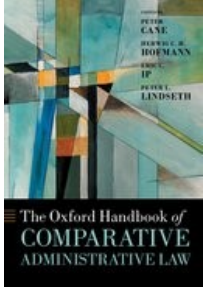

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CHAPTER

42 Legality: Six Views of the Cathedral

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Abstract

This chapter is concerned with the concept of legality, and its role in administrative law. Here, six views of the role of legality are examined. The first two views are foundational, albeit in different senses. Thus, the chapter begins with consideration as to how far legality may be conceived as foundational in the sense of being the meta-precept for administrative law doctrine. The third, fourth, and fifth views of the cathedral consider the way in which legality is deployed by way of contradistinction to other administrative law concepts, with implications for the structure of administrative law doctrine and the intensity of review. The respective distinctions are between legality and rationality, legality and the merits, and legality and policy. These dichotomies are explicated and subjected to critical scrutiny. The sixth and final role played by legality is as a distinct head of judicial review, as evidenced by the principle of legality, which exists in some common law legal systems, and is concerned with the way in which legislation that infringes fundamental rights will be interpreted. The principle is analysed, as is the rationale for the ascription of the nomenclature 'legality'.

Keywords: legality, administrative law, administrative law doctrine, rationality, policy, merits, judicial review

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42.1 Introduction

THIS chapter is concerned with the concept of legality, and its role in administrative law. The topic is interesting, because the answer is not obvious. This is not a topic the contours of which have been finely honed by previous intellectual endeavour, such that we all agree on the architectural frame, leaving disagreement to the interstices. To the contrary, ten different authors might write very different chapters if given this editorial brief. What follows is axiomatically my take on the subject, in which six views of the role of legality are examined.

The first two views are foundational, albeit in different senses. Thus, the inquiry begins with consideration as to how far legality may be conceived as foundational in the sense of being the meta-precept for administrative law doctrine. This might seem plausible and/or intellectually attractive, but it is not sustainable. There is, however, good reason to conceive of legality as being foundational in a narrower, albeit important, sense, which is to denote the need for legal authority for any administrative action.

The third, fourth, and fifth views of the cathedral consider the way in which legality is deployed by way of contradistinction to other administrative law concepts, with implications for the structure of administrative

law doctrine and the intensity of review. The respective distinctions are between legality and rationality, legality and the merits, and legality and policy. These dichotomies are explicated and subjected to critical scrutiny.

The sixth and final role played by legality is as a distinct head of judicial review, as evidenced by the principle of legality, which exists in some common law legal systems, and is concerned with the way in which legislation that infringes fundamental rights will be interpreted. The principle is analysed, as is the rationale for the ascription of the nomenclature 'legality'.

42.2 Foundational: Meta-Precept of Administrative Law

It is fitting to begin by considering whether legality might be conceived as the meta-precept of judicial review in administrative law. It would, on this view, constitute the umbrella concept within which more particular heads of review can be located. This might seem intuitively plausible, perhaps even intellectually attractive. It accords with strains of thought in many regimes of administrative law, as exemplified by repeated admonitions that public bodies must act lawfully, observing the limits placed on their power. Closer inquiry reveals, however, very considerable difficulties with the claim that legality can be regarded as such an overarching precept. This is so for the following reasons.

First, insofar it might perform such a role, the linguistic reality is that the function is better described through the antonym, illegality. Thus, if such an umbrella concept were felt to be necessary or desirable it would properly be described in terms of illegality, with various spokes of the hypothetical umbrella constituting specific grounds on which the public authority had acted illegally. Courts do not intervene to correct behaviour that is legal or lawful. This point is reinforced analogously by the fact that another candidate for such umbrella status is framed in terms of ultra vires. Insofar as it might be thought that this serves as the meta-foundational precept, it is not fortuitous that the aphorism is cast in terms of proscribing a public body from acting ultra vires. It is this, not the antonym intra vires, that is afforded pride of place.

Secondly, and more importantly, the idea that legality/illegality can perform such a function is substantively problematic. It provides no ex ante guidance as to what the particular spokes of the umbrella should be, such that pretty much any ground of review can be accommodated therein if this is so desired. The reality is, therefore, that legality/illegality does little more than provide a conclusory repository for grounds of judicial intervention, which earn their place in the pantheon of review by independent normative argument. This is equally true for claims that ultra vires is the foundational meta-precept, and this is unaffected by the UK debate concerning the foundations of judicial review. This point can be simply exemplified. A legal system might decide to recognize a doctrine of legitimate expectations. The values that drive this may well be eclectic, including the rule of law, trust in government, detrimental reliance, and substantive fairness. The concept of legality/illegality, functioning as a putative meta-precept in administrative law, brings nothing substantive to this discourse. It furnishes no ex ante guidance as whether legitimate expectations should, or should not, be added as an extra strand to the umbrella. This decision is made on the values adumbrated above. The concept of legality can merely accommodate that decision in a conclusory fashion. The same is true for the concept of ultra vires.

Thirdly, the preceding problem cannot be obviated by interpreting legality/illegality in a derivative manner, such that the heads of illegal action in administrative law draw ↳ on conceptions of illegality fashioned in other legal contexts. This argument does not withstand examination. Derivative conceptions of illegality are neither necessary nor sufficient to be regarded as grounds of review in administrative law. They are not necessary, since the great majority of such grounds were created specifically for the purposes of administrative law, based on the type of normative argumentation set out above. They either do not exist, or not in the same form, in other legal contexts. Nor are derivative conceptions of legality sufficient, since the fact that conduct may be regarded as unlawful for the purposes of a different body of law does not, in itself, mean that it will be treated as a head of review in administrative law, or that it will be interpreted in the same manner.

