interest conception.' It has, in particular, sought to emphasise that, although there is standing case law in which the applicant has sought to rely on a legal duty which is normatively oriented towards the *public* and where this has played an important role in shaping their courts' approach to standing, not every standing case fits this pattern. There are, more specifically, important cases in which the applicant has sought to rely on a legal duty designed to protect, in some way, the interests of *the individual* and in which this consideration has clearly played an important role in determining issues of standing.

C. There are Different Legal Relationships in Play in the Standing Case Law

The third and final sense of complexity in the standing case which it is argued is not sufficiently captured by the public interest conception concerns the complexity and variety of the legal relationships in play in the standing case law. The important point, put basically, is this: the public interest conception, in adhering to the idea that the legal duties which arise in the field of administrative law are owed, not to any one individual but, 'to... the public at large,'[164] significantly underestimates the variety of legal relationships which arise both in administrative law generally and in the standing case law specifically. As a result, the public interest conception fails to recognise the important role these relationships play in shaping the courts' approach to standing. A discussion of three examples will suffice to illustrate.

Firstly, consider again *World Development Movement*.[165] As discussed in chapter 3, the legal relationship at the heart of this case cannot be plausibly analysed in terms of Hohfeldian 'individual right-duty correlativity.'[166] Thus, no one individual benefitted above other members of the public from judicial enforcement of the Secretary of State's legal duties under

however, that the applicant organisation in this case was acting in a representative capacity in relation to the individuals who sought to complain.

164 Nicholas Bamforth, 'Hohfeldian Rights and Public Law' in Kramer M, *Rights Wrongs & Responsibilities* (Palgrave 2001), 11.

165 *WDM* (n 82).

166 See especially Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (The Law Book Exchange 2010).

the Overseas Development and Co-operation Act 1980.[167] The court's legal task in this case is more naturally understood, rather, as being of adjudicating on the content of the relationship which subsisted between the public authority and the *public as a collectivity.* This, in turn, was reflected in the court's conclusion that the applicant organisation, as a body capable of representing the interests of the public on the specific issue, had a 'sufficient interest' to make the relevant challenge.

Not every standing case, however, concerns a legal relationship of this kind. Consider again, for instance, *Bateman*.[168] As explained above, the regulatory framework at the background of this case explicitly created a legal relationship of a particular kind, namely a legal relationship between the legal aid board and *solicitors*, entitling the latter to have a particular process followed in the making of decisions about the quantity of tax they were due to pay. As discussed, that this was the nature of the legal relationship in issue in *Bateman* had important implications for how the court approach standing; because, in particular, the board's legal duties were expressly confined to *solicitor*, the applicant, a client, was found to lack a 'sufficient interest' in relying on those duties as grounds for claiming relief in legal proceedings.

By way of a third and final example, consider *Ruddock*.[169] This case concerned a policy, adopted by the Home Secretary, which laid down the criteria which would be applied in the course of taking decisions about whether the telephone of an individual should be tapped. When the Home Secretary took the decision to tap the telephone of a Mr Cox judicial review proceedings were initiated on the ground that the decision had be taken in contravention of the published policy. As noted in chapter 5, in cases of this kind the courts have tended to view the legal relationship at stake in a particular way.[170] They have, in particular, understood the argument advanced as being that the relevant individual holds a *personal legal right* to have the terms of the published policy applied to the individual circumstances of their case. This way of thinking about the legal relationship in issue, in turn, was reflected in the court's

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167 Overseas Development and Co-operation Act 1980 (since repealed by International Development Act 2002).

168 *Bateman* (n 138).

169 *R v Secretary of State for the Home Department, ex parte Ruddock* [1987] 1 WLR 1482 (QB).

170 See especially *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 and *Mandalia v Secrteary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546.

conclusion on the issue of standing in *Ruddock.* This issue arose because the applicants in *Ruddock* included, not only Mr Cox, but two correspondents of Mr Cox whose calls had been intercepted as a result of the Home Secretary's decision. On the question of whether these applicants had standing to bring the challenge, Taylor J concluded as follows:

> If a warrant was signed unlawfully, the unlawfulness would be due to Mr Cox as an individual falling outside the guidelines or criteria justifying such a warrant. Whether or not Mr Cox so fell must be an issue arising upon his application and his alone.[171]

Because, in other words, the legal argument advanced by the applicants required the court to conduct an inquiry into the legal relationship which subsisted between the Home Secretary of *Mr Cox*, only Cox had a sufficient interest in making that argument and thereby requesting the court to conduct that inquiry. Had, then, Mr Cox not appeared as an applicant in *Ruddock*, Taylor J would have dismissed the case for want of standing.

It is helpful, by way of concluding this part of the chapter, to offer a brief summary of the arguments developed herein. The main aim of this part has been to engage in an exercise in pulling apart the standing case law and in exploring the nature of the legal and normative structures in play. Its core argument has been that there are three core senses in which these structures are both complex and varied in ways which are not captured by the public interest conception. Firstly, issues of standing arise in the context of an array of different administrative schemes and the detail of these schemes continues, post-*Fleet Street*, to play an important role in how the courts determine whether an applicant has a 'sufficient interest.' Secondly, as has been emphasised throughout this thesis, administrative law intervenes to protect an array of different values and interests and this has important implications for how the courts approach standing. Thirdly, and similarly, administrative law is concerned with a variety of different kinds of legal relationship, something which, again, shapes their approach under the 'sufficient interest' test.

3. The 'Ground-Dependent' Nature of Standing in Administrative Law

171 *Ruddock* (n 169) 1485.

Having pulled apart the standing case law, and examined the basic legal and normative structures in play, this final part of the chapter can turn to the task of extracting some of the implications which emerge from this exercise for how we ought to understand standing in administrative law. What emerges from the analysis above, it is argued, is that standing in administrative law is *ground-dependent*, an assertion which is made up of three more particular propositions. It is helpful to structure the discussion in this section around an explication of each one.

A. The Courts Make Use of Different Approaches to Standing in Relation to Different Legal Duties

The first important point which emerges from the discussion above is that the courts have not thought of the 'sufficient interest' test of standing as laying down a single unified approach. It is not, for example, the case that the courts in every instance have determined whether the applicant has standing to bring the relevant challenge by inquiring into her motive for doing so.[172] The courts, rather, have made use of different approaches in different contexts.

Thus, on the one hand, for instance, there are certainly cases such as *World Development Movement*[173] and *Greenpeace*[174] in which the courts have made use of what can aptly be called a 'liberal' approach. As explained, in these cases, the courts have proceeded from a recognition of a generalised public interest in having the relevant legal duty enforced and have recognised the applicant as having a 'sufficient interest' on the basis of their claim to represent that strand of the public interest. This line of reasoning, however, has not been used in every case. In particular, in relation to other kinds of legal duty, especially legal duties which have been created primarily for the purpose of providing a form of legal protection to *an individual*, the courts have approached issues of standing rather differently. Thus, for instance, in both *Millard & Connolly*[175] and *Durayappah*,[176] discussed above, the courts

172 *Dixon* (n 79).

173 *WDM* (n 82).

174 *Greenpeace* (n 77).

175 *Millard & Connolly* (n 129).

176 *Durayappah* (n 153).

regarded standing as being confined to the *individual* whom the relevant legal duty sought to protect.

Two further points, which emerge from the discussion above, ought to be noted in relation to this point. The first is that there are at least three, closely related, considerations which the courts will take into account in determining the proper approach to standing to take in a given case: the detail of the legislative scheme which sits in the background of the challenge, the normative values and interests which it is the purpose of the legal duty which the applicant seeks to enforce to promote and the legal relationships in issue in the case. The second is that, contrary to what might immediately be assumed, the use of different approaches to standing in this way is in fact entirely concordant with Parliament's intention in enacting the 'sufficient interest' test.[177] Thus, as was emphasised above, Parliament's decision to opt for this test was not to put in place an approach to standing which would be applied uniformly in all instances. Parliament, rather, enacted the sufficient interest test on the recommendation of the Law Commission which favoured the test precisely because its vague phrasing would effectively delegate to the judiciary the task of developing, on a case by case basis, an appropriate system for determining which applicants should be permitted to make legal challenges. Importantly, the Law Commission clearly envisaged that the courts would do this 'having regard to the relief which is sought.[178] That is, that the courts would develop consider the precise nature of the argument which the applicant sought to make in deciding which approach to standing ought to be used.

B. Certain Legal Duties Require a 'Rights-Based Approach'

The second sense in which standing is ground-dependent which emerges from the analysis above concerns the place of a 'rights-based approach' in administrative law. The first point which ought to be noted in this regard is that the courts have, for good reason, rejected the possibility of making use of a rights-based approach to standing *on a generalised basis*.[179] That is, it is not the case that, in administrative law, an applicant must show in every instance

177 Senior Courts Act 1981, s31(3).

178 Law Comm (n 4) [48].

179 See especially Sedley J's discussion of *Rose Theatre* (n 114) in *Dixon* (n 79).

that *she* has a personal legal right or protected interest at stake. As can be seen from a case such as *Lewisham Union Guardians*,[180] the generalised use of such an approach would have the unfortunate consequence of rendering many statutory duties, designed to benefit not one individual but the public as a collectivity, effectively unenforceable.

That said, the second important point which emerges from the analysis above is that those, such as Lord Reed in *AXA*[181] and Jason Varuhas,[182] who suggest that the courts' approach to standing in administrative law is fundamentally different to the 'rights-based standing rules'[183] which are used in private law[184] and human rights law[185] go too far. There is, in particular, a significant cluster of legal duties arising in the field of administrative law in which either the courts do, or at least that there are strong indications that the courts would, regard standing to rely on those duties in legal proceedings as being confined to the individual regarded as holding the right which is correlative to the administrative decision-maker's duty.

Five such duties, in particular, have emerged throughout the course of argument in this thesis. It is helpful to run through each briefly in turn. Firstly, as has been emphasised in this chapter, and previous chapters,[186] it is not uncommon for legislation to place public authorities under legal duties and to explicitly designate that those legal duties are to be regarded as being owed to the individual. Furthermore, as discussed above, there might be good normative and practical reasons for doing so. Where this is the case, as illustrated by *Millard & Connolly*[187] and *Bateman*,[188] the courts will regard standing to rely on those duties in legal proceedings as grounds for requesting judicial relief as being confined to the *individual* who has been designated by the statute as holder of the right which is correlative to that duty. To hold

180 *Lewisham* (n 31).

181 *AXA* (n 95).

182 See Varuhas (n 1).

183 Vauhras (n 13), 101,

184 See for example *Brushmoor* (n 14).

185 See especially Human Rights Act 1998, s7.

186 See especially the discussion of *R (Conville) v Richmond-upon-Thames LBC* [2006] EWCA Civ 718, [2006] 1 WLR 2808 in chapter 1.

187 *Millard & Connolly* (n 129).

188 *Bateman* (n 138).

otherwise, as recognised by the court in *Millard & Connolly*, would often be to 'defeat the statutory scheme.'[189]

Secondly and thirdly, this chapter has discussed two important cases - *Durayappah*[190] and *Ruddock*[191] - in which the applicants sought to rely on legal duties which, as was explained in previous chapters, have tended to be thought of by the courts are being characterised by Hohfeldian 'individual right-duty correlativity.'[192] There duties were, namely, the duty to provide some individual about whom an important decision is being taken under an individualised legislative scheme with fair notice and an opportunity to make representations, and the prima facie duty to apply published policy, purporting to lay down the criteria by which individualised decisions were to be taken, in the case of an individual. As has been explained, in *Durayappah* and *Ruddock* respectively, the Privy Council and the Administrative Court considered that standing to rely on these legal duties was confined to the *individual* who is the subject of the relevant decision.

