Sources of Dynamism in Modern Administrative Law

Review of JE Varuhas & S Wilson Stark (eds), The Frontiers of Public Law

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The list of recognised grounds of judicial review has remained constant in England and Wales for several decades. Modern administrative law may therefore appear to be characterised by high levels of stability or perhaps stagnancy. The collection of essays in The Frontiers of Public Law *are, however, an important reminder of three important sources of dynamism across modern administrative law. First legislation can change regularly in this field, generating novel legal questions. Second, internal administrative practices are not static but evolving, creating questions about the adequacy of existing doctrinal structures. Third, principles can emerge within 'subbranches' of judicial review, giving rise to questions about whether and how those same principles apply elsewhere. These sources of dynamism make modern administrative law ripe territory for novel and important legal issues.*

Some books read like comforting trips to familiar places. The edited collection which emerged from the third biannual Public Law Conference held in Melbourne in 2018 is not a book of this kind. *The Frontiers of Public Law*[1] is less of a jaunt into the familiar, and more of a voyage of a discovery. As American novelist Kurt Vonnegut put it, 'out on the edge you can see all kinds of things you can't see from the centre.'[2] In a similar vein, the editors of *Frontiers*, Jason

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1 Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019).

2 K Vonnegut, *Player Piano* (1952).

Varuhas and Shona Wilson Stark, explain in their introductory chapter that while many issues at the perceived 'core' of public law have generated a vast literature:

> …what has been far less explored is public law's outer edges. Yet it is at the outer edges of a field or discipline that one often learns the most about the nature of that field or discipline. This is because at the outer edges certain matters, taken for granted at the (perceived) centre of the field, are brought squarely into focus and tested.[3]

Unlike the collections from previous iterations of the conference,[4] *Frontiers* moves away from 'questions squarely *within* public law' to explore the '*intersections* between public law and other fields.'[5] Or, to put the point differently, *Frontiers*' focus is on the 'outer edges'[6] rather than the 'perceived "centre"... [or] "mainstream" of public law.'[7] Unsurprisingly, therefore, the offerings in *Frontiers* are highly diverse. The chapters address an array of different subject-matters, from a variety of methodological perspectives. Indeed, any practitioner or scholar, working within any subfield of public law, will likely find something of direct interest among the book's contents.

While the collection is not lacking in interesting and high quality individual contributions, the broader question arises, however, of whether there is anything of more general importance to be learnt from reading *Frontiers*.[8] The editors explicitly elect not to answer this question in detail. They suggest that one 'golden thread'[9] running through many of the chapters is the importance of public law adapting to a 'chang[ing] reality.'[10] Otherwise, they prefer to leave the reader to 'draw their own conclusions, in light of the rich material presented in the chapters.'[11]

In this review article I take up the editors' invitation. My argument is that *Frontiers* is an important reminder that modern administrative law is a highly dynamic legal field.

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3 Jason NE Varuhas and Shone Wilson Stark, 'Introduction: The Frontiers of Public Law' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019), 3.

4 John Bell and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016); Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law?* (Hart 2018).

5 Varuhas & Wilson Stark (n 3), 3 (original emphasis).

6 Ibid.

7 Ibid.

8 See also Sarah Nason, 'Review: *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives*' [2017] PL 611.

9 Varuhas & Wilson Stark (n 3), 4.

10 Ibid.

11 Ibid.

Administrative law's dynamism may be easily overlooked. In the English and Welsh context at least,[12] the grounds of review are usually thought of as providing administrative law's basic 'doctrinal superstructure.'[13] The list of recognised grounds is long-established, and the courts have repeatedly declined opportunities to significantly modify it. It may be tempting to think, therefore, that modern administrative law is not dynamic but stable, or perhaps stagnant.

This way of thinking, however, looks for dynamism of only one kind. An important broader lesson of *Frontiers* is that there continue to be at least three important sources of dynamism in modern administrative law. First, legislation can change with some frequency in this field, generating important interpretative questions and creating new legal territory in which courts are required to apply existing doctrine. Second, internal decision-making practices at not static but evolving. It is essential that administrative law scholars and practitioners understand the nature of the institutions which are the field's subjects. Changing internal practices also require consideration of whether existing legal frameworks continue to be able to provide effective oversight of new forms of decision-making. Third, legal principles sometimes arise in 'subbranches' of judicial review, giving rise to the question of if and how those principles apply in other cases. While modern administrative law may not be characterised by the kind of dynamism present in earlier decades, these sources of dynamism make the field ripe territory for new and important legal questions.

The discussion is organised into three parts. Part 1 explains why administrative law might easily be thought of as being characterised by stability or stagnancy, as opposed to dynamism. Part 2 offers a very brief overview of the chapters in *Frontiers* and discusses the three sources of dynamism they illustrate. Part 3, finally, offers some concluding reflections.

Some brief caveats should be noted before beginning. A book review always strikes a difficult balance between providing the reader with a clear sense of the book's content and evaluating its broader contribution. The challenge is particularly acute with a collection of essays as diverse as *Frontiers*. It is tempting to structure a review around a detailed consideration of each chapter. The breadth and diversity of *Frontiers*, however, means that this approach would leave little room for much else. This review article therefore explores *Frontiers* in a more cross-cutting way, focusing on what can be learnt from the collection about modern administrative law. This approach admittedly has its downsides. For example, contributions which focus on themes primarily within constitutional law [14] are not discussed in depth. In defence of the approach adopted here, however, a detailed overview of the contents

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12 In contrast to, for instance, Canada. See: Paul Daly, 'The Supreme Court of Canada's Administrative Law Trilogy' [2020] PL 408.

13 To borrow language from Mark Elliott, 'Legitimate Expectation: Reliance, Process, Substance' (2019) 78(2) CLJ 260.

14 For instance Jack Beatson and Emma Foubister, 'Public Law in the UK After Brexit' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019).

of *Frontiers* is available in the editors' introductory chapter.[15] The focus on administrative, as opposed to constitutional, law issues also broadly reflects the division in *Frontiers* and, to some extent, its predecessors.[16]

It should also be noted that this article focuses primarily on the lessons of *Frontiers* in the English and Welsh legal context. Parts of the discussion here – for instance, on the stability of the grounds of review – may not, therefore, ring true in other jurisdictions.[17] The overarching argument, namely, that modern administrative law is a dynamic field in a number of senses, does however have resonance in other legal systems.

