Judicial Review of Administrative Action:

England, France, and Germany (1860s–1910s)

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Abstract

This thesis explores and compares the history of judicial review in England, France, and Germany between the 1860s and the 1910s. It focuses on three subject-matters: the institutional arrangement of decision-makers (both the reviewing courts and the decision-makers subject to review), review on the ground of an unlawful decision-making procedure, and review for error of law.

The principal argument postulates that the institutional and doctrinal frameworks for judicial review were carefully crafted around specific notions of 'judicial' and 'administrative' powers in France and Germany, but less so in England. Although in slightly different ways, France and Germany during the 19th century installed separate administrative courts for the purpose of overseeing 'administrative' powers and decision-makers in a technical sense. England had no separate administrative courts. Further, the variety of processes and remedies which constituted judicial review in England did not specifically target the oversight of 'administrative' powers or decision-makers. As a means of resolving complex legal questions, English judges at times characterised certain powers as 'judicial' or 'administrative'. However, the distinction caused significant confusion. In England, the judicial-administrative divide lacked a clear institutional, legislative and constitutional foundation.

The principal argument touches upon institutions, processes and remedies, the precepts of review, as well as the constitutional foundations of judicial review in each legal system. Such a broad scope is suitable to compare three fundamentally different models of judicial review and of administrative law more broadly. In addition to the principal argument, the thesis makes a number of claims with a limited scope for each of the three subject-matters.

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Chapter 1 – Introduction

I. Comparing Three Models of Judicial Review

This thesis explores and compares judicial review of administrative action in England, France, and Germany in the period between the 1860s and the 1910s. The thesis aims to give an account of judicial review in all three legal systems, understanding each system on its own terms and by reference to the other two, thus comparing all three. Broadly, 'judicial review' is understood here as the judicial activity of passing judgments on the lawfulness of administrative action, carried out in a variety of processes to be delineated below.[1]

During the 1800s and early 1900s, administrative authorities played an important part in implementing various regulatory frameworks and reforms, which are sometimes described as having created 'the administrative state'.[2] As the Italian academic Giacinto della Cananea has pointed out:

> Almost everywhere [in Europe] there was a considerable expansion in the functions performed by government between 1830 and 1860. There was increased regulation in areas such as factories, railways and telegraphs, housing and public health. The new legislation clearly required more administration […] In brief, there was much more government in society than before.[3]

[1] Below, IV 4 (p 27).

[2] On the administrative state, see Sabino Cassese, 'The Administrative State in Europe' in Sabino Cassese, Armin von Bogdandy, and Peter Huber (eds), *The Administrative State* (OUP 2017) 57. According to Cassese, the term 'the administrative state' was coined by Dwight Waldo, *The Administrative State: A Study of the Political Theory of American Public Administration* (Ronald Press 1948).

[3] Giacinto della Cananea, 'Commonality and Diversity in Administrative Justice: Fin de Siècle' in Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 3, 6.

The scope and depth of regulation increased in England, France, and Germany alike.[4] As the English legal historian Frederic William Maitland observed in 1905, the 'volumes upon volumes of statutes' had the following effect:

> [I]f one takes up any business or employment, if one begins to build a house, or thinks to open a lodging-house, or keep a trading ship, or be a baker or chimney-sweep, straightaway one comes in contact with a mass of statutory rules, and if one keeps all the rules expressly laid down by statute still one is not safe, one may come across the rules, orders and regulations some Secretary of State or central board has been empowered to make or the bye-laws of a municipal borough or of a local sanitary authority.[5]

In short, administrative authorities implementing the 'mass of statutory rules', regulations, and by-laws, wielded powers thitherto unknown. This called attention to the means of bringing potentially unlawful administrative action and decision-making before the courts, thus ensuring that administrative authorities had not overstepped any boundaries set by the law.[6] English, French, and German law each provided some form of judicial review. In all three legal systems, parties aggrieved by what they claimed to be an unlawful administrative decision could challenge that decision in court. Naturally, judicial review was limited in numerous ways. But to a certain extent, unlawful decisions were reviewable in each of the three legal systems.

Consider the following example: Plaintiff P builds a house. The planning authority A issues a closing order, assuming that P's house infringes planning law regulations, since it has more floors than statute permits in a certain area. P disagrees. She claims that that the attic

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[4] Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland, Vol 2: Staatsrechtslehre und Verwaltungswissenschaft, 1800–1914* (Beck 1992) 237–40; Marie-Joëlle Redor, *De l'État légal à l'État de droit: L'évolution des conceptions de la doctrine publiciste française, 1879–1914* (Economica 1992) 29 and 319; Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 17 and 170–74 expresses scepticism on this increase for England, although acknowledging 'the growth of governmental functions post 1906' after the 'Liberal landslide'; Joanna Bell, *The Anatomy of Administrative Law* (Hart 2020) 14 similarly stresses the 'substantial expansion in the statutory powers of governmental bodies' during the Asquith Government (1906–16).

[5] Frederic William Maitland, *The Constitutional History of England: A Course of Lectures* (CUP 1908) 505–6.

[6] As noted by Frederic William Maitland, *The Constitutional History of England: A Course of Lectures* (CUP 1908) 505.

of her house does not count as an additional floor. In her view, her house is built in a perfectly legal manner, and A's decision unlawful. Further, P complains that A did not give her an opportunity of raising objections prior to making the closing order. She thinks that this procedural unfairness constitutes a further unlawfulness. P therefore seeks legal redress against the closing order in court.

How did English, French, and German law deal with such, and similar, cases? To what extent did the courts have authority to oversee the decision of the primary decision-maker A? Did the judges have authority to decide on whether P needed to be heard and whether the attic counted as a floor? Or did judges give a lot of weight to the assessment of the planning authority A, to the effect that they only intervened where A's decision was arbitrary or evidently unlawful?

At an abstract level, many of the legal problems raised by the hypothetical case, and similar administrative law cases, are comparable. Judges in all three jurisdictions encountered similar problems about how and where to draw the boundary between the spheres of authority of primary decision-makers and the judiciary. In other words, English, French, and German judges each had to balance administrative autonomy and judicial control.[7]

However, the precise institutional and doctrinal frameworks differed widely between the three legal systems. France and Germany in the 19th century introduced separate 'administrative courts' for the very purpose of overseeing public administration. *Droit administratif* and *Verwaltungsrecht* were each perceived as a distinct branch of French and German law, with corresponding fields of legal scholarship, which flourished in the late

[7] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 297–98 suggests (in the context of review for lack of jurisdiction) that the history of judicial review in England can be conceived as a continuous balancing exercise between administrative autonomy and judicial control.

1800s and early 1900s.[8] By contrast, England had neither designated 'administrative courts' nor an established field of 'administrative' or 'public law'.[9] Nonetheless, English courts oversaw the lawfulness of administrative action, too, through a number of doctrinal rules and remedies which had long been used to ensure that administrative bodies acted within the powers assigned to them.[10]

In line with the broader field of 'administrative' or 'public law', judicial review was historically closely tied to the nation state and its political institutions.[11] Each system of administrative law can be said 'to be unique to the history and traditions of a specific society, and designed expressly for the society within which it operates.'[12] England, France, and Germany have very different ways of conceptualising 'government' or 'the State' (*l'état*, *der Staat*), and the institutions created to govern and administer the State were (and

[8] Michael Stolleis, 'Verwaltungsrechtswissenschaft und Verwaltungslehre 1866–1914' in Karlheinz Blaschke and others (eds), *Deutsche Verwaltungsgeschichte Band 3: Das Deutsche Reich bis zum Ende der Monachie* (Deutsche Verlags-Anstalt 1984) 85; Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland, Vol 2: Staatsrechtslehre und Verwaltungswissenschaft, 1800–1914* (Beck 1992); François Burdeau, *Histoire du Droit Administratif: de la Révolution au début des années 1970* (Presses universitaires de France 1995); Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002) 225.

[9] On the absence of an English public law scholarship, see Frederic William Maitland, *Trust und Korporation* (Hölder 1904) 4; Albert Venn Dicey, *The Law of the Constitution* (John Allison ed, OUP 2019) 101; John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 80.

[10] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 3 and 9 makes the point that England has had 'a body of legal rules concerned directly with the legal constraints placed on the administration […] for at least 400 years.'

[11] In modern English scholarship, judicial review is commonly considered a part of 'administrative law' more broadly, which further encompasses administrative tribunals, inquiries, ombudsmen, and regulatory schemes in their own right. See Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) chs 12 and 13; Joanna Bell, *The Anatomy of Administrative Law* (Hart 2020) 4.

[12] Sabino Cassese, 'The Administrative State in Europe' in Sabino Cassese, Armin von Bogdandy, and Peter Huber (eds), *The Administrative State* (OUP 2017) 57, 58; Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, CUP 2012) 1 state that '[b]ehind every theory of administrative law there lies a theory of the state'; Eberhard Schmidt-Aßmann and Stéphanie Dragon, 'Les fondements comparés des systèmes de droit administratif français et allemand' in (2008) 127 Revue française d'administration publique 525: 'Le droit administratif est un droit largement soumis à l'influence des traditions juridiques nationales'.

still are) widely different, too.[13] In comparative scholarship, the three legal systems are thought to constitute different 'traditions', 'models', 'types', 'ideal-types', or 'prototypes' of administrative law.[14] Similarly in general comparative law, often with a private law focus, England, France, and Germany are commonly considered as forming the 'parent' legal order of different 'legal families'.[15] Due to the discrepancy in conceptualising government (institutions), administrative law, and the law more broadly, comparing judicial review between the three legal systems is complex.

Depending on the level of abstraction, the precise object of comparison, and the aims and purposes of the person undertaking comparative work, the views as to the similarity or dissimilarity of administrative law between England, France, and Germany differed widely, both historically and at present.[16] Certain scholars asserted their essential dissimilarity whereas others claimed a similarity or convergence. The German academic Otto Mayer claimed in 1903 that 'administrative law in the different nations representing the old European civilisation is based on foundational principles which are the same

[13] Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (CUP 2012); Giacinto della Cananea, *The Common Core of European Administrative Laws: Retrospective and Prospective* (Brill 2023) 5 points out that for Friedrich Karl von Savigny, for example, only the Roman-law infused private law was 'a normative science'; public law was considered as being 'heavily "political", and was thus [considered as being] a sort of national enclave.'