The fourth and fifth duties which are worthy of discussion in this section have not been mentioned in this chapter, though they were discussed at length in earlier chapters. The first is the duty, to which the House of Lords gave effect in *Doody*,[193] to provide an individual with reasons following the taking of an important decision about *them*. This duty, which was discussed in chapter 3, was conceptualised by their Lordships as being grounded in a normative concern to ensure the fair treatment of the individual. The second is the duty, to which the Court of Appeal gave effect in a case such as *Coughlan*,[194] to only depart from a tailored assurance which has been directly communicated to an individual in manner which is fair. As explained in chapter 5, this legal duty has been thought of by the courts as an obligation which is owed *to the individual*[195] and which is grounded in a concern to protect her autonomy.

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189 *Millard & Connolly* (n 129), 559.

190 *Durayappah* (n 153).

191 *Ruddock* (n 169).

192 Hohfeld (n 166).

193 *R v Secretary of State for the Home Department, ex parte Doody* [1993] 1 AC 531 (HL).

194 *R v North & East Devon Health Authority, ex parte Coughlan* [2001] QB 213 (CA)

195 See for example discussion of *R (Alansi) v Newham LBC* [2013] EWHC 3722 (Admin), [2014] PTSR 948 in chapter 5.

The important point about these legal duties is this: there does not seem to be a reported case in which any person *other than the individual* to whom reasons must be given, or who received the assurance, has sought to challenge administrative decision-making on the basis of a failure to comply with these duties. This point, it might be said, is insignificant: the reason for the absence of such a case is simply that the person most likely to be sufficiently motivated to initiate review proceedings in such a case is clearly the person subject of that decision.[196] There may, however, be something of greater significance at play here. It is at least possible that the absence of a case in which a stranger has been recognised as having standing to rely on an assurance given to another reflects a *shared background understanding* to the effect that this stranger lacks a 'sufficient interest in the matter'[197] to which her application relates. Two points, mentioned in the introduction, are especially pertinent here. First, although it is very difficult to find precise figures,[198] it is clear that the majority of permission decisions go unreported. It is, accordingly, perfectly possible that such applications have been initiated before the Administrative Court and denied permission for want of standing though the reports of these decisions are not readily available. Second, it is also highly likely that a good deal of what might be called 'behind the scenes shuffling' takes place, whereby barristers seek to ensure that an application for judicial review is brought in the name of a person who clearly has standing.[199] Again, this raises the clear possibility that strangers to reasons or legitimate expectations challenges have considered initiating review proceedings but have been deterred from doing so by counsel on the basis that a claim is better brought in the name of another.

There are, furthermore, good normative reasons to think that standing, in such cases, ought to be confined to the relevant individual. It is helpful to illustrate this point through an example. Consider again *Coughlan*,[200] which was discussed at length in the previous chapter. Imagine that, as happened in *Coughlan*,[201] a promise is issued and accepted to Miss Coughlan to the effect that, if she agreed to relocate to a facility known as Mardon House, she would

196 See for example Baroness Hale, 'Who Guards the Guardians?' (2013) 3(1) CJICL 100, 101.

197 Senior Courts Act 1981, s31(3).

198 See note (n 18).

199 See (n 21).

200 *Coughlan* (n 194).

201 Ibid.

have a 'home for life'[202] there. Now imagine that, some time later, another resident known as Miss A was moved into the same facility. Importantly, however, no promise was issued to her that she would be permitted to remain there for an indefinite period of time. When the decision is taken by the local health authority to close Mardon House, imagine that the decision is taken by Miss Coughlan not to initiate legal proceedings. Perhaps, for instance, she is content with alternative residential arrangements which have been made for her,[203] or she values greatly her privacy and does not wish for her personal information to be made available to a public court. Miss A, however, is much less accepting. She initiates judicial review proceedings and, in doing so, seeks to rely on the legitimate expectation ground. She, more particularly, seeks to argue that in offering an assurance to *Miss Coughlan* to the effect that she would have a home for life in Mardon House, the local health authority had given rise to a legitimate expectation on *Miss Coughlan's* part which now prevents it from closing Mardon House.

In this context, the important question would arise: ought the court to recognise Miss A as having a 'sufficient interest'[204] to make this challenge? There are at least three normative considerations which would tend to point against recognition of Miss A's standing in this case. Firstly, as explained in chapter 5, judicial intervention in 'directly communicated assurance' cases of this kind has tended to be focused on providing a level of protection for the autonomy of the individual who receives the relevant assurance, the basic idea being that the individual should be permitted to make her own life plans and that, therefore, a level of legal protection should accordingly be afforded to the individual when an administrative decision-maker goes back on its word.[205] This way of thinking about the normative groundings of the duty is surely difficult to reconcile with the suggestion that Miss A has a sufficient interest to make this challenge. Secondly, and relatedly, the hearing of Miss A's case would involve a substantial invasion of Miss Coughlan's privacy. Such an invasion, in the absence of Miss Coughlan's consent, is surely difficult to justify.[206] Thirdly, recognition of Miss A's standing also gives rise to inconsistences in the law; were the legal challenge to

202 Ibid, [1].

203 Ibid.

204 Senior Courts Act 1981, s31(3).

205 See especially *R (Bibi) v Newham LBC* [2001] EWCA Civ 607, [2002] 1 WLR 237, [55].

206 Fisher & Kirk (n 156), 384.

be brought in the realm of contract law[207] or human rights law[208] it is clear that standing would be confined to Miss Coughlan.

To summarise, then, what the discussion in this section has sought to show is that, contrary to the analysis of some, such as Lord Reed in *AXA*,[209] there is, albeit limited, room for the use of the 'rights-based standing rules'[210] which are used in private law. The courts have, for good reason, rejected a *generalised* approach to standing which requires the applicant to show that she has a personal legal right or interest at stake. There are, however, certain legal duties arising in the field of administrative law in relation to which the courts either do, or there is good reason to think the court would, regard standing as being confined to the individual who holds the right which is correlative to the administrative decision-maker's duty.

C. Standing to Rely on One Ground Does Not Entail Standing to Rely on All

The third and final proposition inherent in the ground-dependent approach to standing which emerges from the above discussion is that it is a perfectly logical possibility that an applicant who has been found to have standing to challenge a decision on the basis of one legal duty, may lack standing to challenge the same decision on another ground.

This is a possibility which is best illustrated through an example. Consider, again, the imaginary twist on the facts of *Coughlan* set out above. Imagine this time, however, that Miss A seeks to rely on two legal grounds. Firstly, she seeks to argue, as above, that the closure decision amounted to an unlawful breach of Miss Coughlan's legitimate expectation. Secondly, however, she also seeks to argue that the local health authority had failed to properly consult the residents of Mardon House, of which she was one, prior to making the

207 Because, for example, the promise of a home for life was contained in a contractual agreement.

208 See especially Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), art 1 of protocol 1.

209 *AXA* (n 95).

210 Varuhas (n 13), 101.

closure decision.[211] In these circumstances, the important question arises: does Miss A have a 'sufficient interest' to make this challenge?

As explained above, there are significant normative difficulties in the way of the conclusion that Miss A has standing to challenge the closure decision by invoking the assurance offered to Miss Coughlan. To suggest, however, that Miss A lacks standing to rely on her second ground is equally problematic; the duty, on the part of public authorities, to consult users of a care facility prior to withdrawing funding from that facility is designed to protect persons in precisely Miss A's position. To deny her standing, accordingly, would be to deny her the ability to enforce a legal duty which the courts have recognised for the purpose of protecting a group to which she belongs. The most appropriate conclusion, therefore, is that though Miss A lacks a 'sufficient interest' to rely on her first ground, she has standing to rely on her second.

The suggestion, it ought to be noted, that standing to rely on one legal duty does not entail standing to rely on all is contrary to the Court of Appeal's judgment in *Kides*.[212] In this case, Laws LJ opined as follows:

> It seems to me that a litigant who has a real and genuine interest in challenging an administrative decision must be entitled to present his challenge on all available grounds.[213]

There are, however, why the authority of this passage is doubtful. Three are particularly worthy of mention. The first is that significant doubt has been cast on Laws LJ's line of reasoning in *Chandler*.[214] In this case, counsel for the public authority made the argument that this aspect of *Kides* was incorrect and 'contrary to authority.'[215] As full submissions had not been made on the argument, the Court of Appeal did not offer a conclusive view on the point but clearly left the issue open.[216] Secondly, there have also clearly been cases in which

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211 See especially *R v Devon County Council, ex parte Baker* [1995] 1 All ER 73 (CA); *R (LH) v Shropshire Council* [2014] EWCA Civ 404, [2014] PTSR 1052 and discussion in chapter 4.

212 *R (Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370, Official Transcript.

213 Ibid, [134].

214 *Chandler* (n 116).

215 Ibid, [76].

216 Ibid, [78].

the courts have recognised at least the possibility that an applicant may be found to have standing to rely on one legal duty, but lack standing to rely on another. Two examples may be given. First, *McBride*.[217] In this case, Kerr J, as he was then, held that the applicant had standing to challenge the decision not to dismiss from the armed services two soldiers who had been connected to the death of her son on a number of grounds,[218] though lacked standing to argue that the decision violated the principle of equality.[219] Another is *Manson*.[220] Here, counsel for the public authority was prepared to accept that the applicant had standing to rely on two of the three grounds on which he sought to rely, though challenged his standing to rely on a third legal duty.[221] Although it was ultimately concluded that the applicant had standing to rely on all grounds, the court clearly recognised the legitimacy of the authority's argument. Thirdly and finally, the conclusion reached in *Kides* itself could quite easily have been reached without making use of the idea that standing to rely on one legal duty logically entails standing to rely on all.[222]

By way of concluding this part of the chapter it is helpful to offer a brief summary of the arguments developed herein. This part has sought to draw out some of the implications for how we ought to understand standing in administrative law from the analysis in part 2, and in the earlier chapters. It has, in particular, sought to demonstrate that standing in administrative law is 'ground-dependent.' This proposition, in turn, is made up of three more specific arguments. Firstly, the courts do not make use of a monolithic approach to standing in this field; different approaches are used in different contexts depending on the legislative background, the normative considerations in play and the legal relationships at stake in a case. Secondly, contrary to the suggestions of some, there is room in administrative law for the rights-based approach to standing used in fields such as private law. The courts have, for good reason, rejected a generalised approach to standing which requires the applicant to show

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217 *McBride's Application for Judicial Review* [1999] NI 299.

218 Ibid, 311.

219 Ibid, 312.

220 *R v Dyfed CC, ex parte Manson* [1995] Env LR 83 (QB).

221 Ibid, 102.

222 The court, for instance, could have explained that the duty to consider existing affordable housing duty was an obligation created for the benefit of the public at large and that the applicant ought to be recognised as having standing in a representative capacity.

a personal legal right to relief. There are, however, certain significant legal duties arising in this field in relation to which the courts either do, or there is good reason to think the courts would, regard standing as being confined to the individual who holds the right which is correlative to the public authority's legal duty. Thirdly, contrary to Laws LJ's suggestion in *Kides,*[223] it is a perfectly logical possibility that an applicant who has been found to have standing to rely on one legal ground, may lack standing to rely on another.