1. The 'Doctrinal Superstructure' of Administrative Law: Stagnancy or Stability, Rather than Dynamism?

The core argument of this review article is that modern administrative law is a highly dynamic legal field. The field is not always thought of in this way. In the US context William Funk wrote that administrative law is 'commonly perceived as boring, technical abstruse [and] not "real"'.[18] There is, furthermore, a long-standing tradition of speakers introducing lectures on administrative law with tongue-in-cheek apologies. In 1999, for instance, Antonin Scalia famously introduced a lecture on US administrative law[19] by warning his audience that they should 'lean back, clutch the side of [their] chairs and steel [them]selves for a pretty dull lecture.'[20] More recently, in a 2011 lecture David Dyzenhaus joked that he needed to lure his audience into the 'swamp of boredom.'[21]

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15 Varuhas & Wilson Stark (n 3) (available as a free sample chapter: https://media.bloomsburyprofessional.com/rep/files/9781509930371sample.pdf).

16 The contributions in *Public Law Adjudication in Common Law Systems* dealt almost entirely with administrative law issues. Unsurprisingly, in light of its subject matter, a greater portion of the chapters in *The Unity of Public Law?* considered constitutional and human rights law.

17 See for instance the discussion of recent change in Canada in Daly (n 12).

18 William Funk, 'My Ideal "Casebook" Or What's Wrong with Administrative Law Legal Education and How to Fix It, In A Nutshell (So To Speak)' (1999-2000) 38 Brandeis LJ 247, 247.

19 For discussion see Richard A Brisbin Jnr, '"Administrative Law is not for Sissies": Justice Antonin Scalia's Challenge to American Administrative Law' (1992) 44(1) *American Bar Association* 107.

20 Antonin Scalia, 'Judicial Deference to Administrative Interpretations of Law' (1989) 3 Duke LJ 511, 511.

21 David Dyzenhaus, 'Dignity in Administrative Law: Judicial Deference in a Culture of Justification ' 2012 17(1) *Review of Constitutional Studies* 87.

Administrative law's reputation for having a propensity to bore is best explained by several factors. Part of the explanation is probably that modern case law in this field can be complex and technical. Challenges in, for instance, the immigration, planning and tax contexts often require the untangling of large swathes of legislation and policy and their application to complex factual scenarios. If examples of how devilishly complex modern administrative law case law can be are needed, it is not necessary to look further than the case law interpreting planning policy's 'tilted balance principle'[22] or recent legislative changes to immigration appeal rights.[23] While the explanation is multifaceted, however, if administrative law does carry a reputation for dullness in the English and Welsh context, a major factor is surely that its 'doctrinal superstructure' has remained relatively constant for decades.[24] This makes it all too easy to assume that administrative law is the antithesis of dynamic and is, rather, characterised by either stagnancy or stability, depending on one's normative view of the status quo. This argument needs some unpacking. Four points are especially pertinent.

First, in England and Wales the basic 'architecture'[25] of administrative law is usually understood as being supplied by the 'grounds of review.'[26] This way of thinking has been prevalent in textbooks and scholarship English and Welsh since at least the late 1950s.[27] The essential idea is that administrative law is structured around a generally applying set of 'principles of good administration' or 'grounds' and that it is by reference to these standards that the courts review the lawfulness of administrative decision-making.[28] As one leading textbook explains:

> …the essence of administrative law lies in the judge-made doctrines which apply right across the broad and which set legal standards of conduct for public authorities generally.[29]

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22 For a recent example see *Oxton Farm v Harrogate BC* [2020] EWCA Civ 805.

23 David Neale, 'The Ghost of Human Rights Claims Past: Immigration Appeal Rights After *Robinson*' (2019) 24(3) JR 182.

24 For a contrast see Daly (n 12).

25 Kenneth Culp Davis, 'The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence' (1961) 61(2) Columbia LR 201.

26 See for example Dean R Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (CUP 2018), chapters 1 and 3.

27 Stanley De Smith, *Judicial Review of Administrative Action* (Stevens & Sons 1951); William Wade, *Administrative Law* (OUP 1961). For discussion of the influence of these texts see Carol Harlow and Richard Rawlings, 'Administrative Law in Context: Restoring a Lost Connection ' [2014] PL 28; Joanna Bell, *The Anatomy of Administrative Law* (Hart 2020), chapter 2.

28 See broadly Paul Daly, 'The Signal and the Noise in Administrative Law' (2017) 68 University of New Brunswick LJ 68.

29 William Wade and Christopher Forsyth, *Administrative Law* (11th edn, OUP 2014), 5.

Second, following a famously dynamic period of development in the late twentieth century,[30] partly detailed in David Feldman's contribution to *Frontiers*, the list of recognised grounds has remained relatively constant. The two classic judicial articulations of the grounds of review – by Lord Diplock in *CCSU*[31] in 1984 and Lord Slynn in *Alconbury*[32] in 2001 – therefore largely hold true. Perhaps the two most significant developments since *CCSU* have been the coming into effect of section 6 of the Human Rights Act[33] and the concretisation of legitimate expectations as a freestanding ground of review.[34] Both developments, however, are now over twenty years old. There has been little modification of the basic architecture of the grounds since.

Third, the appellate courts have declined several opportunities in recent years to significantly modify the grounds of review. The courts have, for instance, continually rejected arguments in favour of a general duty to give reasons[35] and giving proportionality an expanded role outside of cases with a European Union or human rights dimension.[36] In *Gallaher*,[37] the Supreme Court unanimously rejected an attempt to characterise 'consistency' as a freestanding ground of review. Finally, despite a burgeoning literature,[38] the courts have also resisted suggestions that there is a need for a 'doctrine of due deference.'[39] Perhaps the most significant

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30 Jeffrey Jowell, 'Restraining the State: Politics, Principle and Judicial Review' (1997) 50(1) *Current Legal Problems* 189

31 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL), 410.

32 *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2001] UKHL 23, [2003] 2 AC 295, [50]-[51].

33 Human Rights Act 1998, s6.

34 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 (CA).

35 *R (Hasan) v Secretary of State for Trade and Industry* [2008] EWCA Civ 1312, [2009] 3 All ER 539.

36 *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355; *Browne v Parole Board of England and Wales* [2018] EWCA Civ 2024, [2018] 9 WLUK 246

37 *R (Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25, [2019] AC 96.

38 Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009); Paul Daly, *A Theory of Deference in Administrative Law* (CUP 2012).

39 Murray Hunt, 'Sovereignty's Blight: Why Public Law Needs a Concept of Due Deference' in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003).

modification to the grounds of review in recent years took place in *Mandalia.*[40] As Shona Wilson Stark explains in *Frontiers*, the Supreme Court seems to have understood itself as introducing a new ground of review, presumptively requiring the application of policy.[41] *Mandalia*, however, does little to change substantive law, essentially attaching a new label to an existing requirement[42] rather than creating a wholly new obligation.