Fourthly, insofar as there might be a foundational meta-precept that serves to shape the more particular spokes of the umbrella it would take the following form. When viewed from an historical perspective, the background objective of what we now term administrative law was the need to render public power broadly

conceived accountable. This connoted the twin ideas that an institution complied with conditions laid down in the enabling grant of power, and with certain precepts of good governance, thereby enhancing legitimacy.[1] This was the imperative for judicial involvement and the most basic rationale for judicial review. It is axiomatic that if the courts are to render public power accountable then there must be legal doctrine that serves to keep the relevant body within its assigned sphere of power. It is equally axiomatic that there must be controls to determine whether the power has been used for an improper purpose. Such legal doctrine is fundamental in the sense that if we are to have any body of law to check public power, then there must be doctrinal categories of this kind. This is equally true for the law dealing, for example, with the consequences of invalidity. It is, therefore, unsurprising that these doctrinal categories have existed from the seventeenth century, and have been refined since then. It is equally unsurprising that these categories of judicial review exist in the very great majority, if not all, systems of administrative law.

Fifthly, this still leaves a plethora of issues to be resolved concerning the more detailed content of these doctrinal categories, and it is, inter alia, this, which serves to explain doctrinal differences between systems of administrative law. Thus, there will be debates concerning, for example, the particular standard of review for error of law, the test for factual error, the specific legal criteria to control discretion, and the test for misuse of power. Resolution of these issues will perforce entail normative assumptions, and will be affected by broader considerations concerning the relationship between courts, legislature, and the executive in that legal system. A concept of legality/illegality can accommodate the answers in conclusory manner, but it does not drive the outcome.

42.3 Foundational: Formal Basis for Authority

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While there are, therefore, very considerable difficulties in regarding legality as the meta-precept that provides the foundation for administrative law doctrine, there are good reasons for treating it as foundational in a narrower, but nonetheless important, sense. All legal systems require the administration to be able to point to some ground of lawful authority on which it can base its action. This may well vary as between legal systems, but there are also significant commonalities. Thus, the sine qua non for lawful action in the UK is that the administration can point to some foundation in statute, the prerogative, or the common law to justify the action taken. If it cannot do so, then its action is invalid without recourse to other doctrinal grounds of challenge. In similar vein, the European Union (EU) administration must be able to point to some foundation in a Treaty article, regulation, directive, or decision to legitimate the administrative action that has been taken.

42.4 Distinction I: Legality and Rationality

Legality is also used by way of distinction to irrationality, to denote different grounds for judicial intervention, with implications for the standard of judicial review in the two instances. This distinction is prevalent in UK law, and to a lesser extent in US and EU law.

42.4.1 UK Common Law

The distinction underpinned Lord Diplock's exegesis on administrative law in the *GCHQ* case.[2] His Lordship recognized three grounds on which administrative action could be subject to judicial review, illegality, irrationality, and procedural impropriety, while recognizing that these might be added to by, for example, possible future recognition of proportionality as a ground of judicial review.

For Lord Diplock, 'illegality' connoted the idea that 'the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it', and that 'whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable'.[3]

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Irrationality meant *Wednesbury* unreasonableness,[4] which, for Lord Diplock, was applicable to a 'decision that was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.[5] It was not, said Lord Diplock, necessary to predicate such intervention on an inferred, though unidentifiable, mistake of law.[6] To the

contrary, irrationality could now 'stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review'.[7]

Lord Diplock's distinction reflected that of Lord Greene MR in the *Wednesbury* case.[8] A court could legitimately intervene to control discretion where the authority contravened the law. The motif used repeatedly by Lord Greene was that the authority must act within the four corners of its power, and that if it contravened such limits it would be acting contrary to the law. It could err in this respect if, for example, the exercise of discretion was based on improper purposes, if the body took irrelevant considerations into account or failed to take relevant considerations into account, or acted in bad faith. The rationale for judicial intervention was that the decision could not be made at all, and was therefore illegal. It was outside the four corners of the power that Parliament had given to the decision-maker.

Lord Greene MR also accepted that if exercise of discretion successfully negotiated the hurdles of propriety of purpose and relevancy it could still be invalidated if it was so unreasonable that no reasonable body could have reached such a decision. Where, however, the primary decision-maker was within the four corners of its power then the courts should be reluctant to interfere. The courts should not substitute their view for that of the public body, nor should they overturn a decision merely because they felt that there might have been some other reasonable way for the agency to have done its task. Some control over decisions within the four corners of the public body's power was, nonetheless, warranted. If the challenged decision really was so unreasonable that no reasonable body could have made it, the example given being dismissal of a teacher because of the colour of her hair,[9] then the court was justified in quashing it.[10]

The divide between judicial review premised on legality and rationality has important consequences for the standard of judicial review. Judicial review cast in terms of legality entails substitution of judgment by the reviewing court. It is for the court to decide whether a consideration is relevant or irrelevant, and to determine propriety of purpose. This is regarded as ordinary statutory interpretation that falls properly within the judicial mandate, which is to define the 'four corners' of the power ascribed by Parliament to the public body. If the exercise of discretion is inconsistent with these limits, then it is annulled.[11] The
p. 886 reviewing court might well consider the reasons why, for example, the ↳ public authority regarded a particular consideration as relevant, but this does not alter the fact that the issue is regarded as going to 'legality', and hence for determination by the court.

Judicial review cast in terms of rationality is perceived very differently. The public authority is, by definition, within the scope of its authority, and the courts should therefore be wary of intervention. This was the rationale for the very narrow meaning of unreasonableness identified by Lord Diplock and Lord Greene MR.

The consequences of the divide between legality and rationality review of discretion are, therefore, significant. Concerns over the proper limits of judicial intervention that dominate discourse concerning the latter is largely absent from the former. This is reinforced by the very language used, whereby 'legality' carries the connotation of discernible boundaries, the determination of which properly lies in the preserve of the ordinary courts, thereby making substitution of judgment seem the natural choice.