4. Conclusion

By way of concluding this chapter, it is helpful once again to offer some reflections on the relationship between the argument developed herein and the broad narrative of the thesis. This thesis, as explained in the introduction, is concerned to explore a single, but broad and important, question: how should we approach the development of an understanding of administrative law? Chapter 1 postulated two main possibilities. Firstly, we could, as the 'public interest conception'[224] does, make use of a *monistic* approach which would seek to organise some singular 'organising concept'[225] which serves the function of unifying the legal area. Part of this chapter continues to show why administrative law resists monistic analysis of this kind; the basic legal and normative structures in play are both too complex and too varied to be adequately explained by some singular 'master idea or principle.'[226] Secondly, we could elect for an *anatomical approach* which would pull administrative law apart, examine the nature of its basic legal and normative and legal components, and use the knowledge one finds to construct explanations of its doctrine. This thesis is an exercise in arguing for an approach of this kind. The arguments developed in this chapter continue to demonstrate the utility of such a method; by pulling the standing case law apart, it has been argued, we can begin to construct an explanation of the doctrine which better captures the legal and normative complexities with which judges must grapple in giving effect to it. An

223 *Kides* (n 212).

224 Varuhas (n 1).

225 Language used in, for instance, Christopher Forsyth, 'The Rock and the Sand: Jurisdiction and Remedial Discretion' (2013) 18(4) JR 360, [27].

226 Stephen Smith, *Contract Theory* (OUP 2004), 11-12.

anatomical approach, in particular, has utility in this context because it reveals the ways in which standing in administrative law is *ground-dependent*.

Chapter 7

Against Monism & In Favour of an Anatomical Approach

As explained in the introductory chapter, this thesis has been concerned with single, but broad and important, question: how should we approach the development of an understanding of administrative law? To that end, the introductory chapter began with a story told by Nobel Prize-winning physicist Richard Feynman which has come to be termed his 'Ode to a Flower.'[1] As explained, embedded in Feynman's story are two different approaches to setting about understanding a subject. According to the first, the approach favoured by Feynman's artist friend – which was termed 'monism' - in seeking to understand a subject it is important to proceed by trying to pin down some 'master principle or idea'[2] from which that subject can be seen as flowing. As has been explained throughout this thesis, monism has had a powerful influence in administrative law. Thus a good deal of the literature proceeds by striving to isolate some 'organising concept'[3] which can be thought of as capturing the essence of administrative law and which can thereby lend the subject unity.[4] This thesis has been concerned to a large degree with one important monistic approach to administrative law: the public interest conception. This way of thinking invites us to embrace the advancement of public, as opposed to individual, interests as the 'master idea'[5] which underlies administrative law and is having a growing[6] and practical[7] influence on the administrative law literature. The second approach to understanding which emerges from

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1 http://www.bbc.co.uk/programmes/p018dvyg (last accessed 2 May 2017).

2 Stephen Smith, *Contract Theory* (OUP 2004), 11.

3 Language used in, for instance, Christopher Forsyth, 'The Rock and the Sand: Jurisdiction and Remedial Discretion' (2013) 18(4) JR 360, [27].

4 A point made recently for example in Sarah Nason, *Reconstructing Judicial Review* (Bloomsbury 2016), chapter 1.

5 Smith (n 2), 11.

6 See especially Mark Elliott & Jason Varuhas, *Administrative Law* (5th ed, OUP 2017), chapter 14.

7 See especially Jason Varuhas, 'Against Unification' in Mark Elliott & Hanna Wilberg (eds), *The Intensity and Scope of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, 2015).

Feynman's story, by contrast, is an 'anatomical approach.' As explained, one making use of an approach of this kind would proceed by pulling apart administrative law, examining the detail of the basic legal and normative structures in play and using the knowledge gained to construct understandings of the doctrine.

This thesis has been an exercise in arguing against monistic approaches to administrative law, and the public interest conception specifically, and in favour of an anatomical approach. The public interest conception, it has been argued, fails to provide an understanding of particular doctrines within administrative law which adequately capture the legal and normative complexities within which judges must grapple in giving effect to them. By contrast, it has been shown, by taking an approach which embraces the various ways in which administrative law's basic components are complex and varied, it becomes possible to construct understandings which better capture these complexities.

The purpose of this concluding chapter is to offer some final reflections on why administrative law is not amenable to monistic analysis and on why it is preferable to make use of an anatomical approach. The discussion will be divided into three parts. Each part, in turn, will focus on one of three considerations which, it is suggested, can help to explain the considerable influence that the public interest conception, and monism more broadly, has had within the administrative law literature: an *historical/explanatory* consideration, a *methodological* consideration and a *defensive* consideration. The aim in each part will be to explain two things. Firstly, why, although the relevant consideration might at first sight appear to provide an argument in favour of the public interest conception and monism more broadly, further reflection shows these arguments to be unconvincing. Secondly, why reflection on the consideration, in the end, points to the virtues of an anatomical approach to administrative law.

1. The Historical/Explanatory Consideration

A first consideration, or set of considerations, which helps to explain the influence of the public interest conception, and of monism more broadly, is historical/explanatory. It is helpful to begin by explaining, first, how this consideration helps to explain the influence of

the public interest conception before turning to other monistic approaches to understanding administrative law.

In relation to the public interest conception, the important point put briefly is this: there is certainly an important kernel of truth in the public interest conception and this is so in two more particular senses, the first historical, the second explanatory. Historically, there is clearly a sense in which the modern history of administrative law is, in part, the history of the courts successfully carving out for themselves an important role in intervening so as to promote the vision of the public interest which underlies a statutory scheme. Thus, as was explained in chapter 2, the judiciary over the course of a century moved from a position in *Lewisham Union Guardians*[8] in which it was said by the court that it would be 'far exceeding its proper functions if it were to assume jurisdiction to enforce the performance by public bodies of all their statutory duties without requiring clear evidence that the person who sought its interference had a legal right to insist upon such performance'[9] through to the modern position in which the courts make use of such concepts as representative standing[10] and the '*Padfield* principle'[11] to uphold the vision of the public interest which underlies an administrative scheme. In a close related way, it is also true that the courts continue to decide cases which fit neatly with the account of the basic legal and normative structures of administrative law offered by the public interest conception. Chapter 4, for example, discussed at length the *Moseley*[12] decision, and chapter 5 the *Greenpeace*[13] case. As explained therein, these are best explained as cases in which the judiciary intervened to protect some strand of the public interest and to give effect to a legal duty which was owed 'either to the public at large or a section of it.'[14]

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8 *R v Guardians of the Lewisham Union* [1897] 1 QB 498 (DC).

9 Ibid, 500.

10 *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement* [1995] 1 WLR 386 (QB).

11 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL).

12 *R (Moseley) v Haringey LBC* [2014] UKSC 56, [2014] 1 WLR 3947.

13 *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin), [2007] Env LR 29.

14 Nicholas Bamforth, 'Hohfeldian Rights and Public Law' in Matthew Kramer, *Rights Wrongs & Responsibilities* (Palgrave 2001), 11.

Something similar, furthermore, is no doubt true of other monistic approaches to administrative law which have proven to be influential. There is, for instance, clearly a sense in which the history of administrative law is, in part, the history of the courts moving from a narrow understanding of 'jurisdiction,'[15] to a broad understanding of that term which enabled the development of new legal techniques such as the strong reading down of ouster clauses.[16] There is also clearly a sense in which that history is, in part, the history of the courts invoking such concept of 'ultra vires'[17] and 'abuse of power'[18] as a conceptual basis from which to develop new legal grounds,[19] and of the courts developing, through mechanisms such as the principle of reason-giving and increased use of proportionality[20] a richer 'culture of justification.'[21]

A core point which emerges from the arguments developed in this thesis, however, is that the kernel of truth which lies in an approach to understanding administrative law such as the public interest conception is *partial* only. Take, for instance, public interest conception. As explained in chapter 2, the modern history of modern administrative law is far from the linear tale of the courts' progressing from one end of a single spectrum to another. It is, rather, the story of the proliferation of the many and varied basic components of administrative law. To focus, more specifically, on the success of the courts in carving out for themselves a role in protecting the public interest is to miss at least two other important themes which characterised that history. Firstly, the proliferation of a broad variety of administrative schemes designed to advance and protect different aims and interests and to create legal relationships of different kinds. Secondly, the important role the courts have carved out for

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15 See for example discussion in Philip Murray, 'Process, Substance and the History of Error of Law Review' in John Bell, Mark Elliott, Jason Varuhas and Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016).

16 See especially *Anisminic v Foreign Compensation Commission & Another* [1969] 2 AC 147 (HL).

17 See for example Elliott & Varuhas (n 6), chapter 1.

18 See for example *R v Somerset Country Council, ex parte Dixon* [1998] Env LR 111 (QBD), 121.

19 See for example *R v North & East Devon Health Authority, ex parte Coughlan* [2001] QB 213 (CA).

20 See for example *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591.

21 See especially David Dyzenhaus, Murray Hunt & Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1(1) OUCLJ 5.

themselves in protecting fundamental, and often 'individual-regarding'[22] common law values.[23] In a similar way, consider the explanatory element of truth inherent in the public interest conception. This thesis has sought to show throughout that while the public interest conception is clearly capable of provide us with an idea of some of the legal and normative structures which are necessary to understanding administrative law – specifically, 'public-regarding'[24] normative concerns and the idea of collective right-duty correlativity[25] - it also fails to account for many others, such as the important role played by respect in the procedural fairness case law[26] and the clear recognition on the part of judges that some of the legal duties to which they give effect in the legitimate expectations field are owed personally to the individual applicant.[27]

The historical/explanatory consideration, then, fails to provide a convincing argument in favour of the public interest conception specifically, and monistic approaches to administrative law more broadly. Reflection on this consideration, furthermore, in the end points to the virtues of the anatomical approach to administrative law defended in this thesis. This approach, in contrast to a monistic approach, offers us a much fuller understanding of the basic components of administrative law. It, in particular, emphasises that there are three core senses in which the basic structures of administrative law are both complex and varied. Firstly, administrative law doctrine interacts with an array of different administrative regimes. The principles of administrative law, that is, become closely intertwined with the statutory and policy frameworks which forms the background to a legal challenge and these frameworks are not of one type. Secondly, administrative law intervenes to protect an array of different values. This is true, it has been emphasised, in two more specific ways: the values to which administrative law gives effect originate in different legal sources and focus on

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22 Varuhas (n 2), 42.

23 See especially Dawn Oliver, 'The Underlying Values of Public and Private Law' in Michael Taggart (ed), *The Province of Administrative Law Determined* (Hart Publishing 1997); Dawn Oliver, 'Common Values in Public and Private Law and the Public/Private Divide' [1997] PL 630; *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115.

24 Varuhas (n 2), 42.

25 See for example Jason Varuhas, 'The Reformation of English Administrative Law? "Rights", Rhetoric and Reality' (2013) 72 CLJ 369, 409.