Fourth, it is worth noting that, at the time of writing, a government-initiated review of judicial review is ongoing in England and Wales. This review has already begun to generate a lively debate about the grounds on which courts 'should be able to find a decision to be unlawful' and whether those grounds 'should be codified in statute.'[43] There is little to be gained from speculating as to what the recommendations of the panel will be or whether those recommendations will result in significant reform. Any change to the list of recognised grounds, however, would be the result of legislative intervention, rather than judicial evolution of administrative law doctrine.

2. Lessons from *Frontiers:* Three Sources of Dynamism in Modern Administrative Law

The discussion so far might suggest that 'dynamic' is a peculiar description of modern administrative law. It is possible to find many different definitions of 'dynamism' or 'dynamic.' Commonly these definitions draw attention to a subject-matter's propensity to change: a dynamic situation or system is said to be one which is 'changing in an exciting and dramatic way'[44] or 'always changing and developing.'[45] Another recurring idea is that a dynamic subject is one which is 'full of energy or… new and exciting ideas.'[46]

At first sight, these might seem apt descriptions of English and Welsh administrative law in the late twentieth century, but not now (the ongoing review aside). The period between the 1960s and 1990s witnessed a series of landmark cases in which the courts eradicated long-

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40 *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546.

41 Shona Wilson Stark, 'Non-fettering, Legitimate Expectations and Consistency of Policy: Separate Compartments or Single Principle?' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019).

42 *R v Islington LBC, ex parte Rixon* [1997] ELR 66 (QB) and *R (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744, [2005] INLR 744.

43 https://www.gov.uk/government/groups/independent-review-of-administrative-law.

44 https://www.collinsdictionary.com/dictionary/english/dynamism

45 https://dictionary.cambridge.org/dictionary/english/dynamic

46 https://www.collinsdictionary.com/dictionary/english/dynamism

standing 'technical' distinctions,[47] placed renewed emphasis older, but largely forgotten, principles[48] and introduced new grounds of review. By contrast, the administrative law of the new century has not been characterised by major developments in the list of recognised grounds. Despite a great deal of academic interest in new possibilities,[49] the catalogue has remained constant. 'Stability' or 'stagnancy' might therefore seem more appropriate descriptions, depending on one's normative view of the status quo.

A major overarching lesson of *Frontiers,* however, is that while the grounds of review may be fixed, modern administrative law continues to evolve and to give rise to novel and important legal questions. Before explaining this point in depth, it is helpful to offer a very brief outline of the structure of *Frontiers.*

Frontiers' chapters are divided into four broad categories. The theme of each category is a different 'frontier' or intersection between public law and another field. Part 1 focuses on the relationship between public law and international law. The contributions broadly consider the movement of ideas, both from the 'top down'[50] and 'bottom up,'[51] between domestic public law, on the one hand, and the international plane, on the other. Part 2 considers the relationship between public law and the law of Indigenous peoples. Collectively, this portion of the book offers an accessible and interesting introduction to what Kirsty Gover calls 'the Indigenous challenge'[52] – namely, how to accommodate Indigenous views and voices within traditional public law frameworks – and the progress made so far in New Zealand,[53] Australia[54] and Canada.[55] As the editors emphasise, this section of the book raises the question of why

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

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

49 Mark Elliott, 'Has the Common Law Duty to Give Reasons Come of Age Yet?' [2011] PL 56; Paul Craig, 'Proportionality, Rationality and Review' [2010] NZLR 303.

50 To borrow language from Cheryl Saunders, 'Global Constitutionalism: Myth and Reality' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019), 33.

51 Benedict Kingsbury, 'Frontiers of Global Administrative Law in the 2020s' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019)

52 Kirsty Gover, 'From the Heart: The Indigenous Challenge to Australian Public Law' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019).

53 See especially Matthew SR Palmer, 'Indigenous Rights, Judges and Judicial Review in New Zealand ' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019), 124-134.

54 See especially Gover (n 52).

55 See especially Mary Liston, 'Representing Jurisdiction: Decolonising Administrative Law in a Multijural State' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019), 177-187.

Indigenous laws, rights and culture' are not more firmly at 'the very heart of public law thinking and scholarship.'[56] Not only is the matter of very great practical, moral and political importance, the chapters in this part raise familiar public law questions about representation,[57] institution-design[58] and judicial review.[59]

Most of the chapters in part 3 work within the well-worn trench of the intersection(s) between public and private law. UK readers will be especially interested in Carol Harlow's chapter, pitched as a follow-on from her seminal 1980 *Modern Law Review* article,[60] and ACL Davies' reflections on legal regulation of public authority contracts. Margaret Allars also offers a useful and highly accessible overview of the public-private divide in Australia. The other chapters in part 3, by David Feldman and Chris Maxwell, consider aspects of a lesser explored relationship, namely that between public and criminal law. Part 4, finally, is framed as an exploration of the relationship between public law and public administration. Truthfully, this is the least coherent of the four groupings. There is little which connects the chapters beyond a broad concern with public decision-making power and the standards (legal, constitutional and internal) which structure it. This does not, however, detract from the quality of the individual contributions. Anne Twomey's chapter, exploring the practical challenges of tracing the use of constitutional conventions, is a must-read for any constitutional law scholar. The other chapters deal more directly with administrative law themes and are discussed below.

Moving beyond the 'core' to explore the frontiers of a field can shed new and important light. Sometimes, it reveals that things are rather less stable than they otherwise seem. The changing climate is, for instance, not especially visible in day-to-day life. The climate's dynamism can, however, be very clearly seen by travelling to less visited but more ecologically unstable environments. In a similar way, by exploring the 'outer edges'[61] of public law, the contributions in *Frontiers* draw attention to a number of ways in which modern administrative law continues to deeply dynamic. Scattered across these chapters are many illustrations of three important sources of dynamism: legislative innovation, changing practices within public administration and developments within 'sub-branches' of judicial review. The remainder of this part of the review discusses each in turn.

Before turning to them, it is worth briefly mentioning a final common way in which the language of 'dynamism' is used. Namely, to refer to change which results from the *interaction between things*. In physics, for instance, 'dynamics' is the study of forces and the way in which they can collectively produce motion in objects. Similarly, in psychology, 'dynamic systems

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56 Varuhas & Wilson Stark (n 1), 3.

57 Palmer (n 53), 127-192.

58 Harry Hobbs, 'Public Law, Legitimacy and Indigenous Aspirations' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019).

59 See discussion in Part 2, section A below.

60 Carol Harlow, '"Public" and "Private" Law: Definition without Distinction' (1980) 43 MLR 241.

61 Varuhas & Wilson Stark (n 3), 3.

theory' refers to the idea that behaviours are learnt through the interaction of the person, the task they are performing and their environment.[62] Change or movement, in other words, is often the product of the ways in which things *intersect* with one another. This is an important point to bear in mind. As the discussion below illustrates, the list of recognised grounds of review may remain largely unchanged. Judicial review grounds, however, do not operate in vacuums. Rather they apply in the context of legal and administrative landscapes which themselves are always evolving.