[14] Giacinto della Cananea, *The Common Core of European Administrative Laws: Retrospective and Prospective* (Brill 2023) ch 2; John Bell, 'Comparative Administrative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 1250, 1256–57 points out that in comparative administrative law, the 'grouping of legal systems according to legal families is different from that of private law.' But these differences chiefly concern other legal systems (eg the Netherlands) than the three covered here. Bell ultimately speaks of 'the common law tradition', 'the French tradition', and 'the German tradition'; Michel Fromont, 'A Typology of Administrative Law in Europe' in Sabino Cassese, Armin von Bogdandy and Peter Huber (eds), *The Administrative State* (OUP 2017) 579.

[15] Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (3rd edn, Mohr Siebeck 1996).

[16] Assuming similarity and convergence nowadays: Giacinto Della Cananea, *The Common Core of European Administrative Laws: Retrospective and Prospective* (Brill 2023); Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021); Georg Nolte, 'General Principles of German and European Administrative Law - A Comparison in Historical Perspective' (1994) 57 MLR 191.

everywhere.'[17] The politician and academic Rudolf von Gneist, who published several books on what he called 'English administrative law' between the 1850s and 1870s, made the point that English law developed in such a way as to move closer to the continental administrative laws.[18] By contrast, the French academic and vice-President of the Council of State, Édouard Laferrière, in his *Traité de la juridiction administrative et du contentieux administratif* (1st edn 1887) underlined the 'profound differences resulting from the traditions of each State'.[19] Stressing the dissimilarity in more radical terms, Albert Venn Dicey in his *Lectures Introductory to the Study of the Constitution* (1st edn 1885) famously claimed that English law did not have, need, or allow for an equivalent to the French *droit administratif*.[20] According to Dicey, an English 'administrative law' would be incompatible with the Rule of Law, which required that one set of 'ordinary courts' administered one

[17] Otto Mayer, *Le Droit administratif allemand,* vol 1 (Giard & Briere 1903) xiii; it is unclear whether Mayer thought of England as forming a part of this common legal tradition ('Le droit administratif, dans les différentes nations qui représentent la vielle civilisation européenne, a pour base certains principes généraux qui sont partout les mêmes.') Similarly, FH Lawson, 'Review of CJ Hamson, *Executive Discretion and Judicial Control* and B Schwartz, *French Administrative Law in the Common-Law World*' (1955) 7 Stan L Rev 159: 'in the field of administrative law all civilised countries have much the same problems and much the same desire for their proper solution'; Jean Rivero, *Cours de droit administratif comparé: Le contrôle juridictionnal de la légalite dans l'Europe des Six* (Les Cours du Drtoit 1956-57) 15 made the similar point that there is a 'similitude des problèmes administratifs modernes, largement commandée par des facteurs techniques identiques de pays à pays'; cited by Giacinto della Cananea, 'Commonality and Diversity in Administrative Justice: Fin de Siècle' in Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 3, 34.

[18] Rudolf von Gneist, *Das Englische Verwaltungsrecht der Gegenwart in Vergleichung mit den deutschen Verwaltungsrechtssystemen*, vol 2 (3rd edn, Springer 1884) VIII–IX; see also, Rudolf von Gneist, *Das heutige Englische Verfassungs- und Verwaltungsrecht: Geschichte und heutige Gestalt der Aemter in England mit Einschluss des Heeres, der Gerichte, der Kirche, des Hofstaats* (Springer 1857); Rudolf von Gneist, *Das heutige Englische Verfassungs- und Verwaltungsrecht: Die heutige Englische Communalverfassung und Communalverwaltung oder das System des Selfgovernment in seiner heutigen Gestalt* (Springer 1860); Rudolf von Gneist, *Verwaltung, Justiz, Rechtsweg, Staatsverwaltung und Selbstverwaltung nach Englischen und Deutschen Verhältnissen, mit besonderer Rücksicht auf Verwaltungsreformen und Kreisordnungen in Preußen* (Springer 1869).

[19] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 1 (1st edn, Berger-Levrault 1887) 104–06 ('les systèmes en vigueur présentent entre eux des différences profondes qui tiennent aux traditions de chaque État, à son régime administratif, à son organisation judiciaire et à l'ensemble de son droit public.')

[20] Albert Venn Dicey, *The Law of the Constitution* (John Allison ed, OUP 2019) 97–101.

body of law, the 'ordinary law of the realm', applicable to public and private persons alike.[21]

The contradictory statements on the similarity or dissimilarity of administrative law illustrate the importance of analytical rigour. Whether we find similarity or dissimilarity depends on what precisely we examine, and from which analytical perspective that object is being compared.[22] Particularly in light of the discrepancy in the organisation and design of government, the judiciary, and more broadly in construing the law, a robust comparative framework is essential. Only thus is it possible to compare judicial review between England, France, and Germany.

II. Subject-Matters and the Comparative Perspective

'Judicial review of administrative action' cannot be studied exhaustively within the bounds of this thesis. I focus on three subject-matters and examine these under a specific comparative perspective.

The three subject-matters will each be covered in a respective chapter. Chapter 2 examines the institutional design of decision-makers, both the administrative authorities whose

[21] Dicey in 1915 slightly nuanced this claim, although without fundamentally altering his account: That modern legislation has 'conferred upon the Cabinet, or upon servants of the Crown […] a considerable amount of judicial or quasi-judicial authority […] is a considerable step towards the introduction among us of something like the droit administratif of France'. Yet the fact that 'the ordinary law courts' deal with these issues preserves 'that rule of law which is fatal to the existence of the droit administratif.' Albert Venn Dicey, 'The Development of Administrative Law in England' (1915) 31 LQR 148, 152; similarly, Albert Venn Dicey, *The Law of the Constitution* (John Allison ed, OUP 2019) 417 [Introduction to the 8th edn].

[22] Similarly, Giacinto Della Cananea, *The Common Core of European Administrative Laws: Retrospective and Prospective* (Brill 2023) XI: 'there were sometimes real differences hidden behind a façade of apparent similarities, for example with regard to fairness and openness. Conversely, different legal systems often reached the same results via different ways'. On the infamous *praesumptio similitudines* in comparative law, see Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 345, 375.

decisions were subject to review as well as the courts hearing review cases. Chapter 3 compares review on the ground of an unlawful decision-making procedure. Chapter 4 explores review for error of law. Whilst chapter 2 has an institutional focus, chapters 3 and 4 are interested in doctrinal questions, each covering a ground of review. Recent work on comparative administrative law and on the history of administrative law has repeatedly stressed the interplay between institutions and doctrines.[23] The grounds of judicial review cannot be understood properly without considering the institutional context within which they developed. This nexus between the grounds of review and institutions is a facet of the abovementioned close tie between administrative law and the nation state.[24] Further, it supports the broad scope of this thesis. Confining comparative-historical research on judicial review to a single ground of review, for instance, would run the risk of obscuring institutional contexts which are essential to understanding the legal rules and principles at play. The three subject-matters make it possible to engage in a detailed legal analysis in core areas of judicial review: institutions, procedural review, and review on a (in a certain sense) more substantive ground.[25] When viewed together, these matters lay the ground for more structural comparisons as to how judicial review was conceptualised within each jurisdiction.

[23] Peter Cane, *Administrative Tribunals and Adjudication* (Hart 2009) 24 stresses the importance of the 'interaction between concept-formation and institution-building in the development of administrative adjudication'; John Bell, 'Comparative Administrative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 1250, 1254 makes the point that '[i]t is not possible to understand the law just from reading the legal texts without also considering the organizational setting and procedures.' Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 3, defines administrative law as encompassing 'doctrinal rules […]' as well as 'the design and operation of administrative institutions […]'; similarly, John Bell and François Lichère, *Contemporary French Administrative Law* (CUP 2022) 7–8.

[24] Above, I (p 4).

[25] For a similar conception of substance and process, see Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) 229.

In examining the three subject-matters, the thesis adopts a specific comparative perspective: it focuses on how each jurisdiction conceptualised judicial and administrative powers, and whether and how these conceptions shaped judicial review. This is a methodological choice. Choosing this analytical angle does not entail the claim that other comparative frameworks and perspectives would be inappropriate or ill-considered. Yet I suggest that focusing on how English, French, and German law conceptualised judicial and administrative powers is a useful comparative perspective to elucidate judicial review in all three legal systems.

In simple terms, the idea is that legal actors in England, France, and Germany invoked notions of 'judicial' and 'administrative' powers in various ways, and that these conceptions shaped judicial review to a considerable degree, yet in distinct ways in each system. The legal actors could be legislators, judges, academics, plaintiffs and their lawyers, or jurists more broadly. The respective importance of each of these types of legal actors differed between the legal systems.[26] Viewed together, however, legal actors in the late 1800s and early 1900s drew on notions of 'judicial' and 'administrative' powers in a broad range of contexts and for a variety of purposes. Even within a single legal system, notions of 'judicial' and 'administrative' powers could be invoked for different reasons. To give an example, English judges frequently distinguished between 'judicial' and 'administrative' powers in their reasoning on procedural fairness.[27] Further, they used similar distinctions to establish whether a certain process, the prerogative writ of certiorari, ought to be available against certain kinds of decisions.[28] Lord Hewart's criticism of

[26] RC van Caenegem, *Judges, Legislators, and Professors: Chapters in European Legal History* (CUP 1987).

[27] Eg *Cooper v Wandsworth Board of Works* (1863) 143 ER 414.

[28] Eg *Boulter v Kent Justices* [1897] AC 556; *R v Sharman ex p Denton* [1898] 1 QB 578; *R v Sunderland Justices* [1901] 2 KB 357.

'administrative lawlessness' in *The New Despotism* (1929) again built on specific understandings of the terms 'judicial' and 'administrative'.[29] In France and Germany, legislators, academics, and judges all relied heavily on specific conceptions of 'judicial' and 'administrative' powers in many aspects of judicial review.

At a more abstract level, how each jurisdiction conceptualised judicial and administrative powers involves a range of different elements, notably *institutions*, *functions*, *procedures*, as well as the *constitutional foundations* of judicial review. In the doctrine of separation of powers, for instance, the notion of 'power' has two distinct meanings. 'Legislative power' can refer to an *institution*, the legislature. But 'legislative power' can also refer to a specific *function*, such as making laws (ie enacting statutes). As the German academic Christoph Möllers puts it, 'the common notions of power, *pouvoir*, and *Gewalt*, obscure this distinction since "power" linguistically encompasses both the office holder – the King – as well as what he does: say, signing a death sentence.'[30] Other than distinguishing between judicial and administrative *institutions* and *functions*, a legal system may attach a specific *decision-making procedure* to certain judicial or administrative institutions and functions, for instance by stipulating that a court of law when handing down a judgment must follow a 'judicial' procedure. Ultimately, how each legal system conceptualised judicial and administrative powers depended, to an important degree, on *constitutional foundations*. Separation of powers, for instance, was a key constitutional principle in France, shaping how legal actors in France understood judicial and administrative powers, as much as it

[29] Lord Gordon Hewart of Bury, *The New Despotism* (Ernest Benn 1929) ch 4.