The divide between the two species of control over discretion is, however, far from pristine, and assignment of a case to a particular category can be contestable. The boundaries of discretionary power will often be uncertain. The legislature may make express stipulation as to relevant considerations, but in many instances it will not. Constraints on parliamentary time, epistemic limitations, and party politics, will often render the statute incomplete in this respect. Terminology has consequence. A test conceptualized in terms of the 'four corners' of the empowering statute may be appealing. Discretionary power is, however, often not neatly bounded in this manner. The fact that application of the distinction may be contestable has been recognized by the courts.[12]

The reason for this difficulty is, however, more fundamental than is often perceived. This is because assignment of a case to the category of legality or rationality depends ultimately on the level of abstraction or specificity with which the operative question is posed. The broader the definition of, for example, relevant consideration or purpose, then the more likely that the public body will survive scrutiny at the legality stage, with the consequence that control will take place at the level of rationality. Conversely, the narrower the initial definition of relevancy or purpose, the more likely that the case will be decided at that level without the need for recourse to rationality.

Consider the classic example of the unreasonable decision, dismissal of a teacher because of the colour of her hair.[13] If the considerations relevant to such dismissal are broadly defined as 'any physical characteristic', then dismissal on the above ground is relevant, and any control would then have to be via rationality. However, a more specific initial inquiry would distinguish between the types of physical characteristics felt to be relevant to teaching and those, such as natural hair colour, which were not, such that the case would be resolved at the legality level, without the need for resort to rationality review.

The fragility of the divide between the two controls over discretion may, somewhat paradoxically, help to
p. 887 explain why fewer cases are decided at the legality level than might ↳ be expected. A court may be uncertain as to whether a contested consideration should be regarded as wholly irrelevant, or whether a relevant consideration really was wholly ignored. It may then be inclined to decide the case at the rationality level, where it can assess, inter alia, the weight accorded to the consideration in the overall assessment of the decision.

A further reason for the difficulty of the divide is that it can be contestable whether the statute requires a consideration to be taken into account.[14] If the court concludes that this is not so, then it is for the decision-maker, and not the court, to make the primary judgment as to what should be considered in the circumstances of a given case. The court does, however, exercise a secondary judgment, framed in *Wednesbury* terms, if a matter is so obviously material that it would be irrational to ignore it.

42.4.2 US Law

The principal juridical tool to control discretionary power in the US is the arbitrary and capricious test, which is a head of review in the Administrative Procedure Act (APA) 1946.[15] The test has been interpreted with varying degrees of intensity, and there is some disagreement as to what constitutes the dominant strain with the jurisprudence.[16] The salient inquiry for present purposes is the extent to which there is evidence of a divide analogous to that in the UK. To this end, it is the 'hard look' variant of the arbitrary and capricious test that is most relevant. Prior to this, the arbitrary and capricious test had been interpreted very narrowly, such that the claimant would have to show something extreme to compel judicial intervention.[17] The 'hard look' test heralded a more muscular approach.

Thus in the *State Farm* case,[18] the Supreme Court held that it was not for the reviewing court to substitute its judgment for that of the agency. It, nonetheless, placed greater limits on agency discretion than hitherto. The agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. It was for the reviewing court to decide
p. 888 whether the decision was based on a consideration of the relevant factors and whether ↳ there had been a clear error of judgment. An agency decision would be arbitrary and capricious if the agency relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that ran counter to the evidence before the agency, or was so implausible that it could not be ascribed to a difference in view, or the product of agency expertise.

Viewed from a comparative perspective, this test combines the two elements that constitute control over discretionary power in the UK. Thus, some controls go to relevancy and the fit between evidence and result, while others speak to the implausibility of the substantive outcome. The principal structural difference is that the UK treats legality and rationality review as a two-step inquiry, with a lexical ordering between the stages, such that it is only if the public authority survives legality review, or it is assumed that it would survive it, that the inquiry proceeds to rationality. In *State Farm*, by way of contrast, the two stages are treated as components of one test.

It is, however, interesting to probe further and consider whether the 'hard look' test replicates assumptions that underlie UK law. The more particular inquiry is whether the US courts substitute judgment for that of the agency as to what constitutes a relevant/irrelevant consideration, in a manner analogous to courts in the UK. It is noteworthy that the Supreme Court framed its intervention on grounds of relevancy in terms of divining factors that Congress had intended the agency to consider. This view is reinforced by consideration of the Supreme Court's reasoning on the facts of the case. The challenge succeeded principally on the basis that the agency failed to take account of relevant considerations and that its reasoning was defective. Identification of these considerations was treated very much as being within the judicial ambit, based on the court's construction of the empowering legislation.

It is, nonetheless, not easy to divine from the case law whether the reviewing court substitutes judgment on grounds of relevancy, in a manner analogous to that of UK courts.[19] There is force in Virelli's argument that the different elements that constitute the hard look test should be treated distinctively in terms of how much deference the agency is afforded.[20] Thus, he distinguishes between first and second order aspects of the test, the former being concerned with the gathering of information, reason giving, and the like, the latter with relevant considerations and the rational connection between information and outcome. The second order aspects should, argues Virelli, be afforded greater deference, since they are more closely connected with the value judgment made by the agency, which is likely to have expertise as to the kinds of considerations that should inform its policy. However, he also acknowledges that an agency's statutory relevant factors analysis is less deserving of judicial deference than its rational connection analysis, because courts are generally more competent to evaluate whether an agency ↳ met legislative expectations then they are to judge the wisdom of an agency's final determination.[21]