A. Legislative Innovation

The first source of dynamism concerns changes within legislation. The practical importance of legislation within administrative law cannot be overstated. The vast bulk of administrative decision-making is structured by statute,[63] often fleshed out in delegated legislation and policy. The first place to look in terms of understanding the limits and nature of decision-making power is therefore, usually, an Act of Parliament. The details of the relevant Act matter enormously. An Act's terms shape, among other things, what falls within and outside of a public authority's power, the purposes for which that power must be exercised, the factors which must be taken into account or ignored and the procedure which must be followed prior to a decision being made. For this reason, judicial review judgements often begin with a detailed explanation of the governing legislative framework.[64] Indeed, this practice is so prevalent that it is difficult to point to a particularly exemplary illustration: almost any judicial review challenge in the Administrative Court would suffice.

The legislative frameworks which structure administrative decision-making can also change with some frequency. Take, for instance, immigration decision-making. Beatson LJ recently explained that 'it is a feature of the Rules that they are constantly changing.'[65] The often-fast-moving pace of legislation in the administrative law context is best explained by several factors. Government has significant control over Parliament's legislative agenda. As a result, legislative change is particularly common in areas of administration fought over during elections. As Kirsty Gover's chapter in *Frontiers* emphasises, the counterpoint to this is that legislative change may not be forthcoming in areas where there is little political interest.[66]

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62 Esther Thelen, 'Dynamic Systems Theory and the Complexity of Change' (2005) 15(2) *Psychoanalytical Dialogues* 255.

63 Some administrative decisions continue to be taken under the prerogative. Even these powers, however, are commonly structured by published policy.

64 See broadly Bell (n 27), chapter 3.

65 *Secretary of State for the Home Department v Khan* [2016] EWCA Civ 137, [2016] 4 WLR 56, [40].

66 Gover (n 52).

Legislative change can also be prompted by other developments such as new knowledge of existing or emerging problems, developments within European Union law and court rulings.

The combined consequence of the practical importance of legislation and its often-fast-moving nature is that, as many of the chapters within *Frontiers* illustrate, legislative change is an important source of dynamism in modern administrative law. The focus here is on the impact of legislative innovation in judicial review case law. These impacts can be divided into two broad groups.

Firstly, one of the courts' most important roles in judicial review is that of *interpreting* legislation.[67] A number of the recognised grounds of review, including especially review for error of law, purpose and relevancy, essentially require the court to engage in careful construction of the legislative framework. In consequence, Saran Nason has suggested that around half of judicial review case law raise questions of construction.[68] Similarly, in his chapter in *Frontiers*, Matthew SR Palmer explains that of 53 judicial review challenges in New Zealand which engaged the Treaty of Waitangi, 25 engaged the 'illegality' ground and 18 considered whether relevant considerations had been ignored.[69]

Put simply, one way in which legislative change is a source of dynamism in administrative law is that it can result in new provisions which require authoritative interpretation. As some of the chapters in *Frontiers* illustrate, legislative change can at times be highly innovative, meaning that the interpretive questions they generate can be novel. Take, for instance, the portion of the book dedicated to the relationship between public law and the law of Indigenous peoples. In some jurisdictions, this issue has generated highly innovative legislation. Andrew Geddis & Jacinta Ruru's analysis of (what was) the Te Urewera and Te Awa Tupua (Whangnui River Claims Settlement) Acts is a clear illustration.[70] Geddis & Ruru trace the origins of the two Acts to a negotiating impasse between Maori and Crown representatives. The cause of the impasse was irreconcilable ownership claims relating to the Te Urewera national park and Whanganui River. These highly innovative Acts sought to overcome the impasse by conferring legal personality on the park and river. In doing so, they depart considerably from traditional common law notions of land ownership.[71]

Debbie Mortimer's chapter is a particularly striking example of the way in which innovative legislation can generate novel interpretive questions in judicial review. Her subject is a cluster of legislative provisions in Australia which make the communal assent of traditional

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67 See broadly Joanna Bell and Elizabeth Fisher, 'The 'Heathrow' Case: Polycentricity, Legislation and the Standard of Review' (2020) 83(5) MLR 1072.

68 Sarah Nason, *Reconstructing Judicial Review* (Hart 2016).

69 Palmer (n 5353), 145-146.

70 Andrew Geddis and Jacinta Ruru, 'Places as Persons: Creating a New Framework for Maori-Crown Relations' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019).

71 Katherine Sanders, 'Beyond Human Ownership? Property, Power and Legal Personality for Nature in Aotearoa New Zealand' (2017) 30 JEL 207.

owners a mandatory precondition of certain land management decisions. As Mortimer explains, these provisions have generated questions of construction to which there are no easy answers. One option is to read the legislation as requiring simple majority approval. To interpret the requirements in this way would, however, impose on Indigenous communities an external, non-traditional form of decision-making.[72] The courts have therefore understood these provisions as requiring communal consent, judged by reference to the community's own decision-making customs. The problem with this approach, however, is that the courts have no expertise in these customs. The tendency has been to rely on expert evidence. Mortimer, however, is deeply uncomfortable with this practice as, as she puts it, the decision-making processes of Indigenous communities are subjected to 'a layer of external validation that is not applied to any other form of collective decision-making by people in Australia.'[73] Mortimer therefore urges deeper thought on how communal consent provisions can be read in a way which 'empower[s] Indigenous people to speak for themselves through evidence.'[74]

In addition to generating interpretive issues, developments within legislation can also, secondly, create novel contexts in which courts are called on to apply the grounds of review and other established doctrines. Matthew SR Palmer's chapter expertly shows, for instance, that New Zealand judicial review case law invoking the Treaty of Waitangi has not only generated novel interpretive questions. The courts, rather, have also been required to apply grounds of review such as legitimate expectations, natural justice and unreasonableness, in the context of Acts which incorporate the Treaty.[75] Similarly, a striking theme running through Mary Liston's chapter is the challenge of applying procedural fairness principles in the context of Indigenous governance regimes. Canadian administrative law professes a commitment to universal standards of basic fairness,[76] including the right to a fair hearing and to an independent and impartial decision-maker. There are instances, Liston argues however, where strict application of these standards undermines the rights of Indigenous communities to self-govern.

Further examples can be found elsewhere in *Frontiers*. For instance, ACL Davies' chapter contains a valuable discussion of the interactions between standing rules and public procurement legislation.[77] An important feature of the public procurement regime in England and Wales, is that it confers rights of appeal on economic competitors, but not members of the

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72 Debbie Mortimer, 'Coming to Terms with Communal, Land-related Decision-making by Aboriginal and/or Torres Strait Islander Peoples in a Public Law Context' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019), 159.