[30] Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (OUP 2013) 47.

shaped the French model of judicial review.[31] English constitutional law did not differentiate between judicial and administrative powers in the same manner.[32]

How each legal system conceptualised judicial and administrative powers thus had implications for a variety of issues at play in judicial review: institutions, functions, decision-making procedures, and constitutional foundations. One of the advantages of the chosen analytical angle is that it is broad enough to account for a variety of legal issues in the three jurisdictions, but precise enough for a focused comparison of the three subject-matters: the institutional design of decision-makers, procedural review, and review for error of law. This allows us to go beyond vague statements on the similarity or dissimilarity of the three legal systems, and also beyond Dicey's claim that England had no 'administrative law'. Examining how each legal system conceptualised judicial and administrative powers enables us to better understand the ways in which English law differed from French and German law, whilst at the same time illustrating certain similarities between the legal systems, as well as the differences between French and German law.

III. The Principal Argument

The principal argument of the thesis postulates that the institutional and doctrinal frameworks for judicial review were carefully crafted around notions of 'judicial' and 'administrative' powers in France and Germany, but less so in England. Whilst judicial review was construed as judicial oversight of 'administrative' powers and decision-makers

[31] David Capitant, 'Geschichte der Verwaltungsgerichtsbarkeit in Frankreich' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 1335, 1344–54.

[32] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) ch 7. This will be discussed below in chapter 2.

in a technical manner in France and Germany, the distinction between 'judicial' and 'administrative' often caused confusion in England. The main reason for this discrepancy is that the distinction between judicial and administrative powers had a comprehensive legislative and constitutional underpinning in France and Germany, but not in England. For judicial review in England, notions of judicial and administrative powers were not entirely absent or irrelevant but were less relevant. Depending on the precise issue under examination, notions of 'judicial' and 'administrative' powers were either not at all relevant, much less relevant, or relevant in a different manner than in France and Germany. This principal argument is substantiated for the three subject-matters under examination.

Chapter 2 investigates the institutions involved in judicial review, both the administrative decision-makers whose decisions were subject to review as well as the courts hearing review cases. In France and Germany, separate administrative courts were created in the 19th century for the very purpose of overseeing administrative authorities, which formed a centralised and hierarchically organised 'public administration'. Although the French and German institutions differed considerably, judicial review in these two legal systems was construed institutionally as 'administrative courts' overseeing 'public administration'. In England, judicial review was not construed in this way. Distinguishing between 'judicial' and 'administrative' decision-makers was much less a feature of English law than it was in France and Germany. Instead, judicial review in England was characterised by a variety of processes and remedies, many being available against inferior courts and administrative authorities alike, or against private persons, too.

Chapter 3 examines review on the ground of an unlawful decision-making procedure, especially for failure to give a hearing required by law. English judges commonly used the language of 'judicial' and 'administrative' powers in their judicial reasoning on whether affected parties needed to be heard. Notions of judicial and administrative powers thus had

a remarkable relevance for procedural review in England. However, the distinction caused confusion and complexity in England, and it was less relevant to procedural review in England than it was in France and Germany. The French and German legislators enacted meticulous statutory provisions, differentiating between judicial and administrative decision-making procedures. When hearing procedural review cases, French and German judges could largely rely on these provisions. The judicial or administrative nature of the procedure generally aligned with the nature of the decision ('judgment' or 'administrative act') and with the institutional nature of the decision-maker in question ('court' or 'administrative authority'). In this sense, procedural review was carefully crafted around notions of 'judicial' and 'administrative' powers in France and Germany, and the distinction did not cause any general confusion.

Chapter 4 compares review on the ground of an error of law, understood broadly as pertaining to the interpretation of a statutory or regulatory text and its application to a specific case. In England, notions of judicial and administrative powers came up in discussions on whether the prerogative writ of certiorari ought to be available against certain decisions, such as those of licensing justices. Yet this had a limited operational relevance, and it did not characterise the English approach to review on the ground of an error of law generally. The French and German doctrinal frameworks are complex and more appropriately expounded below in chapter 4, yet they were essentially informed by, and built around, specific notions of judicial and administrative powers.

Depending on the subject-matter under scrutiny, certain nuances and subtleties apply to the principal argument. But overall, when considering the institutional dimension of judicial review, procedural review, and review for error of law, I argue that the institutional and doctrinal frameworks for judicial review were essentially crafted around conceptions of 'judicial' and 'administrative' powers in France and Germany, but less so in England.

The principal argument asserts a similarity between judicial review in France and Germany. However, it will be seen that there was also dissimilarity between French and German law. This dissimilarity will be examined for each of the three subject-matters in the subsequent chapters.

In addition to the principal argument, each subsequent chapter makes a number of claims with a limited scope. Chapter 4, for example, establishes that judges in France and Germany delivered a more intense review on the ground of an error of law than English judges. These claims with a limited scope will be substantiated in the respective chapter.

IV. Methodology and Scope

The methodology of this thesis is guided by its aim of giving a balanced comparative account of judicial review in England, France, and Germany between the 1860s and the 1910s. Whilst there is no orthodox methodology for comparative legal history in the field of administrative law, the thesis can build on methodologies of different sub-disciplines of legal research, particularly legal history, comparative law, and (comparative) administrative law. Further, delineating the precise scope of the inquiry stands in close connection to its methodology. To a certain extent, the thesis treats scoping issues as methodological issues, or at least together with them.

1. A History of the Past: 1860s–1910s

The thesis is historical in outlook; it concerns the period between the 1860s and the 1910s. While there are several ways of 'doing' legal history, I aim to understand the past on its

own terms.[33] This is a history of the past, not a history of the present. Insofar as it is possible, I try to account for historical legal change during the period in question.[34] The thesis does not look at the past with the aim of learning something about the law of the 21st century, or to make an argument regarding the law at present.[35] That does not imply that lessons could not be learned from the thesis for the present, but that this is not the focus or the aim of the thesis.

Consequently, developments which occurred after the 1910s can largely be ignored. Nonetheless, the thesis at times considers later developments, particularly where doing so is useful to render historical legal developments understandable to lawyers of the 21st century. Focusing on how the three legal systems conceptualised judicial and administrative powers, for example, provokes very different reactions in France and Germany than it does in England. The reason is that the distinction is still a fundamental feature of French and German administrative law today.[36] In England, the judicial-administrative divide is not a foundational feature of administrative law of the 21st century. To the contrary, leaving behind the distinction between judicial and administrative powers in the 1960s is commonly seen as a precondition of modern English administrative law.[37]

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[33] John Baker, 'Reflections on "Doing" Legal History' in Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodology* (CUP 2007) 7.

[34] On the need to account for historical legal change, see, for example, William Cornish, Michael Lobban and Keith Smith, 'Introduction' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 3: 'Any legal history worth salting must deal not only with what the law was but how and why it became so […]'; similarly, David Ibbetson, 'The Challenges of Comparative Legal History' (2013) 1 Comparative Legal History 1, 2: 'We need to think *why* things occurred and not just *what* happened[…]'.

[35] In contrast to James Gordley, 'Why Look Backward' (2002) 50 American Journal of Comparative Law 657, 658 which states that past work is 'important to us only to the extent that it has left its imprint on modern law'.

[36] John Bell and François Lichère, *Contemporary French Administrative Law* (CUP 2022); Mahendra Pal Singh, *German Administrative Law in Common Law Perspective* (Springer 2001).

[37] Jeffrey Jowell, 'Restraining the State: Politics, Principle and Judicial Review' (1997) 50 Current Legal Problems 189, 191 makes the point that leaving behind the distinction between judicial and administrative

Against this backdrop, there is wide-spread scepticism and even cynicism about the distinction in contemporary English scholarship.[38] Whilst these later developments are, strictly speaking, not relevant for a history of judicial review in the late 1800s and early 1900s, I occasionally point out later developments so as to place the historical developments in a broader context.

Regarding the other temporal boundary, it is often necessary to explain historical developments prior to the 1860s in order to understand the law in the later 1800s and early 1900s. This is particularly true for the English common law with its doctrine of precedent: judges hearing judicial review cases in the period in question frequently cited and discussed earlier judgments.[39] But in France and Germany, too, legal actors in the late 1800s were influenced by legal ideas fashioned in prior decades. The thesis thus focuses on the period between the 1860s and the 1910s, but with slightly loose boundaries at either end.

Given that legal history has neither a clear starting point nor a clear end point, temporal delimitations usually remain to a certain extent arbitrary. This is particularly true for comparative historical work, which needs to discern shifts and ruptures that justify the temporal boundaries in several legal systems. Nonetheless, there is evidently a clear rationale behind the boundaries of the 1860s and the 1910s. I have observed above that judicial review is particularly interesting in this period due to the wide-ranging

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powers was a condition to enter into the next phase of judicial review in the mid-1960s, particularly *Ridge v Baldwin* [1964] AC 40.

[38] Eg Elizabeth Fisher, 'Administrative Tribunals: An Essay about the Legal Imagination of Administrative Law Scholars' in James Goudkamp, Mark Lunney, and Leighton McDonald (eds), *Taking Law Seriously: Essays in Honour of Peter Cane* (Hart 2021) 259, 267; Philip Joseph, 'False Dichotomies in Administrative Law: From There to Here' (2016) 1 *New Zealand Law Review* 127, 131.

[39] William Cornish, 'Sources of Law' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 41, 44–52.

administrative reforms of the 1800s and early 1900s. More specifically, the 1860s are a sensible boundary for three reasons.

First, all three legal systems to a certain extent reformed the judiciary since the 1860s and early 1870s. The impact of these reforms on judicial review was most pronounced in Germany, where the larger states of the German Empire introduced separate administrative courts between 1863 and 1900. The French Council of State was importantly reformed in 1872. The Judicature Acts of 1873/75 reorganised the English judiciary.[40] These reforms, as well as their relevance for judicial review, will be discussed in chapter 2.