26 See especially *Osborn* (n 26); Trevor Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18 OJLS 497.

27 See for example *R (Alansi) v Newham LBC* [2013] EWHC 3722 (Admin), [2014] PTSR 948.

different groups. Thirdly, administrative law is concerned with legal relationships of different kinds. Thus, it is far too simplistic to suggest, as the public interest conception does, that administrative law is concerned to give effect only to those legal duties which are 'owed either to the public at large or a section of it.'[28]

One of the virtues of the anatomical approach to administrative law defended in this thesis, in other words, is that, unlike a monistic approach, it provides a full explanation of the basic legal and normative structures in play in administrative law. Rather than emphasising merely a subset of these structures, the anatomical approach invites us to embrace the full complexity and variety of the basic normative and legal components of the subject.

2. The Methodological Consideration

A second consideration helps to explain the considerable influence of the public interest conception and monism as an approach to understanding administrative law is *methodological* in nature. For the purposes of this thesis, it is helpful to define 'methodology' as an understanding of the tasks and methods of legal scholarship. To take a methodological position, therefore, is to advocate an understanding of the tasks which a legal scholar ought to be undertaking, the processes by which they ought to be taking them and the evaluative criteria against which the success of their projects can be properly evaluated. Questions about methodology have received a good deal of attention in a number of different places[29] in the literature including in administrative law itself,[30] but also in the fields of general

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28 Bamforth (n 17), 11.

29 For an example from environmental law see Elizabeth Fisher, Bettina Lange, Eloise Scotford & Cinnamon Carlarne, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21(2) JEL 213.

30 See especially Carol Harlow & Richard Rawlings, *Law and Administration* (1st edn, CUP 1984), chapter 1; Carol Harlow & Richard Rawlings, *Law and Administration* (2nd edn, Butterworths 1997), chapter 1; Carol Harlow & Richard Rawlings, *Law & Administration* (3rd edn, CUP 2009), chapter 1; Carol Harlow, 'Changing the Mindset: The Place of Theory in English Administrative Law' (1994) 14(3) OJLS 419; Carol; Carol Harlow & Richard Rawlings, 'Administrative Law in Context: Restoring a Lord Connection' [2014] PL 28 at 29-30; Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22(1) OJLS 157; Denis Galligan, 'Judicial Review and the Textbook Writers' (1982) 2 OJLS 257; David Feldman, 'The Nature of Legal Scholarship' (1989) 53(4) MLR 498; Peter Cane, 'Theory and Values in Public Law' and Paul Craig, 'Theory and Values in Public Law: A Response' both in

jurisprudence,[31] private law[32] and thinking about the relationship between the legal academy and legal practice.[33] The idea which will be discussed in this section is one which originates primarily in the private law scholarship. It has been termed, by Stephen Smith, 'more demanding version'[34] of 'coherence.' This idea, Smith explains in the following terms:

> According to the more demanding version [of coherence], mere consistency [in an explanation of law] is not enough. This version states that theories should also be evaluated according to the extent that they show [a body of law] as a *unified system*... [A body of law] is unified if *all of its constituent parts* flow from a *single master idea or principle.*[35]

According to this way of thinking about methodology, in other words, the task of a legal scholar who wishes to develop an explanation of a branch of the law is to identify some unifying principle or idea from which the entirety of the subject can be seen as flowing.

Paul Craig & Richard Rawlings, *Law and Administration in Europe: Essays in Honour of Carol Harlow* (OUP 2003).

31 See especially HLA Hart, *The Concept of Law* (3rd edn, OUP 2012), postscript; John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011), chapter 1; Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing, 2001).

32 See especially Ernest Weinrib, *The Idea of Private Law* (OUP 2012); Alan Beever, 'Formalism in Music and Law' (2011) 61(2) University of Toronto LJ 213; Roderick Bagshaw, 'Tort Law, Concepts and What Really Matters' in Andrew Robertson & Tang Hang Wu, *The Goals of Private Law* (Hart Publishing, 2009); James Goudkamp & John Murphy, 'Tort Statutes and Tort Theories' (2015) 131 LQR 133.

33 See especially Kenneth Lasson, 'Scholarship Amok: Excesses in Pursuit of Truth and Tenure' (1990) 103(4) Harvard LR 926; Harry Edwards, 'The Growing Disjunction between Legal Education and the Legal Profession' (1992) 91(1) Michigan LR 34; Harry Edwards 'The Growing Disjunction between Legal Education and the Legal Profession: A Postscript' (1993) 91(8) Michigan LR 2191; Robert Gordon, 'Lawyers, Scholars and the Middleground' (1993) 91(8) Michigan LR 2075; Edward Rubin, 'Law And and The Methodology of Law' (1997) Wisconsin LR 521; Deborah Rhode, 'Legal Scholarship' (2002) 115(5) Harvard LR 1327; Richard Posner, 'Legal Scholarship Today' (2002) 115(5) Harvard LR 1314; Lord Rodger, 'Judges and Academics in the UK' (2010) 29 Uni Queensland 29; Mark Tushnet, 'Academics as Lawmakers?' (2010) 29 Uni Queensland LJ 19; Richard Posner, 'The Judiciary and the Academy: A Fraught Relationship' (2010) 29 Uni Queensland 13; Susan Bartie, 'The Lingering Core of Legal Scholarship' (2010) 30(3) Legal Studies 345

34 Smith (n 4), 11.

35 Ibid, 11-12 (my emphasis).

It is entirely possible, indeed likely, that this way of thinking about the tasks of legal scholarship, which has been highly influential in private law,[36] has had an important influence on thinking within administrative law. It may be, more particularly, that this way of thinking has seeped over into administrative law and has crystallised in an implicit belief that the administrative law's scholars task is that of identifying a singular 'organising concept'[37] which serves the function of unifying the subject. In light of this, it is important to consider in some detail the nature of the argument which is offered by those who have defended this idea of 'a more demanding version of coherence'[38] in private law, and to consider the extent to which that argument provides a convincing case for the monistic project in administrative law.

The usual argument one finds in favour of strong coherence in the field of private law has three main stages. Firstly, it is said that the task of the legal scholar is to render the body of case law she seeks to explain *intelligible*. Secondly, it is argued that the scholar must do so by *justifying* the legal doctrine which the judges invoke.[39] Thirdly, it is suggested that the only way in which the theorist can justify a branch of law is to identify a unifying normative concept from which the entirety of that legal branch can be seen as flowing. Thus Alan Beever, for instance, has written that:

> Not only is coherence and unity necessary for intelligibility; it is necessary for justification... Purported justifications that are inconsistent with others do not justify. Moreover, even if the justifications offered are consistent, they do not justify unless they cohere.[40]

This point is best explained through an example. Imagine a private law theorist wishes to develop an explanation of tort law. According to the first and second precepts of Beever's argument her task is to be understood as that of rendering tort law *intelligible* and to do so by *justifying* the doctrines of tort law as they have developed. Imagine that, in undertaking this

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36 See especially Weinrib (n 32); Beever (n 32). See further Ernest Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 Univ of Toronto LJ 349; Ernest Weinrib, *Corrective Justice* (OUP 2012).

37 Forsyth (n 3), [27].

38 Smith (n 2), 11.

39 See especially Weinrib (n 32), 44.

40 Beever (n 32), 235-236.

project, the theorist presents an understanding of private law which stipulates the following. In determining private law claims the courts will take into account four considerations: deterrence of carelessness, compensation of injured persons, corrective justice and economic efficiency. In some cases, the theory explains, the courts will be give precedence to one of these considerations, but in others the courts will give precedence to another. Furthermore, there is no way of explaining why weight is given to, for example, deterrence in certain contexts but less weight in others. Rather, all depends upon the personal preferences of the judge. Such an explanation of private law would clearly *fail* to fulfil the project undertaken by theorists such as Ernest Weinrib and Alan Beever. It would *fail* to provide a convincing justification of *why* the cases have been decided in the way that they have.

With this argument in mind, it is important now to return to administrative law and the viability of the monistic project. The key question is this: does this argument provide a convincing for monism as an approach to understanding administrative law? The arguments of this thesis suggest that there are two main reasons why it does not.

In explaining the first reason, it is important to return to a point made above. Private law theorists such as Weinrib and Beever see the first job of the legal scholar as being that of rendering a legal area *intelligible*. They then go on to argue that the proper way to do this is to isolate a master principle which is capable of justifying the legal doctrine to which the courts give effect. One important point which very clearly emerges from the analysis undertaken in this thesis, however, is that if we really care about rendering administrative law, and the legal and normative issues with which judges must grapple, *intelligible* we must abandon the monistic project. A monistic approach to the subject, more particularly, encourages one to think of the subject in terms which are far too abstracted from the legal and normative detail of a case. The analytical framework it presents one with, as a result, is one which is incapable of helping one to clearly understand the difficulties which a court faces in adjudicating upon matters of administrative law in any given case.

This point can be best appreciated by looking from the perspective of a first time student of administrative law. Imagine, for instance, that a student wishes to learn about standing in administrative law. The first thing she reads is the story of the 'triumph of the public interest conception,'[41] set out in the last chapter, which explains how, in the decades following *Fleet*

[41] Elliott & Varuhas (n 6), chapter 14.

Street Casuals[42] Lord Diplock's approach to standing 'won out'[43] and the courts have come to think of the 'importance of vindicating the rule of law'[44] as justifying a 'liberal'[45] approach to issues of standing. She then comes across a standing case such as *Millard & Connolly*[46] or *Ruddock*.[47] The story of the triumph of the public interest conception does not equip her with the framework she needs to understand the issues which the courts faced in this case. This story, for instance, does not warn her of the hugely important role that the background legislative scheme to a case plays in shaping the courts' approach to determining whether an applicant has a 'sufficient interest,'[48] nor of the complexity of the normative values which the courts seek to protect in administrative law and how they might suggest different approaches to standing in different contexts. Far from rendering administrative law intelligible, in other words, a monistic approach, such as that embodied in the public interest conception, can actually have the effect of rendering the administrative law case law *unintelligible*; the simplistic and monolithic framework it offers fails to provide us with an intellectual system which we can use to comprehend the legal and normative issues which arise in a given case.

The second reason for which Beever's argument for unity does not provide a convincing case for the monistic project in administrative law concerns the second limb of the argument. As explained above, private law theorists such as Beever argue that, in order to justify a body of law, and thereby render it intelligible, it is necessary to identify one singular cluster of normative considerations which are seen as unifying the legal area; to fail to do so, and to say of a body of law that it is concerned with a number of normative purposes, is to fail to perform the task of legal scholarship. The arguments of the previous chapters make clear why this argument does not work in the field of administrative law; close scrutiny of doctrine and

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42 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL).

43 Elliott and Varuhas (n 6), chapter 15.

44 *WDM* (n 10).

45 John McGarry, 'The Importance of an Expansive Test of Standing' (2015) 19(1) JR 60.

46 *R v Birmingham CC, ex parte Millard & Connolly* (1994) 26 HLR 551 (QB).

47 *R v Secretary of State for the Home Department, ex parte Ruddock* [1987] 1 WLR 1482 (QB).

48 Senior Courts Act 1981, s31(3).

of judicial reasoning makes clear that the courts, in the course of adjudicating in administrative law, draw on values which have their legal origins in different sources. One particularly acute problem in this regard is that one cluster of values which the courts seeks to protect have their origins in the logic of the relevant administrative scheme and this, furthermore, no singular type of administrative scheme. This complexity cannot be ignored and an explanation of administrative law which failed to capture this would only add to the unintelligibility of the subject.