73 Ibid, 165.

74 Ibid 159.

75 Ibid 146.

76 Liston (n 55), 192.

77 ACL Davies, 'The 'Contracting State' and the Public/Private Divide' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019), 344.

public. Individuals have, however, sought to challenge aspects of procurement through judicial review, giving rise to the question of whether they have a 'sufficient interest'[78] to do so. The issue is challenging because the court's standing principles do not necessarily all point in one direction. On the one hand, as Davies emphasises, there is well-known case law emphasising the importance of a broad approach to standing in vindicating the rule of law.[79] On the other, the courts have continually emphasised that 'sufficient interest' does not bear a singular meaning, but rather takes its colours from legislative context.[80] The courts have also been reluctant in some contexts to recognise the standing of an applicant where doing so would undermine a deliberate Parliamentary decision to limit the ability to challenge a decision to a particular group.[81]

To summarise, although their subject-matters are diverse, many of the chapters in *Frontiers* contain illustrations of a first source of dynamism in modern administrative law. While the field's most basic principles (that is, the grounds of review) may relatively constant, the legislative territory in which those principles apply is not. Rather, legislation plays a central role in administrative law and can change with some frequency. Legislative innovation can give rise to novel interpretive questions in judicial review. It can also create novel legal landscapes in which the courts are called on to apply existing legal doctrine.

B. Changing Practices within Public Administration

A second source of dynamism which is amply illustrated by the chapters within *Frontiers* concerns practices *within* public administration. As Jennifer Raso explains:

> Two spaces exist within the field of public law: the well-mapped and traversed terrain of external constraints on administrative actors; and the lesser-known, but much broader, landscape of decision-making practices within administrative agencies.[82]

This second space is an important source of dynamism. Internal administrative practices are not fixed but evolving. Recent decades have seen significant shifts in the way in which decision-making power is exercised and further changes are underway.

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78 *R (Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011, [2010] PTSR 749).

79 See especially the judgment of Lord Diplock in *R v Inland Revenue Commissioners, ex parte National Federation of the Self-Employed* [1982] AC 617 (HL).

80 *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, [170].

81 See for instance *R (Bateman) v Legal Aid Board* [1992] 1 WLR 711 (QB); *R v Birmingham CC, ex parte Millard & Connolly* (1994) 26 HLR 551 (QB).

82 Jennifer Raso, 'The In-between Space of Administrative Justice: Reconciling Norms at the Front Line of Social Assistance Agencies' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019), 471.

KM Hayne's chapter looks backwards to the most important changes to internal practices which have been taking place in recent decades.[83] He suggests three. First, the increasing tendency to look to the market economy as a model for providing public services.[84] This development, also touched on by Carol Harlow, can be seen in many places in the UK, including the rise of public service contracts (the primary subject of Hayne's and Davies' chapters), the reframing of welfare provision through 'contractual ideology'[85] and the move away from command-and-control methods to regulation through market intervention.[86] A second, related, change noted by Hayne is the diffusion of decision-making power away from central government departments. Again, the contracting-out of public services is a good example. As is the rise of quangos.[87] Third, Hayne also notes the rise in the use of policy and guidance to structure decision-making.

Looking forward, one important change which has begun to take shape and will undoubtedly continue (exacerbated by Brexit[88] and the Covid-19 pandemic) is the increasing use of computerised technology as an aid to decision-making. This shift – sometimes referred to as the 'automation'[89] or 'digitisation'[90] of public administration - is fundamentally changing how decisions are made. The change is a fast-moving and a complex one. 'Automation' is a not a monolithic development. Rather, computerised technology is and can be used in different ways. In some fields, for instance, decision-making is being increasingly done through computer systems which test individual cases against pre-programmed criteria. Administrative decision-making is also coming to rely on computerised technology of more invasive or ambitious kinds. Facial recognition technology, for instance, is being used in policing.[91] Artificial intelligence or machine learning, whereby computer systems not merely apply pre-programmed criteria but use data to identify further criteria to be applied in the future, is also

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83 KM Hayne, 'The Nature and Bounds of Executive Power: Keeping Pace with Change' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019), 387.

84 Michael Taggart (ed) *The Province of Administrative Law* (1997).

85 Carol Harlow, 'Public and Private Law: A Redundant Divide' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019), 326.

86 Ibid, 327.

87 Mark Freedland, 'The Rule Against Delegation & *Carltona* in an Agency Context' [1996] PL 19.

88 Joe Tomlinson, *Justice in the Digital State* (Policy Press Shorts 2019), 91.

89 Carol Harlow and Richard Rawlings, 'Proceduralism and Automation ' in E Fisher, J King and A Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (OUP 2020).

90 Tomlinson (n 88).

91 Liberty, *Briefing on Police Use of Live Facial Recognition* (2019).

generating considerable interest.[92] In contrast to other comparable edited collections,[93] this shift to automation is strikingly absent from *Frontiers*. This is a surprising omission: the relationship between public law and computerised technology will be one of the most important 'frontiers' practitioners and academics will be required to navigate in coming decades.

Few, if any, would deny that changes in internal administrative practice such as these are significant. There is, however, more disagreement about the extent to which they are the concern of *administrative law*,as opposed, for instance, to 'administrative justice' or the study of public administration. As Raso notes, public law scholarship has tended to focus on the external legal standards which structure decision-making, rather than internal practices. This reflects a traditional way of thinking which takes administrative law to be a body of external legal *doctrine*. Raso's contribution, like that of Richard Martin on the development of a 'culture of justification' within the Northern Ireland Police Service, can be seen as working within a broader conception of the field. This approach - which might be labelled 'functionalist,'[94] 'inside-out'[95] or 'green light'[96] – views legal doctrine as but one of several phenomena which structure administrative decision-making. In an attempt to encourage public law scholars to engage with the workings of public administration, some have argued explicitly that at least certain internal practices are actually best understood as a *form* of law.[97]

This is not the space for detailed consideration of a long-standing debate about what does and does not fall within the scope of administrative law. Instead, the remainder of this section will stress one core point: *even if* administrative law is understood primarily in narrow, doctrinal terms, it remains important for administrative law scholars and practitioners to pay attention to changes within internal practices. This is so for at least two reasons.

First, without rigorous inquiry into the internal workings of the institutions which are administrative law's subject, there is a danger of operating from false, overly-simplistic or outdated assumptions. The literature is replete with examples of influential but misleading conceptions of public administration being shown to be misleading. Good examples include

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92 Jennifer Cobbe, 'Administrative Law and the Machiens of Government: Judicial Review of Automated Public-Sector Decision-Making' (2019) 39(4) LS 636.