There is force in this argument, although whether it is reflected in the case law is less certain.[22] Space precludes detailed analysis, but in summary the position appears to be as follows. Where the enabling statute specifies the considerations relevant to discretionary choices, the reviewing court will ensure that the agency complies. The more interesting scenario is where Congress is silent in this respect. An agency is not required to consider factors made relevant by statutes that are related to the statute being implemented by the agency, even if the agency decision has some effect on policies that underlie the related statutes. There was, in addition, a line of authority from the District of Columbia Circuit to the effect that the courts would interpret Congressional silence with respect to a factor that was logically relevant to a decision so as to allow the agency to consider that factor when making its decision. The status of this case law was, however, cast in doubt by decisions of the Supreme Court.[23] This still leaves open the related, but distinct, issue as to how far the reviewing court makes the determination of what constitutes a relevant consideration in the event of Congressional silence, and to what extent it affords the agency latitude in this respect. The issue is cast into sharp relief by the fact that there are clearly cases where the court made its own determination as to what should be regarded as relevant factors.[24]

42.4.3 EU Law

In EU law, the general legal mantra is that the court should not substitute its judgment for that of the initial decision-maker on issues of fact and discretion. The applicant must show some manifest error, misuse of power, or clear excess in the bounds of discretion for the court to intervene. The salient issue is whether there is anything akin to the divide that prevails in the UK, whereby the court substitutes judgment on the matters going to legality, while exercising greater restraint in relation to rationality/proportionality. The reality is that there is such a distinction, although it is not voiced so expressly in EU law.

The evidence is to be found in the jurisprudence on misuse of power, which is the category of review dealing with propriety of purpose. There is no distinct head of review for failing to take account of a relevant consideration, or the converse, but review for misuse of power is well-established. The European Court of Justice (ECJ) has consistently held that there is a misuse of power if it appears, on the basis of objective, relevant, and consistent factors that an institution adopted a measure with the exclusive or main purpose of achieving an end other than that stated, or evading a procedure specifically provided ↳ by the Treaty for dealing with the circumstances of the case.[25] This head of review is, therefore, primarily directed towards the purpose of the challenged measure rather than its content.[26]

It is for the applicant to adduce objective evidence that the EU institution misused its power.[27] The determination as to whether there has been a misuse of power will necessarily require evaluation of the scope and purpose of the relevant Treaty article, or EU legislation on which the contested measure was based. This provides the foundation for deciding whether the contested measure was adopted to attain some other end than that stated, or to evade a procedure laid down by the Treaty. The EU courts routinely regard this as falling within their legitimate remit and hence substitute judgment on the issue. They make the decision as to the legitimate purposes that can be served by a particular Treaty article, regulation, or directive. This is perceived to be an interpretive exercise in relation to which their determination prevails. There is no evidence of deference being accorded to the institutional repository of the power when defining the purposes that can be served.

42.5 Distinction II: Legality and the Merits

There is a further distinction which is related, albeit different, to that considered above. It is between legality and the merits, and is used principally to guide the intensity of review of discretionary power. The division between legality and rationality, considered in the previous section, speaks to different standards of review for matters such as relevancy and propriety of purpose on the one hand, and rationality/proportionality on the other. The dichotomy between legality and the merits is felt to capture
p. 891 something significant ↳ concerning the appropriate intensity of review at the level of rationality/proportionality.

It is predicated on the assumption that a division between legality and the merits exists, and that observance of this divide ensures that courts do not tread beyond their warranted remit when fashioning controls over discretionary power. This assumption is evident in common law and civil law regimes. Thus, for example, common law courts express caution concerning proportionality as a general head of review lest it should lead to greater intrusion on the merits than was warranted;[28] and civil law systems, such as the French, premise controls over discretionary power on the divide between légalité and opportunité.[29]

We need to tread carefully when thinking about this distinction. There is undoubtedly good reason for courts to be cautious concerning the standard and intensity of review of discretionary power. Caution in this respect is shared by most administrative law regimes. The relevant issue is whether the distinction between legality and the merits furnishes any meaningful criterion or guide as to the appropriate limits of judicial intervention.

We can begin by reiterating the normative and pragmatic reasons for judicial restraint when reviewing exercise of discretionary power by the administration. It is not for the courts to substitute their choice as to how the discretion ought to have been exercised for that of the administrative authority. They should not intervene, reassess the matter afresh and decide, for example, that funds ought to be allocated in one way rather than another. Decisions as to political and social choice are made by the legislature, or by a person assigned the task by the legislature.[30] To sanction judicial intervention simply because the court would prefer a different choice to that of the administrator runs counter to this fundamental assumption, and would entail a re-allocation of power from the legislature and bureaucracy to the courts. This normative rationale for limiting judicial power is reinforced by prudential considerations. Discretionary determinations often require expertise and knowledge of the particular policy area. A generalist court will often lack such expertise, and be hampered by epistemic limitations. These points are generally accepted, although that still leaves room for difference of opinion within, and between, legal systems as to what the test for review ought to be.

The pertinent inquiry is whether, accepting that courts should not substitute judgment on the merits, the distinction between legality and the merits furnishes any guidance as to what the test for review ought to be. To put the same point in a different way, we need to consider how far that distinction provides a touchstone for the appropriate limits of judicial intervention, or whether it is in fact a chimera that brings little if anything of value to the resolution of this issue. It would be helpful if the former were true, but the latter better expresses reality.

p. 892 The reason is not hard to divine. All tests for review of discretionary power entail the judiciary taking some view of the merits of the contested action. This is so even in relation to the classic *Wednesbury* test.[31] What distinguishes different tests for review is not whether they consider the merits or not, but the stringency of the judicial scrutiny. It is possible in this regard to range tests for review along a spectrum. Classic, limited *Wednesbury* review is at one end of the spectrum, judicial substitution of judgment, whereby the court imposes what it believes to be the correct result lies at the opposite end of the spectrum. Heightened *Wednesbury* review, hard look review, and proportionality occupy intermediate positions.[32]

The force of the preceding point can be readily exemplified. Consider a simple statute of the kind that exists in many legal systems, whereby the legislature provides that compensation may be granted to an employee who is injured during the course of employment. The statute is administered by an agency designated by the legislature. It decides in the exercise of its discretion to give compensation to a particular claimant, but to award a relatively small amount having taken account of the facts of the accident, the size of the fund from which the compensation will be drawn, the assets of the claimant and the likely 'precedential' impact of its award for future claims. The decision is challenged by way of judicial review.