The methodological consideration, like the historical/explanatory consideration, then, in the end, fails to provide a convincing argument in favour of monism. Like the historical/explanatory consideration, furthermore, further reflection on this consideration ultimately points to the virtues of taking an anatomical approach. The important point is this: the anatomical approach to administrative law which has been defended in this thesis, unlike monistic approaches to the subject, *does* succeed in providing us with an intellectual framework which is capable of rendering the legal and normative issues with which judges grapple in adjudicating on administrative law intelligible. Chapters 4, 5 and 6 of this thesis sought to demonstrate the various ways in which this is the case with a focus on three case studies of central administrative law doctrines – procedural fairness, legitimate expectations and standing. In relation to each the thesis has sought to demonstrate how, by pulling apart the case law in which these doctrines have been invoked and thinking carefully about the basic legal and normative structures in play, it becomes possible to construct explanations which explicate very clearly the complex issues with which judges must grapple in giving effect to them. For present purposes, however, perhaps the simplest way of demonstrating the utility of the anatomical approach in providing an intellectual framework through which administrative law case law can be understood is through a discussion of a single case. The case chosen has already been briefly discussed in chapter 4 - *Aylesbury Mushrooms*[49] - though the discussion which follows will focus on a slightly different issue within it.

As explained in chapter 4, this case arose in the context of the Industrial Training Board Act 1964 which both empowered the Secretary of State to establish boards for the purpose of regulating training within particular industries[50] and placed her under a legal duty, prior to

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49 *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms* [1972] 1 WLR 190 (QB).

50 Industrial Training Act 1964, s1.

exercising this power, to consult organisations well-placed to represent the interests of particular industries.[51] On the facts of *Aylesbury Mushrooms*, the Secretary of State made use of this power to create a board which would oversee training across a number of agricultural industries including, but not limited to, the mushroom-growing industry. Prior to enacting the relevant order, the Secretary of State had sent a letter to an organisation representing mushroom-growers but the letter had never arrived. This, the court held, meant that the Secretary of State had failed to comply with her statutory duty to consult. The question accordingly arose in *Aylesbury Mushrooms*: what were the consequences of the unlawfulness and, accordingly, what remedial order ought the court now to make? The answer given by the court was that, although the order in general terms remained perfectly valid it 'ha[d] no application to mushroom growers as such.'[52]

How should we set about making sense of this case and the case law, more broadly, in which the courts have considered the effects of unlawfulness? One, highly monistic, approach has come to be 'standard'[53] in the academic literature:[54] it is important, according to this approach, to recognise that 'jurisdiction' is the 'organising concept'[55] of administrative law. When one embraces this point, it is argued, it becomes clear that the proper conclusion, wherever the court finds that a public authority has acted in contravention of administrative law principle, is that the authority has acted outside of the sphere of its jurisdiction and, accordingly, that its purported decision is, and always has been, a nullity.[56]

It is important to note, however, that this approach really is not of much *use* in understanding the issues with which the judges grappled in *Aylesbury Mushrooms*. It is an approach, more particularly, which encourages us to overlook *the legal and normative detail* which applied in the case and which led the court to its conclusion. Indeed, the only guidance offered by

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51 Ibid, s1(4).

52 *Aylesbury Mushrooms* (n 49), 196.

53 Thomas Adams, 'The Standard Theory of Administrative Unlawfulness' (2017) 76(2) CLJ 289.

54 Although note David Feldman, 'Error of Law and Flawed Administrative Act' (2014) 73(2) CLJ 275.

55 Forsyth (n 1), [27].

56 See especially Forsyth (n 3); Elliott & Varuhas (n 6), chapter 3; William Wade, 'Unlawful Administrative Action: Void or Voidable' (1967) 83 LQR 499; William Wade, 'Unlawful Administrative Action: Void or Voidable?' (1968) 84 LQR 95; Christopher Forsyth, 'The Metaphysics of Nullity'' in Christopher Forsyth & Ivan Hare (eds), *The Golden Metwand and the Crooker Cord* (OUP 1998).

this monistic approach is the suggestion that, given the unlawfulness of the Secretary of State's conduct, the order ought to have been regarded as a nullity and thus, perhaps, that the court reached the wrong conclusion.

By contrast, to equip a student with the anatomical approach to administrative law is to equip her with an intellectual framework which helps her to make significant sense of the courts' conclusion in *Aylesbury Mushrooms*. She is directed to think, in particular, about the detail of the statutory scheme which sat at the background to the case, the normative values and interests at stake and the legal relationship on which the court was being asked to adjudicate. Consideration of these three matters helps considerably to make sense of *Aylesbury Mushrooms*: it becomes clear that the reason for the courts' conclusion was that the background legislation was designed to ensure that *particular industries* were given the opportunity to comment before a training board was introduced in relation to them and that, given this, there was no need to quash the Secretary of State's order, but only to hold that it did not apply to the industry of mushroom-growing which had not been properly consulted.

To summarise, the *intelligibility* of administrative law is promoted, not by an approach which seeks to collapse the subject into a singular 'master idea or principle'[57] which serves the function of lending unity to the area, but rather, by an approach which takes seriously the complexity and variety of its basic legal and normative components. To that end, the anatomical approach argued for in this thesis offers an intellectual framework which encourages us to think carefully about the legal and normative structures which are in play in a given body of case law and, thereby, to construct an understanding which better captures the complexities with which judges must grapple in adjudicating in the field of administrative law.

3. The Defensive Consideration

A third and final consideration which helps to explain the significant influence of the public interest conception, and monism more broadly, can be labelled the 'defensive consideration.'

[57] Smith (n 2), 11.

Put simply, the important point is this, there has long, since the days of Dicey, been a sense that administrative law is a subject under attack. Thus, as explained in chapter 2, in its early years the language of administrative law was disparaged by such prominent scholars as Dicey and Lord Hewart. There are, furthermore, a handful of important senses, in which this sense of attack lingers today. In light of this, the appeal of monism is highly understandable: monism, by purporting to identify some singular idea which sits at the heart of administrative law and thereby gives it a unique identity, is tempting because it seems to make the subject much easier to defend. It purports to pin down *the thing* which makes administrative law an indispensable branch of law and a subject worthy of study in its own right.

A number of points in the above assertion are in need of unpacking. Firstly, consider the assertion that there has long been a sense that administrative law has long been a subject in need of defending. Chapter 2 explained in some detail how this was true of administrative law's early years. Thus, in this chapter, it was explained how Albert Venn Dicey, in his treatise on the English constitution[58] and later works,[59] denied that there was any space in English law for administrative law; the central principle 'rule of law,' it was said, was fundamentally inconsistent with either broad administrative power[60] or a special body of principle designed to regulate the use of such power.[61] In a similar way, it was explained how Lord Hewart, following the expansion of the administrative state during and after the first world war,[62] published an influential book[63] condemning these changes and arguing for a return to what he saw as the pre-war Diceyan orthodoxy.

Importantly, however, this sense of administrative law as a subject which is in need of defencing has not entirely dissipated. There are, more particular, two main senses in which this is so. The first is *pedagogical* in nature. Tom Ginsburg has written that, in the eyes of many:

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58 Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (Liberty Fund 1982) reprint of (8th edn, MacMillan 1915).

59 Albert Venn Dicey, 'Droit Administratif in Modern French Law' (1901) 17 LQR 302.

60 Dicey (n 558), 110.

61 Ibid, 120-121.

62 See discussion in Cecil Carr, 'Administrative Law' (1935) 51 LQR 58.

63 Lord Gordon Hewart of Bury, *The New Despotism* (London: Ernst Benn Ltd, 1929).

> Administrative law is the poor relation of public law; the hard-working, unglamorous cousin labouring in the shadow of constitutional law. Constitutional law, it is generally believed resolves the great issues of state and society, while administrative law, in its best moments merely refines those principles for dealing with the administrative state.[64]

Ginsburg was writing in the context of the US academy but his suggestion that administrative law continues to struggle to escape the 'shadow of constitutional law' in law schools has some resonance in the UK. This is true in at least two more particular senses. Firstly, despite the calls of Griffiths and Street in 1952,[65] administrative law continues to be a non-compulsory subject in most law schools. It is true that, in order to obtain 'qualifying law status' students in English and Welsh universities are required to study 'Public Law' which is said to include the study of all three of 'Constitutional Law, Administrative Law and Human Rights.'[66] A glance at the leading textbooks written for use on such courses, however, reveals that administrative law provides a small focus, relative to constitutional law. Mark Elliott & Robert Thomas' *Public Law*,[67] for instance, dedicates only four of twenty-one chapters to judicial review.[68] In a similar way, only four of twenty-four chapters in Ian Loveland's *Constitutional Law, Administrative Law & Human Rights*[69] focus on administrative law.[70] Secondly, even within certain textbooks dedicated exclusively to administrative law, there is a clear sense in which students are encouraged to see administrative law *through the lens* of constitutional law. It is significant, for instance, that

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64 Tom Ginsburg, 'Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law' University of Chicago Public Law & Legal Theory Working Paper, No 331 (2010) available at http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1391&context=public_law_and_legal_theory (last accessed 8 June 2017).

65 TCT, 'Reviewed Works: Principles of Administrative Law by JAG Griffith & H Street' (1953) 11(3) CLJ 501.

66 See for example https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/current-requirements/academic-stage/ (last accessed 8 June 2017).

67 Mark Elliott & Robert Thomas, *Public Law* (3rd edn, OUP 2017).

68 Chapters 11-14.

69 Ian Loveland, *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction* (7th ed, OUP 2015).

70 Ibid, chapters 14-17.

at least two of the leading textbooks on administrative law – those of William Wade & Christopher Forsyth[71] and Mark Elliott & Jason Varuhas[72] introduce the subject, to a large degree, through a discussion of the 'constitutional basis of judicial review.'[73] The implication of this is surely that administrative law is best seen as a *sub-branch* of constitutional law; that the way into administrative law is to first develop a clear understanding of those constitutional principles – such as parliamentary sovereignty and the rule of law – which administrative law is an attempt to refine.[74]

The second sense in which administrative law doctrine is a subject under threat is *political* in nature. Judicial review has, in recent years, found itself under the fire of the government[75] and the legal profession has, understandably, been concerned that the protections of administrative law doctrine are vulnerable to being considerably weakened.[76] Although the fire has, to a large degree been abated,[77] this movement did manifest in significant changes to the judicial review process[78] and to legal aid,[79] both of which have raised considerable alarm among scholars.[80]

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71 Wade and Forsyth, *Administrative Law* (11th edn, OUP 2016), chapters 1-2.

72 Elliott & Varuhas (n 6), 12-24.

73 Ibid, 12.

74 See citations in chapter 1 at (n 32).

75 See especially 'Judicial Review: Proposals for Further Reform' available at https://consult.justice.gov.uk/digital-communications/judicial-review-reform/ (last accessed 8 June 2017).

76 See for example Mark Elliott, 'Judicial Review Reform – The Report of the Joint Committee on Human Rights' available at https://ukconstitutionallaw.org/2014/05/01/mark-elliott-judicial-review-reform-the-report-of-the-joint-committee-on-human-rights/ (last accessed 8 June 2017); Varda Bondy and Maurice Sunkin: 'How Many JRs Are Too Many?' available at https://ukconstitutionallaw.org/2013/10/25/varda-bondy-and-maurice-sunkin-how-many-jrs-are-too-many-an-evidence-based-response-to-judicial-review-proposals-for-further-reform/ (last accessed 8 June 2017).