93 Elizabeth Fisher, Jeff King and Alison L Young (eds), *The Foundation and Future of Public Law: Essays in Honour of Paul Craig* (OUP 2020). See especially chapters by Carol Harlow & Richard Rawlings and Deidre Curtin.

94 Martin Loughlin, 'The Functionalist Style in Public Law' (2005) 55 Univesity of Toronto LJ 361.

95 Sidney Shapiro, 'Why Administrative Law Misunderstands How Government Works' (2013) *Washburn LJ* 1; Nicholas Parillo (ed) *Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry L Mashaw* (2018).

96 Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, CUP 2009), chapter 1.

97 Gillian Metzger and Kevin Stack, 'Internal Adminstrative Law' (2017) 115(8) *Michigan LR* 1239.

the ideas that public administration is a value-free 'transmission belt'[98] for delivering on a legislative mandate or a 'truth machine'[99] which produces neutral 'facts'. It is important that administrative law scholarship operates from a rigorous understanding of the nature and operation of administrative decision-making. As Elizabeth Fisher & Sidney Shapiro have put it, administrative law is the law of public administration.[100] This definition emphasises a fundamental but sometimes overlooked truth: administrative law is structuring decisions by real-world institutions. These institutions are themselves complex, varied and changing. It is difficult to see how rigorous and appropriate legal doctrine can be developed without understanding the institutions which it is structuring.

Second, changes in internal practices can generate new and important *doctrinal* questions.[101] Automation is a good example. Already, the English and Welsh courts have been faced with a series of judicial review challenges to the use and operation of computerised technology. These challenges have required courts to apply a series of existing legal standards including the rationality doctrine,[102] the Article 8 right to a private life and the public sector equality duty.[103] The broader literature highlights many other legal doctrines which will interact with automation challenges in coming years. There is also concern that the existing legal framework will prove unable to provide an appropriately rigorous degree of scrutiny. To mention one particular worry, the growth in automation is inherently linked with the turn to the private sector, as private organisations are often engaged to develop the relevant software.[104] In many contexts developers will therefore retain commercial interests in the programmes, resulting in issues of access and transparency for those who might seek to challenge them.[105]

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98 Lisa Schultz Bressman and Michael P Vandenberch, 'Inside the Administrative State: A Critical Look at the Practice of Presidential Control' (2006) 105(1) *Michigan LR* 47, 53-54.

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

100 Elizabeth Fisher and Sidney Shapiro, *Administrative Competence: Reimagining Adminstrative Law* (CUP 2020).

101 See for instance Joe Tomlinson, 'Justice in Automated Administration' (OJLS forthcoming).

102 *Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 778.

103 *Bridges v CC of South Wales Police* [2020] EWCA Civ 1058.

104 Reuben Binns, 'Algorithmic Decision-Making: A Guide for Lawyers' (2020) 25(1) JR 2.

105 Rebecca Williams, 'Rethinking Deference for Algorithic Decision-Making' Oxford Legal Studies Research Paper No 7/2019.

As others have noted,[106] there will be a need to think imaginatively in the future about how best these various interests can best be balanced.

This example illustrates a broader point, emphasised strongly in Hayne's contribution in *Frontiers*: there is a continual need for administrative law scholars and practitioners to keep abreast of changes in decision-making practices and to reflect on whether existing doctrinal structures continue to be fit for purpose. As Hayne puts it:

> … our thinking [is] confined by habits of thought and argument that were formed in other times and in other circumstances[.] Too often we are creatures of habit. Too often we apply old rules to new circumstances, without pausing to examine whether that is right.[107]

A number of *Frontiers*' chapters engage in precisely this exercise of evaluating the capacity of existing doctrinal frameworks to adequately respond to new problems. ACL Davies' chapter, for instance, returns to an important question which has somewhat fallen from the agenda in recent years: to what extent does English and Welsh public law provide appropriate oversight of public service contracts? The continued significance of this practice is well illustrated by the figures. In 2016, for instance, £192 billion of public expenditure, of a total £734 billion, was spent with contractors in the UK.[108] Davies argues, however, that there continue to be significant 'missing links'[109] in the legal framework which courts use to oversee contracting-out. Following the House of Lords decision in *YL*, the performance of public contracts by private providers is not generally regarded as a public function for the purposes of the Human Rights Act.[110] There are also limited opportunities to challenge the entry by a public authority into a contract.[111] Judicial review, for example, presupposes that there is a singular 'decision' which is the subject of the challenge and it is by reference to this decision that the applicant's promptness in initiating a challenge is judged. Public contracts, however, are often awarded after a lengthy, multi-staged process. The result is considerable uncertainty for a potential challenger.

As explained above, a further important shift in internal practice in recent decades has been the increasing use of guidance and policy - sometimes called 'soft law' – in many areas of public administration. As Shona Wilson Stark emphasises in her chapter, this practice has

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106 Lord Sales, 'Algorithms, Artificial Intelligence and the Law' (2020) 25(1) JR 46.

107 Hayne (n 8383), 397.

108 Davies (n 77), 344.

109 Ibid, 343.

110 *YL v Birmingham CC* [2007] UKHL 27 (although the decision has been overturned in the care context: Care Act 2014, s73).

111 Although note *James v Hertsmere BC* [2020] EWCA Civ 489, [2020] HLR 28.

benefits.[112] The development and application of policy can, however, give rise to an array of different problems. Policy can be introduced without following appropriate procedures.[113] It can be changed overnight, without giving fair warning to those who might have relied.[114] It can be used to introduce highly significant changes without undergoing proper scrutiny.[115] The content of policy can be unduly rigid,[116] otherwise inconsistent with the purpose for which a statutory power is granted[117] or unjustifiably discriminate between groups. Finally, in the course of applying policy, decision-makers might err in interpretation[118] or otherwise unfairly fail to apply it.[119]

The subject of Shona Wilson Stark's contribution is the doctrinal framework used in England and Wales to oversee the use of policy. A significant portion of judicial review case law now includes a challenge to the way in which policy has been developed or applied. There is, however, no general overarching legislative framework which structures how administrative decision-makers develop and apply policy. Review of decisions relating to policy formation and application, therefore commonly takes place in the same way as review of many other aspects of administrative decision-making: through the application of more generalised grounds of review. Among others, the no-fetter principle, legitimate expectations, the *Mandalia* principle, rationality and procedural fairness, all play an important role in judicial review of the use of policy.

This gives rise to the question of whether the established grounds of review are adequate to deal comprehensively with the problems policy can create. Wilson Stark adds to a growing body of literature which grapples, more or less directly, with that question.[120] Her conclusions are mixed. On the one hand, she rejects the argument that the no-fetter principle has outlived its usefulness. On the other, she seems to envisage a reduction in the role played by legitimate expectations, regarding it as a doctrine essentially concerned with 'promises' rather than policy. One concern with this argument is that it may overlook that the legitimate

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112 Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press 1971).