The term merits in this context connotes the discretionary determination made by the agency. There are, as seen above, good normative and pragmatic reasons why the reviewing court should not substitute judgment on the merits for that of the agency, and alter the quantum of compensation as if it were the primary decision-maker. The reviewing court recognizes that this is not its proper remit. It therefore deploys a different test for review of discretionary power. There are choices aplenty: rationality review, proportionality review, review for manifest error, and hard look review, each of which can be applied more or less intensively as the court chooses. Any such choice will involve the court in taking a view of the merits, albeit not substitution of judgment thereon. There is no option that obviates this. To imagine otherwise is erroneous, even if the chosen head of review entails relatively exiguous oversight. There is, therefore, no magic touchstone that enables a court to exercise control over discretionary power without taking some view of the merits, and insofar as talk of a divide between legality and the merits encourages this it is unhelpful.

It might be argued, by way of response, that there are assuredly differences between controls of discretionary power as to how intrusively the court evaluates the initial agency determination, and thus how intensive is the review of the merits that constitute the initial discretionary decision. This is indubitably true. It is precisely why there are differences of view within, and between, legal systems, as to what the test ought to be. The apposite point for present purposes is, however, that the distinction between legality and the merits does nothing, in itself, to resolve that choice. Advocates of low intensity review will deploy a
p. 893 range of arguments as to why their preferred test is optimal; ↳ these arguments will be countered by those who advocate more intensive review in a particular type of case, while being fully cognizant that courts should not substitute judgment.

The legality/merits distinction can accommodate any of these chosen outcomes, but dictates none. To suggest otherwise is simply to stack the deck implicitly in your favour, without rendering the underlying arguments apparent. It entails adherence to the package of values that leads to your preferred intensity of review, under the pretence that this is somehow ipso facto demanded by the dichotomy between legality and the merits, rather than expressive of a particular choice as to the relative intrusiveness of judicial oversight.

42.6 Distinction III: Legality and Policy

The focus of the analysis now shifts to the third of the distinctions posited at the outset of the discussion, which is that between legality and policy. This distinction is related to that between legality and the merits, but is nonetheless distinct therefrom. The legality/policy divide appears most commonly in the context of rule-making, but is not, however, confined thereto. The reasons why the issue surfaces most commonly in the rule-making context is not hard to divine, since general policy issues are more likely to arise when the administration makes rules than when it makes individual determinations. It can be readily acknowledged that policy issues can emerge, explicitly or implicitly, in the latter context as well as the former. Such policy determinations are, nonetheless, more likely to arise when the administration shapes a rule that is to determine, or guide, the resolution of a particular category of case.

The salient issue for present purposes is the significance of the legality/policy divide for the purposes of administrative law doctrine, and the extent to which it sheds light on the role played by the concept of legality within our doctrinal frameworks. It is helpful, when answering this inquiry, to disaggregate four different ways in which the legality/policy divide can play out. The detail may well differ as between legal systems, but the four dimensions articulated below will nonetheless be recognized in many, if not most, legal orders.

There is what may be termed the *boundary dimension* of the legality/policy distinction. Properly understood this is nothing more than recognition of an important point that surfaced in previous discussion, this being that courts should not substitute judgment on determinations that are properly the preserve of the administration. The legislature accords the administration authority to attain the statutory remit. It may discharge this task by the making of individual decisions, or rules, or an admixture of the two. It is not for the courts to substitute judgment via judicial review, and to quash the individual decision or rule merely because the particular court would have made a different choice if it had been the primary decision-maker. This injunction on the limits of judicial review is equally applicable in the context of rule-making, and may be articulated in the language that policy is not the terrain for the courts.

p. 894 There is also a *status dimension* to rules made by the administration, which has implications for the legality/policy divide. Rules may be made by the administration in accord with accepted procedures, and partake of the status that is afforded to such rules by that legal system. They will then have the input legitimacy discussed below. There are, however, many instances where rules or guidelines just develop over time, in particular in areas of mass administrative justice. They serve goals of administrative efficiency, such that the administrator does not have to re-think the wheel each time that a discretionary determination is made; and they can enhance rule of law values by ensuring both that the affected individual can know the criteria that will be used to decide the case, and also that administrators in different parts of the country are applying the same criteria. It is then necessary for the legal system to decide what status to afford to them. It might, in extremis, decide that any reliance on such rules or guidelines is unlawful, and insist that every determination must be individualized. It might, more sensibly, decide that the use of such guidelines is legitimate for the preceding reasons, and can be determinative of the case, provided that the administration gives consideration as to whether to make an exception in the particular case, which is the position in UK law. It might demand that the guidelines be transformed into more formal rules, in order that the conditions for the making of such rules can be applicable.

There is, in addition, the *input legitimacy dimension* to the legality/policy divide as it features in the context of rule-making. If a legal system provides a mechanism for the crafting and approval of rules drafted by the administration, then where a particular rule has been properly made in accordance with such precepts it will invest the policy choice contained therein with input legitimacy, and render courts less inclined to challenge that policy. This is more especially so if the imprimatur for the administrative rule entails some measure of oversight by the parent legislature. Put in terms of the legality/policy divide, the rules have been made in accord with the requisite precepts of legality as connoted by the idea of formal authority adumbrated above, and the input legitimacy that flows therefrom is taken to limit oversight of the resulting policy choice. This is evident in legal systems that have different mechanisms for crafting and approval of such rules, as exemplified by the regime for delegated legislation in the UK,[33] the notice-and-comment procedure in the US,[34] and the rules for approval of delegated and implementing acts in the EU.[35] It follows that courts will commonly enforce via judicial review the participatory or input conditions demanded by the particular legal system, although the degree of intensity with which they do so varies.