77 See especially https://www.gov.uk/government/consultations/reform-of-judicial-review (last accessed 2017).

78 Criminal Justice and Courts Act 2015, s84.

79 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

80 See specially Tom Hickman, 'Public Law's Disgrace' available at https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/ (last accessed 8 June 2017).

With these points in mind, it is now important to turn to the second limb of the above assertion which is in need of unpacking: part of the appeal of monism surely lies in its claim to capture, in some sense, the *essence* of administrative law and, thereby, an easy way to defend it. Take, for instance, the point just made that administrative law is often seen as a mere sub-branch of constitutional law which ought to be studied as such. It might be said that, part of the appeal of a way of thinking such as that offered by the public interest conception, is that it provides a simple way in which to challenge this presupposition. Administrative law, it would be said, is much more than just the application of constitutional principles, such as the rule of law, in concrete situations. It is a distinct, and important area of law which pursues a special set of normative aims and which ought to be studied as such. In a similar way, consider the political threats which administrative law considers to face. Part of the appeal of the public interest conception again probably lies in the way in which it supplies an easy way of responding to those threats: administrative law and judicial review should be preserved because they perform a unique and important functions, namely that of ensuring that interests held by the public as a collectivity are upheld and respected in the course of administrative decision-making.

This mode of defending administrative law, however, should be resisted. Its problem is that it is far too short-sighted and may have long-term, negative implications for the integrity of administrative law. The problem, as has been seen throughout the course of this thesis, with presenting administrative law as a subject which is unified around one 'organising concept'[81] is that that concept must inevitably be one which is so abstracted and vague that it gives little real indication of the legal and normative technicalities with which judges grapple in administrative law adjudication. This in turn fosters a way of thinking about administrative law according to which all judges do is apply general principles which are so vague and so lacking in detail that everything is simply left to judicial discretion. This picture of administrative law is very easy to attack. It, in particular, becomes very easy to argue that administrative law is not a branch of law which law schools should encourage students to study in and of itself; the study of such broad and general principles can easily be accommodated as a sub-branch of constitutional law. Furthermore, and more importantly,

[81] Forsyth (n 3), [27].

administrative law becomes a very vulnerable political target; the arguments against broad judicial discretion do not need rehearsing[82] and they have strong political clout.

Far from pointing in favour of a monistic approach, the defensive consideration, then, suggests we ought to resist the temptation of defending the need to recognise administrative law as a distinct and important legal field by pointing to some organising concept which purports to unify it. The long-term effect of doing so will surely be to perpetuate a perception of the subject as one in which the courts merely exercise discretion through the guise of giving effect to broad legal principle.

The anatomical approach, it ought to be noted, does not suffer from this problem. This approach recognises that administrative law lacks a single organising concept which lends it legal and normative unity. It recognises further that there is no simple brightline which can distinguish administrative law from, for instance, private law or human rights law. But, importantly, it encourages us to appreciate that there is real legal rigour in what the courts do when they adjudicate on matters of administrative law. It presents a picture of administrative law according to which adjudication, does not consist of the application of general principles which are so vague that judges cannot help but drawn on their own background political preference but, is informed by technical and legal rigour. The courts' task is explained as being the navigation of a whole complex of varied and complicated legal things: complex legislative and regulatory regimes, values, embedded in the law, and drawn from an array of different legal sources, and legal relationships of many different kinds. Focusing on the legal rigour of what the courts do, rather than seeking to collapse administrative law into a single unifying idea, will surely in the long-run prove a more effective means of defending it.

4. Conclusion

This thesis has been an exercise in arguing against monistic approaches to administrative law and in favour of, what it has called, 'an anatomical approach.' The purpose of this chapter has been to offer some concluding reflections on the reasons for which administrative law is not amenable to monistic analysis and for which it is better to make use of an approach which

[82] See especially Ronald Dworkin, *Taking Rights Seriously* (new ed, Duckworth 1997).

embraces the complexity and variety of the legal and normative structures in play. To that end, the chapter has discussed three considerations – one historical/explanatory, one methodological and one defensive – which can help to explain the considerable influence that monism has had in the literature on administrative law. The aim, in each case, was to show two things. Firstly, that the consideration fails to provide a convincing argument in favour of monism. Secondly, that further reflection on the consideration only serves to highlight the virtues of an anatomical approach to the subject. Those virtues, summarised briefly, include the provision of a full account of the basic legal and normative components which make up administrative law, the provision of an intellectual framework through which the legal and normative issues with which judges must grapple in adjudicating administrative law are rendered intelligibility and a mode of thinking which, by emphasising the legal rigour of administrative law, will in the long-run provide a better way of defending it than overly abstract monistic approaches.

BIBLIOGRAPHY

Books

Bamforth N & Leyland P (eds), *Public Law in a Multi-Layered Constitution* (Hart, 2003)

Bell J, Elliott M, Varuhas J & Murray P (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, 2016)

Bentham J, *The Works of Jeremy Bentham* published under the Superintendence of his Executor John Bowring (William Tait 1838-1843)

Cane P, *Administrative Law* (5th ed, OUP 2011)

Carr C, *Concerning English Administrative Law* (Columbia University Press 1941)

Craig P, *Administrative Law* (8th edn, Sweet & Maxwell 2016)

Craig P & Rawlings R (eds), *Administration in Europe: Essays in Honour of Carol Harlow* (OUP 2003)

De Smith S, Judicial Review of Administrative Action (London: Stevens 1959)

Dicey AV, An Introduction to the Study of the Law of the Constitution (Liberty Fund 1982) reprint of (8th edn, MacMillan 1915)

Dickson J, *Evaluation and Legal Theory* (Hart 2001)

Dworkin, *Taking Rights Seriously* (new ed, Duckworth 1996)

Dworkin, *Law's Empire* (Hart Publishing 1986)

Dyzenhaus D (ed), *The Unity of Public Law* (Hart, 2004)

Dyzenhaus D, Hunt M & Huscroft G (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart, 2009)

Elliott M, *The Constitutional Foundations of Judicial Review* (Bloomsbury, 2001)

Elliott M & Feldman D (eds), *The Cambridge Companion to Public Law* (CUP 2015)

Elliott M & Robert T, *Public Law* (3rd edn, OUP 2017)

Elliott M & Varuhas J, *Administrative Law* (4th edn, OUP 2017),

Elliott M & Wilberg H (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart 2015)

Endicott T, *Administrative Law* (3rd edn, OUP 2015)

Finnis J, *Natural Law and Natural Rights* (2nd edn, OUP 2011)

Fisher E, Lange B & Scotford E, *Environmental Law* (OUP 2013)

Forsyth C & Hare I (eds), *The Golden Metwand and the Crooked Cord* (OUP 1998)

Fraser D, *The Evolution of the British Welfare State* (4th edn, Palgrave Macmillan 2009)

Galligan D, *Due Process and Fair Procedures: A Study of Administrative Procedure* (OUP 1997)

Griffith J & Street H, *Principles of Administrative Law* (London: Pitman & Sons 1952)

Groves M & Weeks G, *Legitimate Expectations in the Common Law World* (Hart 2017)

Harlow C & Rawlings R, *Law and Administration* (CUP 1984)

Harlow C & Rawlings R, *Law and Administration* (2nd edn, CUP 1997)

Harlow C & Rawlings R, *Law and Administration* (3rd edn, CUP 2009)

Hart HLA, *Essays on Bentham: Jurisprudence and Political Theory* (OUP 2001)

Hart HLA, *The Concept of Law* (3rd edn, OUP 2012)

Henderson E, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard 1974)

Hewart G, *The New Despotism* (London: Ernst Benn Ltd, 1929)

Hohfeld W, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (The Law Book Exchange 2010)

Jowell J & Oliver D (eds), *The Changing Constitution* (7th edn, OUP 2011)

Jowell J & Oliver D (eds), *The Changing Constitution* (8th edn, OUP 2015)

Kramer M, *Rights Wrongs & Responsibilities* (Palgrave 2001)

Loveland I, *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction* (7th ed, OUP 2015)

Lucas J, *On Justice* (OUP 1980)

Maitland, *The Constitutional History of England: A Course of Lectures Delivered by FW Maitland* (CUP 1919)

Nason S, *Reconstructing Judicial Review* (Bloomsbury 2016)

Pearson L (ed), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008)

Peter G & Pierre J, *The SAGE Handbook of Public Administration* (2nd edn, SAGE Publications, 2012)

Port FJ, Administrative Law (Longmans, Green & Co 1929)

Raz J, *The Morality of Freedom* (OUP 1986)

Raz J, *The Authority of Law* (2nd edn, OUP 2009)

Robertson A & Nolan D, *Rights and Private Law* (Hart Publishing 2011)

Robertson A & Hang Wu T, *The Goals of Private Law* (Hart Publishing, 2009)

Robson W (ed), *Man and the Social Sciences* (London: Allen & Unwin, 1972)

Schonberg S, *Legitimate Expectations in Administrative Law* (OUP 2000)

Sedley S, *Lions Under the Throne: Essays on the History of English Public Law* (CUP 2015)

Sigron M, *Legitimate Expectations Under Article 1 of Protocol No 2 to the European Convention on Human Rights* (Intersentia 2014)

Smith S, *Contract Theory* (OUP 2004)

Stevens R, *Torts and Rights* (OUP 2007)

Taggart M (ed), *The Province of Administrative Law* (Hart, 1997)

Thomas R, *Legitimate Expectations and Proportionality in Administrative Law* (Bloomsbury 2000)

Wade W, *Administrative Law* (OUP 1961)

Wade W & Forsyth C, *Administrative Law* (11th ed, OUP 2014)

Weeks G, *Soft Law and Public Authorities: Remedies and Reform* (Hart 2016)

Weinrib, *The Idea of Private Law* (OUP 2012)

Woolf H, *Protection of the Public – A New Challenge* (Stevens and Sons, 1990)

Woolf H, Jowell J, Le Sueur A, Donnelly C & Hare I, *De Smith's Judicial Review* (7th edn, Sweet & Maxwell 2015)

Book Chapters

Bagshaw R, 'Tort Law, Concepts and What Really Matters' in Robertson A & Hang Wu T, *The Goals of Private Law* (Hart Publishing, 2009)

Bamforth N, 'Hohfeldian Rights and Public Law' in Kramer M, *Rights Wrongs & Responsibilities* (Palgrave 2001)

Cane P, 'Theory and Values in Public Law' in Craig P & Rawlings R (eds), *Administration in Europe: Essays in Honour of Carol Harlow* (OUP 2003)

Cane P, 'Rights in Private Law' in Robertson A & Nolan D, *Rights and Private Law* (Hart Publishing 2011)

Craig P, 'Public Law and Control Over Private Power' in Taggart M (ed), *The Province of Administrative Law* (Hart, 1997)

Craig, 'Theory and Values in Public Law: A Response' in Craig P & Rawlings R (eds), *Administration in Europe: Essays in Honour of Carol Harlow* (OUP 2003)