113 *R (Moseley) v Haringey LBC* [2014] UKSC 39, [2014] 1 WLR 3847.

114 *R (Patel) v General Medical Council* [2013] EWCA Civ 237.

115 House of Lords Select Committee on the Constitution, *The Legislative Process: The Delegation of Powers*

116 *AG (Tilley) v Wandsworth LBC* [1981] 1 WLR 854 (CA).

117 *R (Hillingdon LBC) v Secretary of State for Transport* [2020] EWCA Civ 1005, [2020] 7 WLUK 487.

118 *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983.

119 *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363.

120 See also Aileen McHarg, 'Administrative Discretion, Administrative Rule-Making and Judicial Review' (2017) 70(1) *Current Legal Problems* 267.

expectations ground has historically played more than one role in responding the problems created by policy. As Wilson Stark recognises, the doctrine has been relied on in cases where a decision-maker has failed to apply policy in an individual's case. Wilson Stark is right to point out that the effect of the Supreme Court decision in *Mandalia*, discussed above, is to reconceptualise the basis of intervention in such cases in terms of a presumptive duty to apply policy.[121] It is important to note, however, that the legitimate expectations ground also plays an important role in *managing changes* between policy. Specifically, there are several cases where a decision-maker has shifted policy without adopting transitional provisions for groups which have detrimentally relied has been held to have contravened their legitimate expectations.[122] Limiting legitimate expectations to 'promise' cases would prevent it from performing this important role.

It might be tempting to assume that legislation explicitly regulating the way policy and guidance can be introduced or changed would provide a more straightforward solution. Kathryn E Kovacs' chapter is, however, a reminder of the legal complexity such legislation could generate. Her subject is rule-making by federal agencies.[123] In this context, the US courts have added considerably to the legislative requirements with which agencies are required to comply, resulting in a highly structured and legally detailed process. Kovacs argues, in line with others,[124] that these developments have had important, unintended consequences. Specifically, the complexities of the mandated procedures have meant that policy-making by agencies has become 'ossified.' Coupled with Congress' increasing inability to enact legislation, a significant policymaking void has emerged which is being increasingly filled by the President. Kovacs makes the case that the US court ought therefore to revisit their 'rules about rulemaking.' There are, she argues, strong legal arguments in favour of returning to a position where the legislative requirements are regarded as exhaustive.

To summarise, many of the chapters in *Frontiers* provide an important reminder that internal administrative practices are not static. Practices within public administration evolve as, for instance, new technologies and ways of making decisions are utilised. These developments are of great importance for administrative law practitioners and academics. It is always important to bear in mind that administrative law doctrine is structuring real-world, changing institutions. An understanding of those understandings is a pre-requisite to developing appropriate doctrine. New internal practices can also give rise to significant doctrinal issues, including fundamental questions about the adequacy of existing legal structures to provide appropriate oversight in new eras.

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121 *Mandalia* (n 4040).

122 *Patel* (n 4). See also Rebecca Williams, 'The Multiple Doctrines of Legitimate Expectations' (2016) 132 LQR 639; Bell (n 27), chapter 5.

123 While rules are understood as a form of delegated legislation (Andrew Edgar and Kevin M Stack, 'The Authority and Interpretation of Regulations ' (2019) 82(6) MLR 1009), as opposed to policy, the example remains instructive.

124 See for instance Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart 2007), chapter 3.

C. Movement of Principles Across Sub-Branches of Judicial Review

A third source of dynamism which is well illustrated by the chapters within *Frontiers* concerns the movement of legal principles across different 'sub-branches' of judicial review. Public law scholars are most familiar with a particular mode of dividing up administrative law case law, specifically by reference to the grounds of review on which applicants rely. This is connected with a point made in part 1: general grounds are often taken to form the underlying 'doctrinal superstructure'[125] of administrative law. There is, however, another way of organising jurisprudence in this field.[126] Namely, by reference to the *area of administration* which is the subject of the challenge. Understood in this way, the relevant categories are not error or law, procedural impropriety, etc. They are, rather, challenges to housing, professional discipline, planning, education, immigration and tax decisions. These divisions are ingrained in several aspects of legal practice. The First-tier Tribunal, which handles many challenges to first instance decision-making, is, for instance, organised into subject-specific chambers. The Administrative Court now has a specialised Planning Division. It is also common for legal practitioners to specialise in fields such as housing or planning law, rather than judicial review in a more general sense.[127]

As David Feldman's chapter emphasises, legal principles can emerge in the context of, what might be called, 'sub-branches' of judicial review. Where this happens, important questions can arise about whether those principles apply, and if so how, in other sub-branches. Legal principles developed in one field, in other words, can expand into more general standards.[128] Feldman's chapter discusses the example of judicial review of prison discipline (in addition to considering the legal frameworks which govern policing and prosecutorial discretion). As Feldman recounts, from the 1970s this area underwent dramatic change, largely because barristers in the 1970s were able to 'draw forensically on developing principles'[129] outside of the prison context to encourage the courts to take a more interventionist role.

This source of dynamism – the evolution of legal principles in 'sub-branches' of judicial review which are then extended to others - persists in modern administrative law. Specifically, while applying the grounds, the courts sometimes articulate principles with which they expect

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125 Elliott (n13).

126 Harlow & Rawlings (n 27).

127 Nason (n 68).

128 See for instance the discussion of improper purpose review in Harry Woolf and others, *De Smith's Judicial Review* (8th edn, Sweet & Maxwell 2017), chapter 5.

129 David Feldman, 'Changing Boundaries: Crime, Punishment and Public Law' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019), 296.

administrative decision-makers to comply. Important questions can then arise about whether, and if so how, those principles apply in judicial review of other aspects of administration also.