There is, finally, the *output legitimacy dimension* to the legality/policy divide. The fact that the administration has complied with the stipulated conditions for the making of the rule, and thus has input legitimacy, does not immunize it from substantive review. Thus, while the courts generally respect the admonition that they should not substitute judgment on the policy that the rule is designed to serve, this does not preclude substantive oversight of its content. Nor should it do so. To contend to the contrary would
p. 895 mean that the administration could render substantive choices safe from any judicial oversight ↳ by embodying them in a rule. There is no basis for any such conclusion, since it would embed an unjustified divide between discharge of statutory objectives through individual decisions and through rules that is not normatively warranted. It is, moreover, necessary for there to be some substantive oversight in order to ensure that the rule is consistent with the parent statute pursuant to which it was made, and this is so notwithstanding the fact that the conditions for the making of the rule have been properly navigated. This then leaves open for consideration the doctrinal nature, and intensity, of such substantive review, on which there is considerable debate, judicial and academic, in many legal orders. The nature of this debate has been adverted to above, and is apparent again in the next section. The apposite point for the present discussion is that the concept of legality, as juxtaposed to that of policy, does not provide any particular guidance as to issues such as the doctrinal nature or intensity of such review. To be sure it serves to proscribe substitution of judgment, but there many variants of substantive review that do not transgress this prohibition. The concept of legality can accommodate any of these, but does not dictate any particular one.

42.7 A Distinct Head of Review: The 'Principle of Legality'

The discussion thus far has focused on whether legality might constitute the overarching precept for the more particular heads of judicial review, and its role in demanding a lawful foundation for administrative action. We then considered whether there is utility in the distinction between legality and rationality, and that between legality and the merits. There is, however, a further use of the concept of legality, which is prevalent, inter alia, in the UK, New Zealand, and Australia, where it is a distinct head of review.[36] It was of particular importance in the UK prior to the Human Rights Act 1998, but the principle continued to exist thereafter. Space precludes detailed treatment of all case law.

Antecedents of the concept can be traced back to earlier jurisprudence,[37] but the modern UK articulation is associated with the judgment of Laws J. in *Witham*.[38] He held that access to the court was a constitutional right and that the executive could only abrogate that right if it was specifically permitted to do so by Parliament. Laws J. accepted that Parliament might expressly limit this right, but stated that he could not
p. 896 conceive of anything short of this which would convince the court that the right had been limited by ↳ implication. The class of case where the right might be limited by necessary implication was a class with no members.

The principle has received the imprimatur of the House of Lords and Supreme Court. Thus, in *Simms*,[39] the House of Lords held that legislation was to be read subject to a principle of legality, which meant that fundamental rights could not be overridden by general or ambiguous words. This was, said Lord Hoffmann, because there was too great a risk that the full implications of their unqualified meaning might have passed unnoticed in the democratic process. In the absence of express language, or necessary implication to the contrary, the courts would therefore presume that even the most general words were intended to be subject to the basic rights of the individual. Parliament had, therefore, to squarely confront what it was doing and accept the political cost.

The principle was reiterated by the Supreme Court in *Ahmed*.[40] The case concerned the scope of the United Nations Act 1946, section 1 of which empowered the making of Orders in Council when it appeared 'necessary or expedient' to enable United Nations (UN) measures to be applied in the UK. Such orders were made to freeze the assets of suspected terrorists. The Treasury was allowed to designate a person where it had reasonable grounds for believing that he or she was engaged in terrorist acts, and such designation could be made for people placed on a list by the sanctions committee of the Security Council. The claimants' assets were frozen pursuant to these Orders, and the claimants argued that this was ultra vires.

The Supreme Court held, inter alia, that because fundamental rights could only be overridden by express language or necessary implication, the general wording of section 1 of the 1946 Act did not empower the executive to override the fundamental rights of the individual. The sanctions committee regime made no provision for procedural fairness, and deprived those thus designated of the fundamental right of access to an effective judicial remedy by which their listing could be reviewed.

The principle of legality featured prominently in the Supreme Court's reasoning. For Lord Hope, the principle was at the heart of the relationship between Parliament and the citizen. It meant that fundamental rights could not be overridden by general words, but only by express language or by necessary implication.[41] Lord Phillips held that, in accord with the principle of legality, a statutory provision that delegated to the executive the power to make regulations should be strictly construed, and that where the power was conferred in general terms, it could be necessary to imply restrictions in its scope in order to avoid interference with individual rights that were not proportionate to the object of the primary legislation.[42] Similar reasoning pervaded the other judgments.

There is a rich literature discussing various dimension of the principle of legality.[43] Suffice it within the
p. 897 limits of space to make the following points. First, the principle is ↳ one of interpretation as to how primary legislation should be read. It rests on sound normative foundations,[44] although there is contestation as to what should be regarded as the dominant rationale.[45] The legality principle may be said to rest on legislative intent, the assumption being that the legislature would not seek to undermine fundamental rights; the principle might be justified because it will enhance the parliamentary process, by ensuring that increased attention is given to statutes that impact on rights; and the principle might rest on the idea that Parliament should confront the political cost of what it is doing if it wishes to limit fundamental rights.