Second, France and Germany experienced a change in political regimes after the Franco-German War in 1870–71, with the downfall of the Second Empire and the creation of the Third Republic in France in 1870, as well as the creation of the German Empire in 1871. Although this may have marked less of a rupture for judicial review and administrative law in 1870/71 precisely, the new constitutional frameworks constituted by-and-large stable circumstances within which judicial review evolved over subsequent decades.[41]

Third, the 1860s are a sensible temporal boundary for England due to the case of *Cooper v Wandsworth Board of Works* (1863).[42] Judicial review in England evolved on account of slow and gradual developments, typical for the common law, rather than by means of fundamental ruptures.[43] But *Cooper* was one of the leading cases on notions of 'judicial'

[40] Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66); Supreme Court of Judicature Act 1875 (38 & 39 Vict c 77).

[41] In France, 1870 was often considered a decisive rupture for the history of administrative law, whereas more recent scholarship stresses the continuity between the administrative law of the Second Republic and the Third Empire, see Grégoire Bigot, *Ce Droit qu'on dit Administratif: Études d'Histoire du Droit Public* (La mémoire du droit 2015) 13; Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002) 13. For Germany, see Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (3rd edn, Duncker und Humblot 1924) VI: 'Verfassungsrecht vergeht, Verwaltungsrecht besteht.'

[42] *Cooper v Wandsworth Board of Works* (1863) 143 ER 414.

[43] Catherine Marshall, *Political Deference in a Democratic Age: British Politics and the Constitution from the Eighteenth Century to Brexit* (Palgrave Macmillan 2021) 75–76; John Allison, *The English Historical*

and ‘administrative’ powers, being frequently cited, discussed, and reinterpreted in the late 1800s and early 1900s.[44]

While the temporal boundary in the 1860s is warranted by various approximative circumstances in each jurisdiction, in the 1910s the First World War marked a rupture in all three legal systems. The extent to which this had an impact on judicial review depends on the precise issue in question, but it has been argued for England, France, and Germany alike that 1914 and/or 1918/19 brought about certain changes in how the courts oversaw administrative action.[45]

Constitution: Continuity, Change and European Effects (CUP 2007) 19 speaks of a ‘continuing process of formation’ of the English historical constitution more broadly.

[44] This concerned procedural fairness especially; it will be discussed in more detail in chapter 3.

[45] Robert Thomas, ‘The Development of Administrative Law in the United Kingdom (1890–1910)’ in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 257, 265; Joanna Bell, *The Anatomy of Administrative Law* (Hart 2020) 41–42; Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002) 270–71; François Burdeau, *Histoire du Droit Administratif: de la Révolution au début des années 1970* (Presses universitaires de France 1995) 303–4. Concerning Germany, the matter is more complex. For Bavaria, it has been argued that 1914 was less of a rupture for judicial review, see Heinrich Rehak, ‘Geschichte der Verwaltungsgerichtsbarkeit in Bayern’ in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 387, 417; the Weimar Constitution of 1919 encouraged the creation of administrative courts in each single state and a federal administrative court, but the latter was not realised during the Weimar Republic; however, the Weimar Constitution had a certain impact on whether administrative courts were perceived as ‘judicial’ or ‘administrative’, see Christine Steinbeiß-Winkelmann, ‘Formen der Verwaltungsgerichtsbarkeit auf Reichsebene’ in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 79, 108–110; Bert Schaffarzik, ‘Die Verwaltungsgerichtsbarkeit auf ihrem Weg von der Verwaltung zur Gerichtsbarkeit’ in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 873, 897–98. Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland, Vol 2: Staatsrechtslehre und Verwaltungswissenschaft, 1800–1914* (Beck 1992) 459 points out that 1914 was a caesura for German public law (scholarship) more broadly.

2. Comparative Methodology

A common ('functionalist') approach in comparative law examines legal systems from the non-normative viewpoint of an outsider.[46] On this approach, one compares how different legal systems solve certain social problems or 'problematic fact situations'.[47] For example, it would be possible to examine whether an individual with a history of alcohol abuse is allowed to open a public house in the different systems. Thus, one could compare the law on licensing in each legal system and potentially evaluate which legal system best strikes the balance between the conflicting interests of the individual (to open a public house) and the community (safety from alcohol abuse).

However, this thesis is ultimately less interested in social problems, but rather in legal problems and their equally legal solutions.[48] The key interest is not whether an individual with a history of alcohol abuse can legally open a public house in the different legal systems, or – to return to the earlier example – whether A's house with an attic was legal. Instead, I am interested in the institutional and doctrinal frameworks with which each legal system approached such legal problems if an administrative decision was challenged in court. The viewpoint adopted here is not that of an outsider. The thesis is chiefly interested

[46] Evidently, there exist various functionalist methodologies, see Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 345. On the 'black box' metapher, describing the perspective from the outside, see Birke Häcker, *Consequences of Impaired Consent Transfers a Structural Comparison of English and German Law* (Hart 2013) 5; Hein Kötz, 'Abschied von der Rechtskreislehre?' (1998) 6 Zeitschrift für europäisches Privatrecht 493, 505.

[47] An example for a social problem in private law would be a party making a gift to someone under a mistaken assumption or under some form of pressure, see Birke Häcker, *Consequences of Impaired Consent Transfers a Structural Comparison of English and German Law* (Hart 2013) 3; David Ibbetson, 'The Challenges of Comparative Legal History' (2013) 1 Comparative Legal History 1, 9 suggests adopting a functionalist methodology and to identify 'problematic fact situations' in comparative legal history.

[48] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 345, 347 and 365 considers 'comparative legal history' as an alternative to 'functionalist' comparative law.

in how English, French, and German law operated 'on the inside', ie how certain legal outcomes were generated and justified within each system. However, comparing the three systems requires to examine each legal system from the perspective of the other two legal systems, hence in a certain sense from an 'outside' perspective. But that 'outside' perspective is the 'inside' perspective of another legal system, rather than a viewpoint which is external to all three systems (eg a shared social problem). I thus focus on how the three legal systems operated 'on the inside', but I switch to outside perspectives (eg considering English law from the perspective of French law, and vice versa) in order to relate each legal system to the other two.

It is important to note that I adopt an analytical perspective rather than an evaluative one. It is not the aim of the thesis to assess or evaluate the approaches of the different legal systems against an external criterion, or to establish a 'best approach' to judicial review.[49]

Since this thesis does not compare legal solutions to similar social problems, a different comparative framework is needed. I have already outlined the essence of this approach above: it consists in the divergent conceptions of judicial and administrative powers in each legal system. For each subsequent chapter, I delineate a subject-matter and scope of the inquiry in legal, as opposed to social or factual, but in jurisdiction-neutral terms. How each jurisdiction approached the matter (eg review for error of law), and whether and how this approach was shaped by how that legal system conceptualised judicial and administrative powers is thus discussed in turn. Subsequently, towards the end of each chapter, a comparative section draws out similarities and differences between the three jurisdictions.

[49] On the evaluative stage of (functionalist) comparative law, see Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (3rd edn, Mohr Siebeck 1996) 45–46; Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 345, 379.

3. Sources

Comparative studies on the history of administrative law in England, France, and Germany are few and far between.[50] Historical research confined to two of the three jurisdictions is slightly more common, especially for Anglo-French and Franco-German comparisons.[51] Further, comparative literature on administrative law of the 21st century occasionally contains accounts of how each legal system evolved historically.[52] This literature is particularly useful for chapter 2 on the institutional design of decision-makers. For the more doctrinally focused chapters 3 and 4, which cover procedural review and review for error of law, comparative and historical literature is sporadic.[53] Yet a growing body of secondary

[50] Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021); Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019); Erk Volkmar Heyen (ed), *Geschichte der Verwaltungsrechtswissenschaft in Europa: Stand und Probleme der Forschung* (Klostermann 1982); Erk Volkmar Heyen (ed), *Konfrontation und Assimilation nationalen Verwaltungsrechts in Europa, 19./20. Jahrhundert* (Nomos 1990).

[51] Sabino Cassese, *La Construction du Droit Administratif: France et Royaume-Uni* (Montchrestien 2000); CH Hamson, *Executive Discretion and Judicial Control: An Aspect of the French Conseil d'Etat* (Stevens 1954); Bernard Schwartz, *French Administrative Law and the Common Law World* (New York University Press 1954); Erk Volkmar Heyen, *Profile der deutschen und französischen Verwaltungsrechtswissenschaft 1880–1914* (Klostermann 1989); Olivier Beaud (ed), *Eine deutsch-französische Rechtswissenschaft? Kritische Bilanz und Perspektiven eines kulturellen Dialogs* (Nomos 1999).

[52] Susan Rose-Ackerman, Peter L Lindseth and Blake Emerson (eds), *Comparative Administrative Law* (2nd edn, Elgar 2017); Peter Cane and others (eds), *The Oxford Handbook of Comparative Administrative Law* (OUP 2020); Sabino Cassese, Armin von Bogdandy and Peter Huber (eds), *The Administrative State* (OUP 2017).

[53] Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) being a notable exception. See also, Paul Craig, 'Judicial Review of Questions of Law: A Comparative Perspective' in Susan Rose-Ackerman, Peter Lindseth, and Blake Emerson (eds), *Comparative Administrative Law* (2nd edn, Elgar 2017) 389.

literature covers the history of administrative law within France,[54] Germany,[55] and more recently England, too.[56]

To a large extent, and in chapters 3 and 4 in particular, the thesis builds on historical sources dating from the late 1800s and early 1900s, namely judgments, legislation, and academic scholarship. The importance of each of these categories of sources differs between the three legal systems.[57]

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[54] François Burdeau, *Histoire du Droit Administratif: de la Révolution au début des années 1970* (Presses universitaires de France 1995), Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002); Grégoire Bigot, *Ce Droit qu'on dit Administratif: Études d'Histoire du Droit Public* (La mémoire du droit 2015); Conseil national de la recherche scientifique (ed), *Le Conseil d'Etat: son Histoire à travers les Documents d'Époque, 1799–1974* (Éditions du Centre national de la Recherche scientifique 1974); Mathieu Touzeil-Divina, *La Doctrine Publiciste, 1800–1880: Éléments de Patristique Administrative* (La mémoire du droit 2009); Bernard Pacteau, *Le Conseil d'État et la Fondation de la Justice Administrative Française au XIXe siècle* (Presses universitaires de France 2003); Jean-Michel Blanquer and Marc Millet, *L'Invention de l'État: Léon Duguit, Maurice Hauriou et la Naissance du Droit Public moderne* (Odile Jacob 2015); Marie-Joëlle Redor, *De l'État Légal à l'État de Droit: L'évolution des conceptions de la doctrine publiciste française, 1879–1914* (Economica 1992); Jacques Chevallier, *L'Élaboration Historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (Pichon & Durand-Auzias 1970).