Craig P, 'Administrative Law in the Anglo-American Tradition' in Peter G & Pierre J, *The SAGE Handbook of Public Administration* (2nd edn, SAGE Publications, 2012)

Daly P, ‘Administrative Law: A Values-Based Approach’ in Bell J, Elliott M, Varuhas J & Murray P (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, 2016)

Drewry G, ‘The Executive: Towards Accountable Government and Effective Governance?’ in Jowell J & Oliver D (eds), *The Changing Constitution* (7th edn, OUP 2011)

Elias S, ‘Righting Administrative Law’ in Dyzenhaus D, Hunt M & Huscroft G (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart, 2009)

Elliott M, ‘From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification’ in Elliott M & Wilberg H (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart 2015)

Forsyth C, ‘The Metaphysics of Nullity’’ in Forsyth C & Hare I (eds), *The Golden Metwand and the Crooked Cord* (OUP 1998)

Forsyth, ‘Blasphemy Against Basics: Doctrine, Conceptual Reasoning and Certain Decisions of the Supreme Court’ in Bell J, Elliott M, Varuhas J & Murray P (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, 2016)

Groves M & Weeks G, ‘The Legitimacy of Expectations about Fairness’ in Bell J, Elliott M, Varuhas J & Murray P (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, 2016)

Halpin A, *Rights & Law: Analysis & Theory* (1997 Hart)

Hunt M, ‘Constitutionalism and the Contractualisation of Government’ in Taggart M (ed), *The Province of Administrative Law* (Hart, 1997)

Hunt M, ‘Sovereignty’s Blight: Why Public Law Needs a Concept of Due Deference’ in Bamforth N & Leyland P (eds), *Public Law in a Multi-Layered Constitution* (Hart, 2003)

Hunt M, ‘Against Bifurcation’ in Dyzehaus D, Hunt M & Huscroft G (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (OUP 2009)

Jowell J, ‘Proportionality and Deference: Neither Merger Nor Takeover’ in Elliott M & Wilberg H (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart 2015)

Kahn-Freund O, ‘The Legal Framework of Society’ in Robson W (ed), *Man and the Social Sciences* (London: Allen & Unwin, 1972)

Laws J, ‘Wednesbury’ in Forsyth C & Hare I (eds), *The Goldern Metwand and the Crooked Cord* (OUP 1998)

Miles J, ‘Standing in a Multi-Layered Constitution’ in Bamforth N & Leyland P (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003)

Murray P, ‘Process, Substance and the History of Error of Law Review’ in Bell J, Elliott M, Varuhas J & Murray P (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, 2016)

Norton P, ‘Parliament: A New Assertiveness’ in Jowell J & Oliver D (eds), *The Changing Constitution* (8th edn, OUP 2015)

Oliver D, ‘The Underlying Values of Public and Private Law’ in Taggart M (ed), *The Province of Administrative Law Determined* (Hart Publishing 1997)

Poole T, ‘Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights’ in Pearson L (ed), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008)

Taggart M, ‘Reinventing Administrative Law’ in Bamforth N & Leyland P, *Public Law in a Multi-Layered* Constitution (Hart Publishing 2003)

Taggart M, ‘The Tub of Public Law’ in Dyzenhaus D (ed), *The Unity of Public Law* (Hart, 2004)

Varuhas J, ‘Against Unification’ in Elliott M & Wilberg H (eds), *The Intensity and Scope of Substantive Review: Traversing Taggart’s Rainbow* (Hart Publishing, 2015)

Varuhas J, ‘The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications’ in Bell J, Elliott M, Varuhas J & Murray P (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016)

Varuhas J, ‘In Search of a Doctrine: Mapping the Law of Legitimate Expectations’ in Groves M & Weeks G, *Legitimate Expectations in the Common Law World* (Hart 2017)

Wright T, ‘The Politics of Accountability’ in Elliott M & Feldman D (eds), *The Cambridge Companion to Public Law* (CUP 2015)

Journal Articles

Adams T, ‘The Standard Theory of Administrative Unlawfulness’ (2017) 76(2) CLJ 289

Ahmed F & Perry A, ‘The Coherence of the Doctrine of Legitimate Expectations’ (2014) 73(1) CLJ 61

Allan T, ‘Procedural Fairness and the Duty of Respect’ (1998) 18 OJLS 497

Allan T, ‘The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?’ (2002) CLJ 87

Allan T, ‘Constitutional Dialogue and the Justification of Judicial Review’ (2003) 23 OJLS 563

Allan, ‘Doctrine and Theory in Administrative Law: An Elusive Quests for the Limits of Jurisdiction’ [2003] PL 429

Aronson M, ‘Private Bodies, Public Power and Soft Law in the High Court’ (2007) Federal LR 1

Arvind T& Stirton L, ‘The Curious Origins of 99 Judicial Review’ (2017) 133(1) LQR 91

Aspey E, ‘The Search for the True Public Law Element: Judicial Review of Procurement Decisions’ [2016] PL 35

Bailey SH, ‘Reflections on Standing for Judicial Review in Procurement Cases’ (2015) 4 PPLR 122

Barber, ‘The Afterlife of Parliamentary Sovereignty’ (2001) 9 International Journal of Constitutional Law 144

Barber N, ‘Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?’ (2004) 17(4) Ratio Juris 474

Bartie S, ‘The Lingering Core of Legal Scholarship’ (2010) 30(3) Legal Studies 345

Becker F, ‘The Donoughmore Report and the Franks Report’ (1958) 24 *International Review of Administrative Sciences* 31

Beever A, ‘Formalism in Music and Law’ (2011) 61(2) University of Toronto LJ 213

Bell J, ‘The Privy Council and Doctrine of Legitimate Expectations Meet Again’ (2017) 75(3) CLJ 449

Bell J, ‘*ClientEarth No 2*: A Case of Three Legal Dimensions’ (2017) 29(2) JEL 343

Bell J, ‘*Kent and Oakley*: A Re-examination of the Common Law Duty to Give Reasons in Relation to Grants of Planning Permission and Beyond’ (2017) 22(2) JR 105

Campbell C, ‘Monopoly Power as Public Power for the Purposes of Judicial Review’ (2009) 125 LQR 491

Cane P, ‘Standing up for the Public’ [1995] PL 276

Cane P, ‘Damages in Public Law’ (1999) 3 Otago LR 489

Cane P, ‘Open Standing and the Role of Courts in a Democratic Society’ (1999) 20 Sing LR 23

Cane P, ‘Two Conceptions of Constitutional Right’ (2015) 8(3) Insights 1

Carr C, ‘Review: Administrative Law in England by Frederick John Port’ (1929) 11(4) *Journal of Comparative Legislation and International Law* 285

Carr C, ‘Administrative Law’ (1935) 51 LQR 58

Clayton R, ‘Legitimate Expectations, Policy and the Principle of Consistency’ (2003) 62 CLJ 93

Craig P, ’Representations by Public Bodies’ (1977) 93 LQR 398

Craig P, ‘Legitimate Expectations: A Conceptual Analysis’ (1992) 108(1) LQR 79

Craig P, ‘Competing Models of Judicial Review’ [1999] PL 428

Craig P, ‘Public Law, Political Theory and Legal Theory’ (2000) PL 211

Craig P, ‘Constitutional Foundations, the Rule of Law and Supremacy’ [2003] PL 92

Craig P, ‘The Common Law, Shared Power and Judicial Review’ (2004) 24 OJLS 237

Craig P, ‘Proportionality, Rationality and Review’ [2010] NZLR 303

Craig P, ‘Perspectives on Process: Common Law, Statutory and Political’ [2010] PL 275

Craig P, ‘The Nature of Reasonableness Review’ (2013) 66 CLP 131

Craig P, ‘Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application’ [2015] PL 60.

Craig P & Bamforth N, ‘Constitutional Analysis, Constitutional Principle & Common law judicial review’ [2001] PL 763

Craig P & Schonberg S, ‘Substantive Legitimate Expectations after Coughlan’ [2000] PL 564.

Daly P, ‘Wednesbury’s Reason and Structure’ [2011] PL 238

Davis KC, ‘The Requirement of a Trial-Type Hearing’ (1956) 70(2) Harvard LR 193

Davis KC, ‘The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence’ (1961) Colum. L. Rev 201

De Smith S, ‘The Prerogative Writs’ (1951) 11(1) CLJ 40

De Smith S, ‘The Right to a Hearing in English Administrative Law’ (1955) 68(4) Harv LR 569

Devlin P, ‘The Common Law, Public Policy and the Executive’ (1956) 9(1) CLP 1

Dicey AV, ‘Droit Administratif in Modern French Law’ (1901) 17 LQR 302

Dicey AV, ‘The Development of Administrative Law in England’ (1915) 31 LQR 148

Diplock Lord, ‘Judicial Review Revisited’ (1974) 33(2) CLJ 233

Dyzenhaus D, Hunt M & Taggart M, ‘The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation’ (2001) 1(1) OUCLJ 5

Edwards H, ‘The Growing Disjunction between Legal Education and the Legal Profession’ (1992) 91(1) Michigan LR 34

Edwards H, ‘The Growing Disjunction between Legal Education and the Legal Profession: A Postscript’ (1993) 91(8) Michigan LR 2191

Elliott M, ‘Boddington: Rediscovering the Constitutional Logic of Administrative Law’ [1998] PL 92

Elliott M, ‘The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law’ (1999) 58(1) CLJ 129

Elliott M, ‘Unlawful Representations, Legitimate Expectations and Estoppel in Public Law’ [2003] JR 71

Elliott M, ‘Legitimate Expectations, Consistency and Abuse of Power: The Rashid Case’ (2005) 10 JR 281

Elliott M, ‘Legitimate Expectations and the Search for Principle: Reflections on *Abdi & Nadarajah*’ [2006] JR 281

Elliott M, ‘Has the Common Law Duty to Give Reasons Come of Age Yet?’ [2011] PL 56

Elliott M, ‘Judicial Review’s Scope, Foundations and Purposes: Joining the Dots’ [2012] NZLR 75

Elliott M & Thomas R, ‘Tribunal Justice and Proportionate Dispute Resolution’ (2012) 71(2) CLJ 297

Feldman D, ‘The Nature of Legal Scholarship’ (1989) 53(4) MLR 498

Feldman D, ‘Public Law Values in the House of Lords’ (1990) 106(2) LQR 246

Feldman D, ‘Public Interest Litigation and Constitutional Theory in Comparative Perspective’ (1992) 55 MLR 44

Feldman D, ‘None, One or Several? Perspectives on the UK’s Constitution(s)’ (2005) 64(2) CLJ 329

Feldman D, ‘Error of Law and Flawed Administrative Act’ (2014) 73(2) CLJ 275

Fisher E & Kirk J, ‘Still Standing: An Argument for Open Standing in Australia and England’ [1997] Australian Law Journal 370

Fisher E, Lange B, Scotford E & Carlarne C, ‘Maturity and Methodology: Starting a Debate about Environmental Law Scholarship’ (2009) 21(2) JEL 213.