Secondly, this still leaves open the rationale for the nomenclature of 'legality'. It might be argued that this is warranted since the principle entails the conclusion that the executive does not have lawful authority to infringe fundamental rights where the statute is cast in general or ambiguous words. Viewed from this perspective it embodies a linguistic limit on what Parliament can achieve. Thus, while substantive limits on the UK Parliament are generally felt to be a constitutional oxymoron, given the foundational precept of parliamentary sovereignty, the principle of legality embodies a linguistic limit, such that if Parliament really wishes to curtail fundamental rights it must do so expressly and hence pay the political cost. This explanation has some force. It is, nonetheless, tempered by the realization that there are other principles of interpretation applicable to primary legislation that directly or indirectly affect how it is to be read,[46] and thus have implications for the power that can be exercised pursuant thereto, but these are not endowed with the appellation 'legality'. A related justification for the appellation of legality is that the principle demarcates what can be done by the legislature and the executive. It is, therefore, expressive of a foundational precept that Parliament could not lawfully endow the executive with extensive powers through according a blank cheque to do whatsoever it wished, at least insofar as that power might interfere with fundamental rights.[47] Viewed in this way, the principle has some connection with a non-delegation doctrine, which accords with the rationale for the principle of legality that is framed in terms of enhancing democracy.

Thirdly, there is debate about the relationship between the principle of legality and proportionality/heightened rationality review.[48] The relationship is, in my view, best conceptualized as follows. The principle of legality furnishes guidance as to how legislation will be read. A statute framed in general or ambiguous terms will not, therefore, suffice in itself as the legal foundation for limiting rights.
p. 898 This does not, however, ↳ mean that the claimant will necessarily win in a common law rights-based claim. It will still have to be shown that the right has been infringed by the contested legislation. The very fact that common law rights indubitably have justified limits,[49] means that the courts will play a role in determining the nature and application thereof. They can, in this respect, draw on various sources including, inter alia, human rights instruments, background values, and the policy underlying the legislation in issue in the particular case. Thus, if it is alleged that a common law right to free speech has been infringed, it would be natural for the reviewing court to consider whether there is a limit to free speech that might be pertinent on the facts of the case. If the legislation pursuant to which the limit is made is general or ambiguous, then it could not in itself suffice to legitimate that constraint. This would not, however, prevent the reviewing court from concluding that such a limit to the common law right was commonly accepted, and that its application in the instant case survived scrutiny for proportionality/heightened rationality.

Fourthly, where the enabling legislation does not expressly authorize infringement of a particular right, then a court will be less inclined to find that it might have done so by necessary implication the more serious is the infringement of the fundamental right. This is the reasoning in *Leech*,[50] which does not, as has been suggested,[51] embody augmentation of the principle of legality, but rather the natural logic of the principle of legality itself. A rule made pursuant to statute by a prison governor allowed the screening of all correspondence to and from the prison, including legal correspondence between prisoners and their lawyers. It thereby interfered with the fundamental right of access to court. The operative issue, as articulated by Steyn LJ, was whether a statute framed in general terms as a power to manage and regulate prisons[52] could be regarded as implicitly authorizing the contested rule.[53] For Steyn LJ, 'the more fundamental the right interfered with, and the more drastic the interference, the more difficult becomes the implication'.[54] The court concluded that while a power to undertake some monitoring of prisoner correspondence could validly be drawn from the parent legislation, it did not warrant a rule cast as broadly as that in the instant case.[55] This reasoning flowed naturally from the principle of legality. The enabling legislation was framed in very general terms, and contained no express authorization to monitor correspondence. The operative inquiry was, therefore, whether it might have authorized this by necessary implication. The hurdle for the government to surmount should naturally be higher, the greater the infringement with the protected right. This coheres with the rights-protective and the democracy-enhancement dimensions of the principle of legality.

42.8 Conclusion

The preceding discussion has analysed six different ways in which the concept of legality is deployed in administrative law. It may well be that scholars will identify further uses of the concept that are distinct from those considered above. Insofar as that might be so, such contributions would be welcome. This chapter would then have served to stimulate debate about a concept, the meaning and use of which is not clear. What is of more abiding importance is that we continue to think hard about concepts that are used in administrative law, and that we do not assume that the same word always bears the same meaning when used in different contexts. It is equally important that we think hard about whether conceptual distinctions drawn within our discipline withstand examination. It is hoped that the present chapter has made some contribution in this respect.

Notes

1 SA de Smith, 'The Prerogative Writs' [1951] *CLJ* 40; SA de Smith, 'Wrongs and Remedies in Administrative Law' (1952) *MLR* 189; L Jaffe and E Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *LQR* 345; EG Henderson, *Foundations of English Administrative Law* (Harvard University Press, 1963); A Rubinstein, *Jurisdiction and Illegality* (Oxford University Press, 1975); P Craig, '*Ultra Vires* and the Foundations of Judicial Review' [1998] *CLJ* 63; P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) ch. 1.

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

3 ibid, 410.

4 *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223.

5 *GCHQ*, n. 2, 410.

6 Referring in this respect to reasoning in *Edwards v. Bairstow* [1956] AC 14.

7 *GCHQ*, n. 2, 411.

8 *Wednesbury*, n. 4, 228–30.

9 The example was taken from *Short v. Poole Corp* [1926] Ch 66.

10 *Wednesbury*, n. 4, 229–30.

11 P Craig, *Administrative Law* (Sweet & Maxwell, 8th edn, 2016) chs 19, 21.

12 *Wednesbury*, n. 4, 229–30.

13 *Short*, n. 9.

14 H Wilberg, 'Deference on Relevance or Purpose? Wrestling with the Law/Discretion Divide' in H Wilberg and M Elliott (eds), *The Scope and Intensity of Substantive Review, Traversing Taggart's Rainbow* (Hart Publishing, 2015) ch. 11; R. (Khatun) v. Newham LBC [2004] EWCA Civ 55, [35]; R. (DSD) v. Parole Board [2019] Q.B. 285, [141].

15 APA 1946, s. 702(2)(A).

16 J Gersen and A Vermeule, 'Thin Rationality Review' (2016) 114 *Mich. L. Rev*. 1355; L Virelli, 'Deconstructing Arbitrary and Capricious Review' (2014) 92 *NCLRev* 721.