[55] Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000); Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996); Michael Stolleis, 'Verwaltungsrechtswissenschaft und Verwaltungslehre 1866–1914' in Karlheinz Blaschke and others (eds), *Deutsche Verwaltungsgeschichte Band 3: Das Deutsche Reich bis zum Ende der Monachie* (Deutsche Verlags-Anstalt 1984) 85; Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland, Vol 2: Staatsrechtslehre und Verwaltungswissenschaft, 1800–1914* (Beck 1992); Michael Stolleis, 'Entwicklungsstufen der Verwaltungsrechtswissenschaft' in Eberhard Schmidt-Aßmann, Wolfgang Hoffmann-Riem, Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts, vol 1: Methoden, Maßstäbe, Aufgaben, Organisation* (2nd edn, Beck 2012) 65; Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019); Alfons Hueber, *Otto Mayer: die "juristische Methode" im Verwaltungsrecht* (Duncker und Humblot 1992).

[56] Martin Loughlin, 'Why the History of English Administrative Law is not Written' in Michael Taggart and others (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart 2009) 151; Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 21, makes the point that 'Administrative law history is, in relative terms, in its infancy'; Paul Craig, 'English Administrative Law History: Perception and Reality' in Swati Jhaveri and Michael Ramsden (eds), *Judicial Review of Administrative Action across the Common Law World* (CUP 2021) 27; Joanna Bell, *The Anatomy of Administrative Law* (Hart 2020) ch 2; Stephen Sedley, *Lions Under the Throne: Essays on the History of English Public Law* (CUP 2015); Stuart Anderson, 'Judicial Review' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 486.

[57] See David Ibbetson, 'The Challenges of Comparative Legal History' (2013) 1 Comparative Legal History 1, 8.

Judgments are important sources for a history of judicial review in all three jurisdictions. Yet on account of the different styles of giving judgments, they provide insight to a varying extent.[58] Due to the doctrine of precedent and the 'fully argued' nature of English judgments, they do not only contain the outcome of a judicial decision, but also express legal reasoning as a means of explaining and justifying that decision.[59] French judgments, by contrast, consisted of one single sentence and contained very little express reasoning or justification for a certain decision.[60] German judgments, in terms of their length, level of detail, and the degree of explicit reasoning and justification, are situated somewhere between English and French judgments.

Legislation played a role for judicial review in various ways, such as creating decision-makers, delegating certain matters to them, or enacting rules on decision-making procedures. As will be seen, French and German legislators played a more active role in determining the institutional and doctrinal frameworks for judicial review than Parliament did in England.

Academic scholarship on administrative law is an important source for France and Germany. Chairs of administrative law were first established in 1819 (Paris) and 1842 (Tübingen).[61] Academic literature in the form of textbooks, treatises, and academic journals

[58] Hein Kötz, 'Über den Stil höchstrichterlicher Entscheidungen' (1973) 37 Rabels Zeitschrift für ausländisches und internationales Privatrecht 245.

[59] John Bell, John Bell, 'The Role of Doctrinal Writing in Creating Administrative Law: France and England Compared' (2018) 15 Glossae. European Journal of Legal History 141, 141–143, 146.

[60] The 'conclusions' of the Government Commissioners are an additional source in France; I explain this in chapter 2.

[61] See John Bell, 'The Role of Doctrinal Writing in Creating Administrative Law: France and England Compared' (2018) 15 Glossae. European Journal of Legal History 141,141, 145; Michael Stolleis, 'Entwicklungsstufen der Verwaltungsrechtswissenschaft' in Eberhard Schmidt-Aßmann, Wolfgang Hoffmann-Riem, Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts, vol 1: Methoden, Maßstäbe, Aufgaben, Organisation* (2nd edn, Beck 2012) 65, 81. In France, the creation of the *agrégation de droit public* in 1896 was an important milestone, see Marie-Joëlle Redor, *De l'État Légal à l'État de Droit: L'évolution des conceptions de la doctrine publiciste française, 1879–1914* (Economica 1992) 26.

flourished in the late 1800s and early 1900s. In England, by contrast, in the absence of an entrenched distinction between public and private law, an established academic discipline of 'administrative law' did not exist.[62] There were practitioner handbooks on certain processes, such as the prerogative writs, but no English textbooks or journals on 'administrative law'.[63] It is interesting to note that German scholars published books on what they perceived as 'English administrative law'.[64] Yet these works were firmly rooted in German legal thinking of the time. They are more reliable sources on the views of German lawyers than on English law.[65]

English jurists began discussing 'administrative law' in the 1920s and 1930s.[66] The growth of central government powers and the ensuing question to what extent these were subject to judicial oversight proved especially controversial. Although publications such as William Robson's *Justice and Administrative Law* (1928), Lord Hewart's *The New Despotism* (1929), FJ Port's *Administrative Law* (1929), and the Donoughmore Report (1932) fall outside the temporal boundaries of this thesis, they are relevant insofar as the

[62] Stuart Anderson, 'Judicial Review' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 486; John Bell, 'The Role of Doctrinal Writing in Creating Administrative Law: France and England Compared' (2018) 15 Glossae. European Journal of Legal History 141, 146–47.

[63] Thomas Tapping, *The Law and Practice of the High Prerogative Writ of Mandamus, As It Obtains in England and Ireland* (Benning 1848); William Joyce, *The Doctrines and Principles of the Law of Injunctions* (Stevens and Haynes 1877); John Shortt, *Informations, Mandamus and Prohibition* (Clowes and Sons 1887); Joshua Scholefield and Gerard Hill, *Appeals from Justices* (Butterworth 1902); all cited by Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 9.

[64] Rudolf von Gneist (above p 6 n 18); Otto Koellreuter, *Verwaltungsrecht und Verwaltungsrechtsprechung im modernen England: eine rechtsvergleichende Studie* (Mohr 1912).

[65] Erk Volkmar Heyen, 'Französisches und Englisches Verwaltungsrecht in der Deutschen Rechtsvergleichung des 19. Jahrhunderts: Mohl, Stein, Gneist, Mayer, Hatschek' in Erk Volkmar Heyen and Guido Melis (eds), *Verwaltung und Verwaltungsrecht in Frankreich und England, 18./19. Jahrhundert* (Nomos 1996) 163.

[66] Joanna Bell, *The Anatomy of Administrative Law* (Hart 2020) 42.

authors looked back in time and tried to make sense of what had happened in the preceding decades.[67]

4. 'Judicial Review'

The term 'judicial review' did not exist in the late 1800s and early 1900s. In England, a streamlined process by the name of an 'application for judicial review' was only introduced in the 1970s.[68] In French and German law of the late 1800s and early 1900s, '*le contentieux administratif*' and '*Verwaltungsrechtspflege*' described adjudication in administrative courts, the terms being firmly embedded in the specific institutional and remedial frameworks of the respective legal system.[69]

As was mentioned above, the term 'judicial review' is understood here as the judicial activity of passing judgments on the lawfulness of administrative action. In addition to the institutional design of decision-makers (chapter 2), I cover review on the ground of an unlawful decision-making procedure (chapter 3) and review for error of law (chapter 4). Review of discretion is not a subject-matter of this thesis. Hence, 'reasonableness' review in England and the development of 'proportionality' review in the Prussian Administrative

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[67] William Robson, *Justice and Administrative law: A Study of the British Constitution* (Macmillan 1928), FJ Port, *Administrative Law* (Longmans 1929), Lord Gordon Hewart of Bury, *The New Despotism* (Ernest Benn 1929); The Committee on Ministers' Powers Report (HM Stationery Office, 1932) ('Donoughmore Report').

[68] Law Commission, *Report on Remedies in Administrative Law* (Law Comm No 73, 1976); Rules of the Supreme Court (Amendment No 3) 1977 (SI 1977/1955); Senior Courts Act 1981.

[69] The French *contentieux administratif* consisted of four kinds of attributions of the French administrative courts, not easily translatable (or lacking precise equivalents in England): the *contentieux de pleine juridiction*, the *contentieux d'annulation*, the *contentieux de l'interprétation*, and the *contentieux de répression*. See Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) livre V–VIII. The German *Verwaltungsrechtspflege* does not encompass actions in delict against public officials and authorites, but it does encompass challenges of administrative acts before the administrative courts of first instance, installed within the administrative hierarchy; this is discussed below in chapter 2.

High Court are not covered.[70] Further limitations of the scope of inquiry will be clarified in chapter 2, but it is useful briefly to outline them here.

With regard to the courts hearing review cases, the thesis focuses on the English superior courts, the French Council of State, and the German Administrative High Courts. In England, 'the superior courts' are understood as encompassing the High Court with its several divisions (or, prior to the Judicature Acts of 1873/75, the equivalent predecessor courts), the Court of Appeal, and the House of Lords.[71] In France and Germany, I focus on judgments given by the French Council of State and the German Administrative High Courts, but I also mention inferior administrative courts to outline the respective models of judicial review. Under the constitution of the German Empire (1871–1918), it was not the federal level which was responsible for public administration and its judicial oversight, but the twenty-six constituent German states.[72] I focus on the larger German states which introduced separate administrative courts between the 1860s and 1900: Baden, Bavaria, Prussia, Saxony, Württemberg, and Hesse.[73]

[70] On these matters, see Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) chapter 13; Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996); Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021). Comparing review of discretion between England, France, and Germany, is especially difficult due to fundamentally different understandings of 'discretion' in each legal system.

[71] John Baker, *An Introduction to English Legal History* (5th edn, OUP 2019) 58–59; Patrick Polden, 'The Judicature Acts' in William Cornish and others (eds) *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 757. The High Court of Justice created by the Judicature Acts initially had five divisions (Queen's Bench, Common Pleas, Exchequer, Chancery, and the Probate, Divorce and Admiralty Division), but Common Pleas and Exchequer were absorbed into Queen's Bench Division in 1880.

[72] Lilly Weidemann, 'Standards of Judicial Review of Administrative Action (1890–1910) in the German Empire' Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 132.

[73] This is discussed below, chapter 2 III 1 (p 52).