Fisher E, Pascual P & Wagner W ‘Understanding Environmental Models in their Legal and Regulatory Context’ (2010) 22(2) JEL 251

Fordham M, ‘Reparation for Maladministration: Public Law’s Final Frontier’ [2003] JR 104

Forsyth C, ‘The Scope of Judicial Review: “Public Duty” Not “Source of Power”’ [1987] PL 356

Forsyth C, ‘The Provenance and Protection of Legitimate Expectations’ (1988) 47(2) CLJ 238

Forsyth C, ‘Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review’ (1996) 55(1) CLJ 12

Forsyth C, ‘Collateral Challenge and the Foundations of Judicial Review: Orthodoxy Vindicated and Procedural Exclusivity Rejected’ [1998] PL 364

Forsyth C, ‘Legitimate Expectations Revisited’ [2011] JR 429

Forsyth C, ‘The Rock and the Sand: Jurisdiction and Remedial Discretion’ (2013) 18(4) JR 360

Freedland M, ‘The Rule Against Delegation and the Carltona Doctrine in an Agency Context’ [1996] PL 19

Galligan D, ‘Judicial Review and the Textbook Writers’ (1982) 2 OJLS 257

Gordon R, ‘Lawyers, Scholars and the Middleground’ (1993) 91(8) Michigan LR 2075

Goudkamp J & Murphy J, ‘Tort Statutes and Tort Theories’ (2015) 131 LQR 133

Hale Baroness, ‘Who Guards the Guardians?’ (2013) 3(1) CJICL 100

Hannett S & Busch L, ‘Ultra Vires Representations and Illegitimate Expectations’ [2005] PL 729

Harlow C, ‘Changing the Mindset: The Place of Theory in English Administrative Law’ (1994) 14(3) OJLS 419

Harlow C, ‘Back to Basics: Reinventing Administrative Law’ (1997) PL 245

Harlow C & Rawlings R, ‘Administrative Law in Context: Restoring a Lost Connection’ [2014] PL 28

Harris MC, ‘Fairness and the Adversarial Paradigm: An Australian Perspective’ [1996] PL 508

Hickman T, ‘Problems for Proportionality’ [2010] NZLR 303

Hilson C, ‘Judicial Review, Policeis and the Fettering of Discretion’ [2002] PL 111

Holloway I, ‘Natural Justice and the New Property’ (1999) 25 Monash University LR 85

Irvine Lord, ‘Judges and Decision-Makers: The Theory and Practice of Wednesbury Review’ [1996] PL 59

Jennings I, ‘The Report on Ministers’ Powers’ (1932) 10(4) *Public Administration* 333

Jowell J, ‘Of Vires and Vacuums: The Constitutional Context of Judicial Review’ [1999] PL 448

King J, ‘Proportionality: A Halfway House’ [2010] NZLR 327

Kramer M, ‘Refining the Interest Theory of Rights’ (2010) 55(1) American Journal of Jurisprudence 55(1), article 2

Kramer M & Steiner H, ‘Theories of Rights: Is There a Third Way?’ (2007) 27(2) OJLS 281

Lasson K, ‘Scholarship Amok: Excesses in Pursuit of Truth and Tenure’ (1990) 103(4) Harvard LR 926

Lester A & Jowell J, ‘Beyond Wednesbury: Substantive Principles of Administrative Law’ [1987] PL 368

Masterman R & Wheatle S, ‘A Common Law Resurgence in Rights Protection?’ (2015) 1 EHRLR 57

McGarry J, ‘The Importance of an Expansive Test of Standing’ (2014) 19(1) JR 60

Mead D, ‘Outcomes Aren’t All: Defending Process-Based Review of Public Authority Decisions under the Human Rights Act 1998’ [2012] PL 61

Miles J, ‘Standing under the Human Rights Act 1998’ (2000) 59(1) CLJ 133

Mitchell JDB, ‘The Causes and Effects of the Absence of a System of Public Law in the United Kingdom’ [1965] PL 95

Mullan D, ‘The New Natural Justice?’ (1975) 25(3) University of Toronto LJ 281

Murray P, ‘Escaping the Wilderness: R v Bolton and Judicial Review for Error of Law’ (2016) 75(2) CLJ 333.

Oliver D, ‘Is Ultra Vires the Basis of Common Law Judicial Review?’ [1987] PL 543

Oliver D, ‘Common Values in Public and Private Law and the Public/Private Divide’ [1997] PL 630

Oliver D, ‘Public Law Procedures and Remedies – Do We Need Them?’ [2002] PL 91

Oliver D, ‘Functions of a Public Nature under the Human Rights Act’ [2004] PL 329

Olowofoyeku A, ‘The Nemo Judex Rule: The Case Against Automatic Disqualification’ [2000] PL 456

Poole T, ‘The Reformation of English Administrative Law’ (2009) 68(1) CLJ 142

Posner R, ‘Legal Scholarship Today’ (2002) 115(5) Harvard LR 1314

Posner R, ‘The Judiciary and the Academy: A Fraught Relationship’ (2010) 29 Uni Queensland 13

Raz J, ‘Promises in Morality and Law’ (1982) 95 Harvard LR 916

Raz J, ‘Legal Rights’ (1984) 4(1) OJLS 1

Reich C, ‘The New Property’ (1964) 73(5) Yale LJ 733

Reynolds P, ‘Legitimate Expectations and the Protection of Trust in Public Officials’ [2011] PL 330

Rhode D, ‘Legal Scholarship’ (2002) 115(5) Harvard LR 1327

Rivers J, ‘Proportionality and Variable Intensity Review’ (2006) 65(1) CLJ 174

Robson W, ‘The Report on the Committee on Ministers’ Powers’ (1930) 3(3) The Political Quarterly 346

Robson W, ‘The National Insurance Act 1946’ (1947) 10(2) MLR 171

Rodger Lord, ‘Judges and Academics in the UK’ (2010) 29 Uni Queensland 29

Rubin E, ‘Law And and The Methodology of Law’ (1997) Wisconsin LR 521

Sales P, ‘Legitimate Expectations’ (2006) 11(2) JR 186

Sales P & Steyn K, ‘Legitimate Expectations in English Public Law: An Analysis’ [2004] PL 564

Schiemann K ‘Locus Standi’ [1990] PL 342

Sedley S, ‘The Sound of Silence: Constitutional Law without a Constitution’ (1994) 110(2) LQR 270

Sedley S, ‘Not in the Public Interest’ (2014) 36(5) London Review of Books 29

Sedley S, ‘The Lion Beneath the Throne: Law as History’ (2016) 21(4) JR 289

Steele I, ‘Substantive Legitimate Expectations: Striking the Right Balance?’ (2005) 121 LQR 300

Sunkin M, ‘Pushing Forward the Frontiers of Human Rights Protection: The Meaning of Public Authority Under the Human Rights Act’ [2004] PL 643

Taggart M, ‘Proportionality, Deference, Wednesbury’ [2008] NZLR 423

Taylor G, ‘Judicial Review of Improper Purposes and Irrelevant Considerations’ (1976) 35(2) CLJ 272

TCT, ‘Reviewed Works: Principles of Administrative Law by JAG Griffith & H Street’ (1953) 11(3) CLJ 501

Tomkins A, ‘In Defence of the Political Constitution’ (2002) 22(1) OJLS 157

Tushnet M, ‘Academics as Lawmakers?’ (2010) 29 Uni Queensland LJ 19

Vanderman Y, ‘Ultra Vires Legitimate Expectation: An Argument for Compensation’ [2012] PL 85

Varuhas J, ‘The Reformation of English Administrative Law? “Rights”, Rhetoric and Reality’ (2013) 72 CLJ 369

Varuhas J, ‘Judicial Review at the Crossroads’ (2015) 74(2) CLJ 215

Vrousalis N, ‘Between Insensitivity and Incompleteness: Against the Will Theory of Rights’ (2010) 16(4) *Res Publica* 415

Wade W, ‘The Basis of Legal Sovereignty’ (1955) 13(2) CLJ 172

Wade W, ‘The Twilight of Natural Justice?’ (1955) 67 LQR 103

Wade W, ‘Unlawful Administrative Action: Void or Voidable’ (1967) 83 LQR 499

Wade W, ‘Unlawful Administrative Action: Void or Voidable?’ (1968) 84 LQR 95

Wade W, ‘Procedure and Prerogative in Public Law’ (1985) 101 LQR 180

Wade W, ‘Sovereignty: Revolution or Evolution?’ (1996) 112 LQR 568

Waldron J, ‘A Right to Do Wrong’ (1981) 92 *Ethics* 21

Waldron J, ‘How the Law Protects Dignity’ [2012] CLJ 200

Watson J, ‘Clarity and Ambiguity: A New Approach to the Test of Legitimacy in the Law of Legitimate Expectations’ (2010) 30(4) LS 633

Weinrib E, ‘Corrective Justice in a Nutshell’ (2002) 52 Univ of Toronto LJ 349

Wenar L, ‘The Nature of Rights’ (2005) 33 *Philosophy and Public Affairs* 223

Wilberforce R, ‘Lord Diplock and Administrative Law’ [1986] PL 6

Williams D, 'The Donoughmore Report in Retrospect' (1982) 60 *Public Administration* 273

Williams R, 'The Multiple Doctrines of Legitimate Expectations' (2016) 132(3) LQR 639

Williams R, 'Structuring Substantive Review' [2017] PL 99

Woolf H, 'Public Law – Private Law: Why the Divide? A Personal View' [1986] PL 220

Reports

Committee on Ministers' Powers, 'Report' (London HMSO, 1932)

Law Commission, 'Report on Remedies in Administrative Law' (Law Comm No 73, 1976)

Bondy V & Sunkin M, 'The Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges Before Final Hearing' (Public Law Project 2009)

Law Commission, 'Administrative Redress: Public Bodies and the Citizen' (Law Comm No 322, 2010)

Bondy, Platt L & Sunkin M, 'The Value and Effects of Judicial Review: The Nature of Claims, Their Outcomes and Consequences' (Public Law Project 2015)

Conference Papers

Adams T, 'Disunity in the Justification of Judicial Review' presented at the Public Law Conference (Cambridge, September 2016)

Working Papers

Varuhas J, 'Taxonomy and Public Law' forthcoming in Mark Elliott, Jason Varuhas & Shona Wilson Stark, The Unity of Public Law? Doctrinal, Theoretical and Comparative Perpsectives (Hart 2017) abstract available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2891890

Ginsburg T, 'Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law' University of Chicago Public Law & Legal Theory Working Paper, No 331 (2010) available at http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1391&context=public_law_and_legal_theory

Blog Posts

Elliott M, 'Judicial Review Reform – The Report of the Joint Committee on Human Rights' available at https://ukconstitutionallaw.org/2014/05/01/mark-elliott-judicial-reviewreform-the-report-of-the-joint-committee-on-human-rights/

Sunkin M, 'How Many JRs Are Too Many?' available at https://ukconstitutionallaw.org/2013/10/25/varda-bondy-and-maurice-sunkin-how-many-jrs-are-toomany-an-evidence-based-response-to-judicial-review-proposals-for-further-reform/

Hickman T, 'Public Law's Disgrace' available at https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/

Webpages

http://www.bbc.co.uk/programmes/p018dvyg

http://dictionary.cambridge.org/us/dictionary/english/anatomical

https://www.merriam-webster.com/dictionary/anatomy

https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/currentrequirements/academic-stage/

https://www.gov.uk/government/consultations/reform-of-judicial-review

Other

Leary T, 'The Nature of Public Law Duty and Citizen Standing in English Law' available at: https://www.google.co.uk/?gws_rd=ssl#q=andrew+leary+the+nature+of+public+law+duty