An emerging example from the English and Welsh context illustrates the point well. In the well-known case of *Evans*[130] the Supreme Court upheld by majority a challenge to an order by the Attorney General, effectively overruling a determination by the Upper Tribunal. The Attorney General's power was subject to the condition of 'reasonable grounds'.[131] Lord Mance (with the agreement of Lady Hale) reasoned that, given the Upper Tribunal's competence to make relevant findings of fact and law, reasonable grounds to depart from those findings would exist only where the Attorney General articulated a clear justification for regarding the tribunal as having erred. In other words, it was *unreasonable* to reject the Upper Tribunal's legal and factual findings without engaging closely with its reasoning and clearly identifying flaws. This has given rise to important question in subsequent case law of whether Lord Mance's reasoning applies in the content of the freedom of information legislation only. Or, alternatively, whether *Evans* is illustrative of a more general principle. A growing, but largely neglected, body of case law is emerging which grapples with this question.[132]

Christopher Maxwell's chapter in *Frontiers* is a further illustration of how doctrinal developments in one context give rise to questions about whether and how those same developments apply elsewhere. Many of the basic principles of administrative law were originally developed in the context of judges overseeing the activities of inferior courts.[133] Maxwell makes an argument for the movement of principles in the opposite direction. As Maxwell points out, in reviewing decisions by administrative bodies, the courts have regarded consistency as an aspect of reasonableness,[134] sometimes emphasising the importance of using general policy guidelines to structure discretion.[135] Maxwell raises the question of why those same principles should not apply in the context of review of criminal courts. Specifically, Australian appellate courts have repeatedly rebuked attempts to structure criminal sentencing by adopting guidelines or compiling tables of similar convictions. In Maxwell's view, there is no good reason for continuing to treat sentencing as an exercise in 'instinctual synthesis'[136]

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130 *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787.

131 Freedom of Information Act 2000, s53(2).

132 *R (Lupepe) v Secretary of State for the Home Department* [2017] EWHC 2690 (Admin); *R (Miah) v Secretary of State for the Home Department* [2017] EWHC 2925 (Admin).

133 See broadly Edith Henderson, *Foundations of English Adminstrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard UP 1963).

134 *Gallaher* (n 37).

135 See for instance *Nzolameso v Westminster CC* [2015] UKSC 22, [2015] PTSR 549, [39]-[41].

136 Christopher Maxwell, 'Discretionary Power and Consistency: Is the Sentencing Discretion Different?' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019), 297.

when administrative decision-makers are increasingly expected to structure their discretion with policy.

A final complication worth discussing is that legal principles move not only within administrative law, but across its boundaries with other fields. The term 'boundaries' is used here loosely because, as Varuhas & Wilson Stark stress, many of the chapters in *Frontiers* raise the 'important and interesting question… [of] the extent to which there *are* discernible boundaries of frontiers between public law and other fields.'[137] While the boundaries are often blurred, legal categories can nonetheless play an important pragmatic role in enabling the law to be carved into manageable compartments for the purposes such as research, teaching, and practice.[138] Unsurprisingly, therefore, legal principles are not necessarily confined to the 'field' in which they were originally developed. They can, rather, cross the boundaries and influence thinking in other areas. Carol Harlow, for instance, remarks that:

> Transparency and accountability are pre-eminently market values, which travelled across the private/public border in the toolkit of managerial governance. Latecomers to public law, the terminology is now used "almost to saturation point" in the jargon of both public and corporate business management.[139]

In other words, at least some of the origins[140] of the notions of transparency and accountability - now buzzwords in administrative law[141] - can be traced to corporate contexts. A particularly notable example of legal principles moving the opposite direction – that is, from administrative law into private law - is the *Braganza* decision,[142] discussed by Margaret Allars.[143] In *Braganza*, the UK Supreme Court confirmed that contractual discretion may be subject to an implied term requiring that the decision-making process is 'lawful and rational in the public law sense.'[144] The effect of *Braganza* is to enable the grounds of review to cross the boundaries from judicial review challenges against administrative bodies, into claims for alleged breach of contract. The decision gives rise to a host of questions about how the grounds apply in the

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137 Varuhas & Wilson Stark (n 3), 4 (my emphasis).

138 For an argument in favour of a broad, more controversial, role for legal compartments see Jason NE Varuhas, 'Taxonomy and Public Law' in M Elliott, J Varuhas and S Wilson Stark (eds), *The Unity of Public Law?* (Hart 2018).

139 Harlow (n 85), 327-328.

140 See more broadly Elizabeth Fisher, 'Transparency and Administrative Law: A Critical Evaluation' (2010) 63(1) Current Legal Problems 272.

141 Ibid.

142 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661.

143 Margaret Allars, 'Public and Private Boundaries of Administrative Law' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019), 381-384.

144 *Braganza* (n 142142), [30].

context of a contract, as opposed to a statute,[145] especially bearing in mind the procedural and remedial differences between judicial review and contract claims.[146]

To summarise, in exploring the 'outer edges' of public law many of the chapters within *Frontiers* illustrate that judicial review is not a simple, nor a monolithic practice. Rather, judicial review case law is highly varied, involving challenges to decision-making in different areas. It is also not tightly sealed off from other fields, such as contract law. The movement of legal principles among sub-branches of judicial review, and across the overlaps between administrative law and other legal fields, is therefore a long-standing feature of the area. Several the chapters within *Frontiers* contain important illustrations both of how movement of this kind has shaped the area and continues to give rise to important legal questions.

3. Concluding Remarks

David Feldman in his contribution to *Frontiers* explained that the evolution of judicial review of prison disciplinary decisions in the 1970s was only possible because practitioners had their 'finger[s] on the pulse of the of the living body of public law as a whole.'[147] That image neatly captures the overarching argument of this article. Modern administrative law, at least in England and Wales, might have a fixed doctrinal superstructure in the sense that there has been little recent change to the list of recognised grounds. It is, however, a 'living,' evolving body of law and practice. This article has drawn attention to three main ways in which the administrative law landscape continues to change: legislative innovation, changes in internal decision-making practice and the development of principles in 'subfields' of judicial review.

As Feldman emphasises, the principled development of administrative law requires practitioners and academics alike to have their 'fingers on the pulse' of these various changes. Understanding these sources of dynamism and continual reflection on their implications is therefore fundamental. Consider, for instance, the second source of dynamism: changing internal practices. Without an understanding of how internal decision-making practices are changing there is surely a risk of doctrinal frameworks becoming outdated. Like the frog in hot water, we may find that public administration has 'changed irrevocably…without us even noticing'[148] that court oversight has long been inadequate to provide adequate oversight. Similarly, consider the third: the emergence of legal principles in 'subfields' of judicial review. Inattention to these developments and their implications surely risks unjustified fragmentation or exceptionalism.

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145 Ernest Lim and Cora Chan, 'Problems with *Wednesbury* Unreasonableness in Contract Law: Lessons from Public Law' (2019) 135(1) LQR 88.

146 Michael Bridge, 'The Exercise of Contractual Discretion ' (2019) 135(2) LQR 237.

147 Feldman (n 129), 296.

148 Sales (n 106), [4].

Having one's finger on the pulse of these developments is not easy to achieve. Put simply, there are a great many, complex moving parts. While the challenges are significant, however, they are also exciting. Modern administrative law is not, as Dyzenhaus joked, a 'swamp of boredom.'[149] Far from it. Modern administrative law remains ripe territory for novel and important legal questions.

149 Dyzenhaus (n 21).