The most challenging decision at the outset concerned the limits as to the processes and remedies covered by the thesis. The difficulty emanates from the significant differences between the three legal systems in the processes available to bring unlawful administrative action before the courts, as well as in the forms of relief granted by the courts.[74] Each of the three jurisdictions had a process to annul unlawful decisions.[75] Beyond this commonality, there was considerable dissimilarity: processes existing in one jurisdiction lacked equivalents in the other two. For example, the French and German administrative courts had very limited mandatory or prohibitory powers, when compared to the English superior courts.[76] Generally, the approach taken here is to cover the processes and remedies which are best comparable between the three legal systems as well as the most important ones within each system, whilst keeping the scope of inquiry manageable.[77]

For England, the scope of inquiry extends to the prerogative writs of mandamus, certiorari and prohibition, collateral challenges via tort actions (particularly trespass), and the equitable remedies of injunctions and declarations. Statutory appeals are not a subject-matter of this thesis, but they will be mentioned where useful or necessary.[78] For France,

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[74] This problem can build on methodological literature, eg Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 345, 387 makes the point that the 'creation of comparability' is an interpretive step.

[75] The prerogative writ of certiorari, the *recours pour excès de* pouvoir, and the *Anfechtungsklage.*

[76] Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002) 294; David Capitant, 'Geschichte der Verwaltungsgerichtsbarkeit in Frankreich' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 1335, 1367; Karl-Peter Sommermann, 'Entwicklungspfade europäischer Verwaltungsgerichtsbarkeit' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 1735, 1751–3.

[77] On pragmatism in comparative law, see Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 345, 367.

[78] This thesis is more interested in the general principles, rather than in ad hoc remedies. For England, this means covering the common law's development of its own heritage. Nonetheless, I mention statutory appeals insofar as they had an impact on the availability of other processes (eg the prerogative writs). Similarly to statutory appeals in England, I do not cover the ad hoc remedies of bringing unlawful decisions before the German administrative courts of first instance; this is explained below in chapter 2. For England, Stuart

the thesis focuses chiefly on the so-called *recours pour excès de pouvoir*, but to a certain extent also covers cases brought in the *recours de pleine juridiction*. The former was the general process to bring unlawful administrative acts before the Council of State, with the aim of having the primary decision quashed.[79] The latter process was available chiefly for actions in delict against officials and public authorities, in disputes on 'government contracts', and in tax disputes.[80] In Germany, the thesis focuses on the process to quash primary decisions, the so-called *Anfechtungsklage*.

Actions in tort or delict against officials or public authorities are an interesting example illustrating the challenges of comparing judicial review in a historical perspective. In England, excluding tort actions would be unfortunate given the close interconnection between collateral challenges and the prerogative writs, with regard to both procedural review and error of law review.[81] In France, the delictual liability of public authorities stood in a relatively close connection to quashing orders, both falling under the responsibility of administrative courts.[82] In Germany, by contrast, actions in delict against officials or public authorities fell under the jurisdiction of the ordinary (private law) courts.[83] They did not

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Anderson, 'Judicial Review' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 486, 492–98 underlines the importance of statutory appeals in the late 1800s and early 1900s, but there was nothing systematic about them.

[79] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 578.

[80] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) livre V.

[81] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 254–56.

[82] Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002) 269 mentions that the boundaries between the *recours pour excès de pouvoir* and the *contentieux de pleine juridiction* became blurred as the scope of the former was significantly extended in the late 1800s and early 1900s.

[83] Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (Duncker und Humblot 1895) 226: 'Die Ersatzpflicht des Beamten für den Schaden, den er jemandem durch sein Verhalten im Amte zugefügt hat, ist zweifellos civilrechtlicher Natur. Maßgebend dafür sind die Regeln, welche das Civilrecht aufgestellt hat für die Schuldverhältnisse aus unerlaubten Handlungen, Privatdelikten. […]' Thereafter, Mayer discussed the differences as between private persons and public officials or authorities being sued in delict.

stand in close connection to the legal rules and principles administered by the administrative courts; they are therefore not covered. Given this dissimilarity, acute attention will need to be paid to the different processes and remedies throughout the thesis.

5. Beyond the Scope of the Thesis

Two matters lying beyond the scope of this thesis ought to be mentioned briefly.

First, the transnational discourses and influences are not the subject-matter of this thesis. In the late 1800s and early 1900s, many legal scholars in England, France, and Germany were looking at legal developments abroad. Édouard Laferrière in his *Traité de la juridiction adminsitrative* compared various jurisdictions.[84] The American scholar Frank Goodnow, who had studied in Paris and Berlin before taking on a chair in administrative law at Columbia, published a monograph on English, French, German, and American administrative law in 1893.[85] Albert Venn Dicey looked across the English Channel to explain to his students the English Rule of law.[86] Occasionally, the writings of scholars were published in other languages, thus being accessible to foreign audiences.[87] The interests, purposes, and aims of comparative work varied. Often, an interest in other legal

[84] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 1 (2nd edn, Berger-Levrault 1896) Livre Préliminaire, chs 2–4.

[85] Frank J Goodnow, *Comparative Administrative Law: An Analysis of the Administrative Systems, National and Local, of the United States, England, France and Germany* (GP Putnam's Sons 1893).

[86] John Allison, 'Editor's Introduction' to Albert Venn Dicey, *The Law of the Constitution* (John Allison ed, OUP 2019) xxxii ; Martin Loughlin, 'Why the History of English Administrative Law is not Written' in Michael Taggart and others (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart 2009) 151, 154 makes the stronger point that the objective of Dicey's comparison was 'solely to highlight the virtues of the English practice and the deficiencies of the French system.'

[87] Otto Mayer, *Le droit administratif allemand*, 4 vols (Paris 1903–06); Gaston Jèze, *Das Verwaltungsrecht der Französischen Republik* (Tübingen 1913); Léon Duguit, 'French Administrative Courts' (1914) Political Science Quarterly 390; Léon Duguit, *Law in the Modern State* (translated by F and H Laski; Allen and Unwin 1921).

systems was at least partially motivated by the aim of learning something relevant for the scholar's own jurisdiction, potentially enabling him to make suggestions for reforms.[88] Although these transnational interactions, communicative networks, influences and receptions are interesting, they are not covered in detail. As mentioned above, the aim of the thesis is to understand each legal system on its own terms and by reference to the other two. How legal actors in one legal system perceived other systems back at the time is not essential to this endeavour. The inquiry thus constitutes a comparative, as opposed to a transnational, legal history.[89]

The second limitation is that broader developments in politics, society, and intellectual history are not a subject-matter of this thesis.[90] Ideas on rights, democracy, liberalism, conservatism, republicanism, and monarchism played a certain role for judicial review. Yet it is not the aim of this thesis to relate the legal developments in judicial review to broader political, social, or intellectual developments.[91] Limiting the scope to legal issues reflects not only the primary interest of this dissertation, but also the fact that the more technical legal questions on procedural fairness and review for error of law often appeared relatively

[88] Rudolf von Gneist studied English law with the aim of suggesting reforms in Prussia. Based on a study of French administrative law, Otto Mayer effectuated many legal transplants with his scholarship. Mayer's position at the University in Strasbourg, which was part of the German Empire between the Franco-German War of 1870/71 and the First World War, was ideally suited for such endeavour. See Erk Volkmar Heyen, 'Französisches und Englisches Verwaltungsrecht in der Deutschen Rechtsvergleichung des 19. Jahrhunderts: Mohl, Stein, Gneist, Mayer, Hatschek' in Erk Volkmar Heyen and Guido Melis (eds), *Verwaltung und Verwaltungsrecht in Frankreich und England, 18./19. Jahrhundert* (Nomos 1996) 163.

[89] On transnational legal history, see Kjell Å Modéer, 'Abandoning the Nationalist Framework: Comparative Legal History' in Markus D Dubber, Heikki Pihlajamäki and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (OUP 2018) 101; Thomas Duve, 'Entanglements in Legal History: Introductory Remarks' in Thomas Duve (ed), *Entanglements in Legal History: Conceptual Approaches* (Max Planck Institute for Legal History and Legal Theory 2014) 3; Thomas Duve, 'German Legal History: National Traditions and Transnational Perspectives' (2014) 2 Rechtsgeschichte – Legal History 16.

[90] Except for the institutional chapter 2, this is chiefly an 'internal', rather than an 'external' legal history, see David Ibbetson, 'What is Legal History a History of?' in ADE Lewis and Michael Lobban (eds), *Law and History* (OUP 2004) 33.

[91] Compare to Robert Thomas, 'The Development of Administrative Law in the United Kingdom (1890–1910)' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 257, 259.

disconnected from these broader developments.[92] Concerning the institutional frameworks discussed in chapter 2, the broader political contexts played a more important role. Here, I draw on these broader contexts insofar as it is useful to account for legal developments.

V. Summary

To briefly summarise this introductory chapter, the present thesis compares the history of judicial review in England, France, and Germany in the period between the 1860s and the 1910s. Its principal argument is that the institutional and doctrinal frameworks for judicial review were carefully crafted around specific notions of judicial and administrative powers in France and Germany, but less so in England. This argument is substantiated for the institutional design of decision-makers (chapter 2), review on the ground of an unlawful decision-making procedure (chapter 3), and review for error of law (chapter 4). A brief thematic summary concludes the thesis (chapter 5).

[92] Similarly, Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 259; more broadly, see Joshua Getzler, 'Legal History as Doctrinal History' in Markus D Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (OUP 2018) 171.

Chapter 2 – The Institutional Dimension of Judicial Review

I. Introduction

Recent scholarship has pointed out repeatedly that judicial review (and administrative law more broadly) cannot be understood properly when confining one's attention to the precepts of review. Institutional frameworks need to be taken into account, too.[1] For comparative administrative law particularly, John Bell has pointed out that combining doctrinal and institutional perspectives is essential: 'National administrative law has to be understood in the context of the character of national public administration' given that the institutional arrangements 'provide the setting within which the legal norms operate.'[2] Whilst chapters 3 and 4 of this thesis have a doctrinal focus in that each covers a ground of review, this chapter examines 'institutions' in the sense of the decision-making bodies involved in judicial review.

In France and Germany, separate administrative courts were created in the 19th century for the very purpose of overseeing administrative authorities. Notions of 'judicial' and 'administrative' powers played a crucial part in this, albeit in different ways. England, by contrast, had no separate administrative courts. Further, judicial review was not construed institutionally as the oversight of 'public administration'. Instead, judicial review in

[1] Peter Cane, *Controlling Administrative Power: An Historical Comparison* (CUP 2016) 2, 230, 237; Peter Cane, *Administrative Tribunals and Adjudication* (Hart 2009) 31; Giacinto della Cananea, *The Common Core of European Administrative Laws: Retrospective and Prospective* (Brill 2023) chs 2 and 3; Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 3; John Bell and François Lichère, *Contemporary French Administrative Law* (CUP 2022) ch 2.