17 See e.g. RL Rabin, 'Federal Regulation in Historical Perspective' (1985–86) 38 *Stan. L. Rev*. 1189, 1252.

18 *Motor Vehicle Manufacturers Assn v. State Farm Mutual Automobile Insurance Co* 463 US 29, 42–3 (1983).

19 CR Sunstein, 'Deregulation and the Hard-Look Doctrine' (1983) *Sup. Ct. Rev*. 177, 181; RJ Pierce, Jr, 'What Factors Can an Agency Consider in Making a Decision?' (2009) *Mich. St. L. Rev*. 67; Virelli, n. 16.

20 Virelli, n. 16, 724–5.

21 ibid, 765–9.

22 Pierce, n. 19, 69.

23 *Massachusetts v. EPA* 549 US 497 (2007); *National Ass'n of Home Builders v. Defenders of Wildlife* 551 US 644 (2007); Pierce, n. 19, 77–87.

24 *Judulang v. Holder* 132 S.Ct. 476 (2011).

25 Cases T-244 and 486/93 *TWD Textilwerke Deggendorf GmbH v. Commission* [1995] ECR II-2265, para. 61; Case C-48/96 P *Windpark Groothusen Gmbh & Co Betriebs KG v. Commission* [1998] ECR I-2873, para. 52; Case C-301/97 *Netherlands v. Council Netherlands v Council* [2001] ECR I-8853, para. 153; Cases T-344–345/00 *CEVA Sante Animale SA and Pharmacia Enterprises SA v. Commission* [2003] ECR II-229, paras 71–3; Case C-452/00 *Netherlands v. Commission* [2005] ECR I-6645, para. 114; Case C-407/04 P *Dalmine SpA v. Commission* [2007] ECR I-829, paras 99–100; Cases T-227–229, 265, 266, and 270/01 *Territorio Histórico de Álava—Diputación Foral de Álava and Comunidad autónoma del País Vasco—Gobierno Vasco v. Commission* [2009] ECR II-3029, para. 213; Case T-390/08 *Bank Melli Iran v. Council* [2009] ECR II-3967, para. 50; Case T-348/14 *Yanukovych v. Council of the European Union*, EU:T:2016:508, para. 123; Case T-287/15 *Tayto Group Ltd v. European Union Intellectual Property Office*, EU:T:2017:443, para. 79.

26 Case T-52/99 *T Port & Co KG v. Commission* [2001] ECR II-981, para. 56.

27 Cases T-133 and 204/95 *International Express Carriers Conference v. Commission* [1998] ECR II-3645, paras 179–96; Case C-407/04 P*Dalmine*, n. 25, para. 100; Case T-390/08 *Bank Melli Iran*, n. 25, para. 50; Case T-49/07 *Sofiane Fahas v. Council*, EU:T:2010:499, para. 88; Case T-332 and 350/00 *Rica Foods (Free Zone) NV and Free Trade Foods NV v. Commission* [2002] ECR II-4755, para. 203; Cases C-186 and 188/02 P *Ramondin SA and others v. Commission* [2004] ECR I-10653, paras. 42–8.

28 See e.g. *R v. Secretary of State for the Home Department, ex p. Brind* [1991] 1 AC 696, 757–8, 761–2, 766–7.
29 See e.g. M Dubisson and M Eisenmann, *La distinction entre la légalité et l'opportunité dans la théorie du recours pour excès de pouvoir* (Pichon & Durand-Auzias, 1958).
30 *R v. Ministry of Agriculture, Fisheries and Food, ex p. First City Trading* [1997] 1 CMLR 250, 278.
31 *Wednesbury*, n. 4, 233–4.
32 *First City Trading* [1997] 1 CMLR 250, 278–9.
33 Statutory Instruments Act 1946.
34 APA 1946.
35 Articles 289–291 of the Treaty on the Functioning of the European Union (TFEU).
36 D Dyzenhaus, M Hunt, and M Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *OUCLJ* 5; D Meagher and M Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017); J Varuhas, 'Conceptualising the Principle(s) of Legality', <https://ssrn.com/abstract=3239264>.
37 M Groves, 'The Principle of Legality and Administrative Discretion: A New Name for an Old Approach?' in Meagher and Groves, n. 37, ch. 9; Varuhas, n. 36, 1–2.
38 *R v. Lord Chancellor, ex p. Witham* [1998] QB 575, 585–6.
39 *R v. Secretary of State for the Home Department, ex p. Simms & O' Brien* [2000] 2 AC 115; *R v. Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539; *R (Morgan Grenfell & Co Ltd) v. Special Commissioner of Income Tax* [2003] 1 AC 563;*R (Anufrijeva) v. Secretary of State for the Home Department* [2004] 1 AC 604.
40 *Ahmed v. HM Treasury* [2010] 2 AC 534.
41 ibid, para. 75.
42 ibid, paras 110, 122.
43 See n. 36.
44 There can, however, be controversial applications of the principle, *R (Evans) v. Attorney General* [2015] AC 1787.
45 B Lim, 'The Rationales for the Principle of Legality' in Meagher and Groves, n. 36, ch. 1; J Goldsworthy, 'The Principle of Legality and Legislative Intention', ibid, ch. 4.
46 Consider in this respect basic principles of statutory interpretation concerning singular and plural, or concerning gender.
47 *Ahmed*, n. 40, paras 118–24.
48 D Meagher, 'The Principle of Legality and Proportionality in Australian Law' in Meagher and Groves, n. 36, ch. 7; H Wilberg, 'Common Law Rights have Justified Limits: refining the "Principle of Legality"', ibid, ch. 8.
49 Wilberg, n. 48.
50 *R v. Secretary of State for the Home Department, ex p. Leech* [1994] QB 198.
51 Varuhas, n. 36, 6–7.
52 Prison Act 1952, s. 47(1).
53 *Leech*, n. 50, 208.
54 ibid, 209.
55 ibid, 217.