[2] John Bell, 'Comparative Administrative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 1250, 1255.

England was constituted by a variety of processes and remedies which did not specifically target decision-makers of an 'administrative' nature. Whilst English courts on judicial review oversaw decision-makers of various institutional natures, judicial review on the continent was essentially construed as '(administrative) courts' overseeing 'public administration'.

The main argument of the present chapter is that an institutional model of judicial review, carefully crafted around notions of 'judicial' and 'administrative' powers, prevailed in France and Germany, whereas the judicial-administrative divide was much less important to the English remedial model. Chapter 2 thus substantiates the principal argument of this thesis for the institutional dimension of judicial review. To be clear, I do not suggest that notions of 'judicial' and 'administrative' powers were unheard of or entirely irrelevant to the English remedial model. In fact, the wide-ranging administrative reforms of the 1800s and early 1900s brought these notions to the fore and made them the subject of discussion. Nonetheless, notions of 'judicial' and 'administrative' powers did not have the same overarching significance to judicial review in England as in France and Germany.

I examine France, Germany, and England in turn, before drawing out similarities and differences in the chapter's final comparative part.

II. The French Institutional Model: The Council of State

The French model of judicial review was characterised by the gradual development of an independent administrative court from within the executive over the course of the 19th century, the Council of State. This arrangement was largely due to the French conception of separation of powers, which prohibited the ordinary courts from interfering with administrative matters. The distinction between 'judicial' and 'administrative' powers was thus at the very heart of judicial review. The discussion of France begins with an examination of the institutions which resolved administrative law disputes in the early modern period and with the history of the Council of State in the earlier 19th century. This builds an important historical background to the developments of the later 1800s, which are subsequently discussed.

1. The Distinction between Judicial and Administrative Powers

In France, administrative law disputes were treated differently from private law disputes for centuries prior to the period covered by this thesis.[3] Since the late medieval period, cases concerning the King and his government had been decided by separate courts, not the ordinary judiciary.[4] Subsequently, under the absolutism of the 17th century, public law

[3] David Capitant, 'Geschichte der Verwaltungsgerichtsbarkeit in Frankreich' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 1335, 1343; John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 48–49.

[4] Eg *La Chambre des comptes*, the predecessor of today's *Cour des comptes*, and the *Cour des aides*; see David Capitant, 'Geschichte der Verwaltungsgerichtsbarkeit in Frankreich' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 1335, 1338; Jean-Bernard Auby and Marcel Morabito, 'Evolution and Gestalt of the

conflicts were removed from these separate courts and kept within the royal administration itself.[5] In the famous edict of Saint-Germain-en-Laye of 21 February 1641, Louis XIII clarified that all courts of law were established solely for the purpose of 'deliver[ing] justice to our subjects'. Courts were expressly forbidden from investigating matters concerning 'the State, public administration, and government, which we [the King] reserve to our person and our royal successors'.[6] This targeted particularly the *Parlement de Paris*, the most important court of the early modern period, which repeatedly attempted to bring under its control the decision-making of the royal officials sent to each province.[7] During the 18th century, the *Parlement de Paris* and several special courts such as the *Cour des aides* continued to defy the royal initiative to keep administrative disputes within the royal administration.[8]

The revolution of 1789 reformed the judiciary but continued to prohibit judicial interference with administrative matters.[9] The Act of 14–24 August 1790 confirmed that

French State' in Sabino Cassese, Armin von Bogdandy, and Peter Huber (eds), *The Administrative State* (OUP 2017) 165, 171.

[5] David Capitant, 'Geschichte der Verwaltungsgerichtsbarkeit in Frankreich' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 1335, 1341; Jean-Bernard Auby and Marcel Morabito, 'Evolution and Gestalt of the French State' in Sabino Cassese, Armin von Bogdandy, and Peter Huber (eds), *The Administrative State* (OUP 2017) 165, 171.

[6] David Capitant, 'Geschichte der Verwaltungsgerichtsbarkeit in Frankreich' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 1335, 1342; John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 138–39, outlines the enormous power vested in the *Parlements* prior to the Revolution; after the '*frondes parlementaires*', a royal decree of 8 July 1661 repeated the prohibition for the courts to investigate matters reserved 'to his Majesty and his Council'.

[7] The *intendants*

[8] David Capitant, 'Geschichte der Verwaltungsgerichtsbarkeit in Frankreich' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 1335, 1342 notes that the *Cour des aides* between 1756 and 1775 issued 18 *rémonstrations* to the King.

[9] Tocqueville maintained that whereas the political constitution of France changed in 1789, the administrative constitution remained largely the same, Alexis de Tocqueville, *L'Ancien régime et la Révolution* (JP Mayer ed, Gallimard 1967), see the title of pt 3 ch 7: 'How great administrative changes preceded the political

'judicial functions are distinct and will always remain separate from administrative functions.'[10] Judges were forbidden under the threat of penalty from interfering with administrative matters.[11] This displayed a deep mistrust against the allegedly conservative judges.[12] The revolutionaries introduced popular sovereignty, represented by the National Assembly and by the statutory law it enacted, *la loi*. The revolution subdued executive and judicial powers to that of the legislator: administrators ought to implement the revolutionary measures determined by the legislator, without any interference of the judges.[13] As the German law professor Christoph Möllers points out, for Montesquieu and the entire pre-revolutionary discourse on separation of powers, the legislator was 'the most dangerous power'. The judiciary, by contrast, was considered to be 'the least dangerous'.[14] This relationship was reversed in 1789. As John Allison puts it, the revolution construed the separation of powers as 'radical but pointedly one-sided' in favour of the legislator and the executive.[15] For the relationship between the executive and the judiciary, this meant

revolution'; cited by Giacinto della Cananea, *The Common Core of European Administrative Laws: Retrospective and Prospective* (Brill 2023) 2.

[10] The Act of 14–24 August 1790 concerning the Organisation of the Judiciary, art 13 [*loi des 14–24 août 1790 relative à l'organisation judiciaire*]: 'Les fonctions judiciaires sont distinctes et demeureront toujours séparées des fonctions administratives'; Jean-Bernard Auby and Marcel Morabito, 'Evolution and Gestalt of the French State' in Sabino Cassese, Armin von Bogdandy, and Peter Huber (eds), *The Administrative State* (OUP 2017) 165, 173; Grégoire Bigot, *Ce Droit qu'on dit Administratif: Études d'Histoire du Droit Public* (La mémoire du droit 2015) 4 and 14, stresses that the revolutionary statutes did not create administrative courts, they only prohibited the ordinary judges to investigae administrative matters.

[11] The Act of 14–24 August 1790, art 13.

[12] Jean-Louis Mestre, 'France: The Vicissitudes of a Tradition' in Peter Cane and others (eds), *The Oxford Handbook of Comparative Administrative Law* (OUP 2020) 24.

[13] RC van Caenegem, 'The Rechtsstaat in Historical Perspective' in RC van Caenegem, *Legal History: A European Perspective* (Hambledon 1991) 185, 195–6.

[14] Christoph Möllers, *The Three Branches: a Comparative Model of Separation of Powers* (OUP 2013) 18–21; 'the least dangerous' is a quote of the Federalist Papers, No 78 (Alexander Hamilton).

[15] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 142; similarly, Jean-Louis Mestre, 'France: The Vicissitudes of a Tradition' in Peter Cane and others (eds), *The Oxford Handbook of Comparative Administrative Law* (OUP 2020) 24.

that 'judges were […] prevented from administering, but administrators were not prevented from judging'.[16]

In 1799, the future emperor Napoleon created the Council of State, assembling a variety of legislative, executive, and judicial functions.[17] The aim was to facilitate government and to remove politically controversial issues from ordinary judicial oversight.[18] Dispute-resolution was initially considered a mere facet of the administrative activity. But with the creation of an 'adjudication department'[19] in 1806, an administrative case law began to emerge and a separate administrative court evolved within this multi-purpose institution.[20] It is a characteristic feature of French administrative law that the administrative judiciary developed from within the executive, gradually increasing its independence from the executive over the course of the 19th century.[21] The constitutional backdrop to this development was the strict understanding of separation of powers which prevented the ordinary judiciary from interfering with administrative matters.

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[16] Marcel Waline, *Droit administratif* (9th edn, Sirey 1963) 7; quoted by Bernard Schwartz, *French Administrative Law and the Common Law World* (New York University Press 1954) and by John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 142.

[17] Jean-Bernard Auby and Marcel Morabito, 'Evolution and Gestalt of the French State' in Sabino Cassese, Armin von Bogdandy, and Peter Huber (eds), *The Administrative State* (OUP 2017) 165, 176; for example, the Council of State initially had the monopoly on legislative initiatives.

[18] Grégoire Bigot, *Ce Droit qu'on dit Administratif: Études d'Histoire du Droit Public* (La mémoire du droit 2015) 34–41; for example the legal status of emigrants who fled France in the 1790s and property questions around the *biens nationaux*.

[19] Initially '*commission du contentieux*', later '*section du contentieux*'.

[20] Jean-Bernard Auby and Marcel Morabito, 'Evolution and Gestalt of the French State' in Sabino Cassese, Armin von Bogdandy, and Peter Huber (eds), *The Administrative State* (OUP 2017) 165, 176.

[21] David Capitant, 'Geschichte der Verwaltungsgerichtsbarkeit in Frankreich' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 1335, 1347–52; John Allison, *The English Historical Constitution: Continuity, Change and European Effects* (CUP 2007) 77–78.

The Council of State survived the many regime changes from Napoleon's Empire (1799/1804–1815) back to the monarchy under the Bourbons (1815–1830), to the July-Monarchy under Louis-Philippe (1830–1848), a short-lived Second Republic (1848–52) and the Second Empire under Napoleon III (1852–1870), the latter generally being considered a very productive period for the development of administrative law doctrine by the Council of State.[22] In the early 1870s, however, due to the defeat in the Franco-German War of 1870/71, the political situation of France was characterised by unrest. When the news of Napoleon III's surrender reached Paris, a group of republican parliamentarians proclaimed the Third Republic on 4 September 1870, thus bringing the Second Empire to an end.[23] The new Minister of the Interior, Léon Gambetta, on the same day suggested abolishing the Council of State.[24] The existence of France's highest administrative court was threatened not only by the new government but also by the revolutionary movement known as the Paris Commune, which in March 1871 unleashed civil war.[25] On the evening of 23 May 1871, the Communards set fire to the Orsay Palace, which had housed the Council of State since 1840. The building was entirely destroyed and Paris covered in a

[22] Centre national de la Recherche scientifique (ed), *Le Conseil d'Etat: son Histoire à travers les Documents d'Époque, 1799–1974* (Éditions du Centre national de la Recherche scientifique 1974) 201–202, 225–226, 237, 309, 397–398, 459; Jean-Bernard Auby and Marcel Morabito, 'Evolution and Gestalt of the French State' in Sabino Cassese, Armin von Bogdandy, and Peter Huber (eds), *The Administrative State* (OUP 2017) 165, 181; Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (PUF 2002) 172; according to Grégoire Bigot, *Ce Droit qu'on dit Administratif: Études d'Histoire du Droit Public* (La mémoire du droit 2015) 35, administrative law accomplished its 'most flagrant progress under the reign of Napoleon III'.

[23] JPT Bury, *France 1814–1940* (5th ed, Taylor & Francis 2003) 96.

[24] Centre national de la Recherche scientifique (ed), *Le Conseil d'Etat: son Histoire à travers les Documents d'Époque, 1799–1974* (Éditions du Centre national de la Recherche scientifique 1974) 530.

[25] JPT Bury, *France 1814–1940* (5th ed, Taylor & Francis 2003) 104.

pall of smoke.[26] The rationale of the Communards was to obliterate symbols of the imperial and monarchic pasts.[27] The Council of State was considered one such imperial symbol.[28]

The institutional design of public administration and the judiciary was thus a politically sensitive subject. In fact, the existence of the Council of State had been questioned at all major regime changes in 19th-century France: in 1814/1815, 1830, 1848, and 1870/71.[29] The Council of State was attacked from across the political spectrum. Conservatives considered it a revolutionary instrument, republicans thought of it as conservative, and liberals rejected it as authoritarian.[30] Particularly French liberals so frequently demanded the abolition of the Council of State in the period between the 1830s and 1870s that they were considered its 'born adversaries'.[31] The liberal opposition to separate administrative courts found an influential expression in Alexis de Tocqueville's famous monograph *De la démocratie en Amérique* (1835/40).[32] The wide-spread distrust against the Council of State was still alive in 1870. To some degree, it explains the scepticism towards administrative

[26] Arthème Fayard, *Histoire de la Commune de 1871* (BnF-P 2016, first published 1871) 188.

[27] JPT Bury, *France 1814–1940* (5th ed, Taylor & Francis 2003) 107. In addition to the *Palais d'Orsay*, the Communards destroyed the ministry of finance, the palace of the *Légion d'honneur*, the Tuileries, and the town hall.

[28] For example, Athenase Cucheval-Clarigny referred to it as 'l'instrument principal de l'administration du prince'; cited by Jean-Pierre Machelon, 'L'Avènement de la Troisième République, 1870–1879' (1998) 51 La Revue administrative 19, 20; Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002) 172.

[29] Jean-Bernard Auby and Marcel Morabito, 'Evolution and Gestalt of the French State' in Sabino Cassese, Armin von Bogdandy, and Peter Huber (eds), *The Administrative State* (OUP 2017) 165, 179.

[30] Jean-Bernard Auby and Marcel Morabito, 'Evolution and Gestalt of the French State' in Sabino Cassese, Armin von Bogdandy, and Peter Huber (eds), *The Administrative State* (OUP 2017) 165, 179.

[31] Achille Mestre, *Droit Administratif* (Cours de droits 1938–9) 26 ('les adversaires-nés'); cited by Sabino Cassese, *La Construction du Droit Administratif: France et Royaume-Uni* (Montchrestien 2000) 30. Similarly, Léon Duguit, *Les Transformations du Droit Public* (Colin 1913) 149; John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 143.

[32] Sabino Cassese, *La Construction du Droit Administratif: France et Royaume-Uni* (Montchrestien 2000) 32–35; Alain Chatriot, 'La difficile écriture de l'histoire du Conseil d'État' (2008) 26 French Politics, Culture and Society 23.

courts in the initial phase of the Third Republic as well as the arson by the Communards.[33] In the early 1870s, in an effort to reflect on the military defeat and the downfall of the Second Empire, many French political institutions were called into question. Criticism of public administration and the administrative judiciary was particularly prevalent.[34]

Ultimately, the Council of State was reformed rather than abolished.[35] The reform was brought about by an Act of 24 May 1872.[36] Yet it is important to note that separate administrative courts remained controversial in the 1870s and early 1880s. Opposing an administrative judiciary altogether only became a rare minority position at the very end of the century.[37] In the decades after 1870, the Council of State had to prove its worth under a republican system.[38] Interestingly, when the Republicans took over government and started what French historiography refers to as '*la République des républicains*', they purged State Councillors considered too conservative from the Council of State in 1879 as

[33] For examples of this distrust in the 1870s, see Centre national de la Recherche scientifique (ed), *Le Conseil d'Etat: son Histoire à travers les Documents d'Époque, 1799–1974* (Éditions du Centre national de la Recherche scientifique 1974) 548–549 and 571.

[34] Vincent Wright, 'La crise de 1871–1880' in Michel Bruguière (ed), *Administration et Parlement depuis 1815* (Droz 1982) 49.

[35] Bernard Pacteau, *Le Conseil d'État et la Fondation de la Justice Administrative Française au XIXe siècle* (Presses universitaires de France 2003) 178–84.

[36] Act of 24 May 1872 concerning the reorganisation of the Council of State *[loi du 24 mai 1872 portant la réorganisation du conseil d'État*].

[37] Quite isolated, René Jacquelin still maintained there was no such thing as a genuine administrative court; René Jacquelin, *Les Principes dominants du Contentieux Administratif* (Paris 1899) 27; cited by Jacques Chevallier, *L'Élaboration historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (Pichon & Durand-Auzias 1970) 285–86.

[38] David Capitant, 'Geschichte der Verwaltungsgerichtsbarkeit in Frankreich' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 1335, 1354.

potential legal obstacles to the government's anticleric policies. By contrast, not a single State Councillor was removed from office between July 1879 and 1914.[39]

Prior to elaborating on the evolution of the Council of State in the late 1800s and early 1900s in the following section, it is useful to briefly outline the relevant French institutions. The 'active administration' refers to all decision-makers forming the public administration.[40] By contrast, the 'administrative judiciary'[41] pertains to the administrative courts of the Council of State, the Councils of Prefecture[42], and special administrative judges with a jurisdiction narrowly confined to one subject-matter.[43] The 'ordinary judiciary' with the Court of Cassation[44] at the top of its hierarchy was competent for adjudication in private and criminal law. From 1872 onwards, a Tribunal of Conflicts[45] decided on the correct allocation of cases between the 'ordinary' and the 'administrative' judiciary if there was a conflict of competence between these two branches of the

[39] Jean-Pierre Machelon, *La République contre les Libertés? Les Restrictions aux Libertés Publiques de 1879 à 1914* (Presses de la Fondation nationale des sciences politiques 1976) 119.

[40] *L'administration active*; in the late 1800s and early 1900s, this was frequently translated into German as *die aktive Verwaltung*, but it is no longer common in German law today.

[41] *La juridiction administrative*.

[42] *Conseils de Préfecture*. The Councils of Prefecture exceptionally acted as administrative judges where statute conferred such jurisdiction on them. See, Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 953–55.

[43] In addition to the Council of State and the Councils of Prefecture, which had a wide-ranging jurisdiction, there existed special administrative judges with a jurisdiction limited to one subject-matter (eg the *Cour de comptes*, the *Conseils du contentieux des colonies*, the *Conseil supérieur de l'instruction publique*).

[44] *Cour de Cassation.*

[45] *Tribunal des Conflits.*

judiciary.[46] As was explained in chapter 1, this thesis focuses chiefly on the Council of State.[47]

2. Readjustments in the 1870/80s: *justice déléguée* and *Cadot*

The 1870s and 1880s saw important readjustments in the relationship between the administrative judiciary and the active administration. The following section analyses these changes by focusing on two crucial episodes: the legislative reform of the Council of State in 1872 and its judgment in the so-called *Cadot* case in 1889.

The Act of 24 May 1872 substantially reformed the Council of State's adjudication department.[48] The other three departments remained responsible for what the Act described as 'purely administrative matters', such as responding to legislative projects, executive regulations, and legal questions submitted by Ministers or the President.[49] In the adjudication department, the fundamental shift consisted in separating its judicial decision-making powers from the head of State. Under the Second Empire, the Council of State had exercised a so-called 'retained jurisdiction' (*justice retenue*) on behalf of the Emperor

[46] Act of 24 May 1872, art 25. The Tribunal of Conflicts consisted of 'judicial' and 'administrative' judges under the presidency of the Minister of Justice. A few of its judgments were crucially important to the development of administrative law, eg the Tribunal of Conflicts, 8 February 1873 (*Blanco*); for a reassessment of its importance, see Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002) 195. The Tribunal of Conflicts had briefly existed previously in the short-lived Second Republic between 1848 and 1852.

[47] Chapter 1 IV 4 (p 26).

[48] Act of 24 May 1872, art 10.

[49] Act of 24 May 1872, arts 8 and 10 ('les affaires purement administratives'); Jacques Chevallier, *L'Élaboration historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (Pichon & Durand-Auzias 1970) 208 ; Centre national de la Recherche scientifique (ed), *Le Conseil d'Etat: son Histoire à travers les Documents d'Époque, 1799–1974* (Éditions du Centre national de la Recherche scientifique 1974) 597.

Napoleon III. Rather than handing down genuine judgments, the Council of State had given so-called 'opinions',[50] which needed the Emperor's approval to become legally valid. The Act of 24 May 1872 removed this requirement and assigned to the Council of State a 'sovereign' jurisdiction to give judgments in administrative matters, thus granting it a 'delegated jurisdiction' (*justice déléguée*).[51]

Under the previous system of 'retained jurisdiction', the head of state could in theory deviate from an 'opinion' and reach a contrary decision. In practice, however, the head of state in the decades prior to 1872 never deviated from the 'opinion' of the Council of State.[52] As a consequence, legal scholars have argued that the approval of the head of state had become a mere formality, and that the genuine authority lay with the Council of State in any event.[53] In light of Dicey's portrayal of French *droit administratif* as despotic, it is worth stressing that the State Councillors under 'retained jurisdiction' did not have a pervasive pro-government bias.[54] All the same, the system of 'retained jurisdiction'

[50] *Des avis*.

[51] Act of 24 May 1872, art 9 ('Le conseil d'État statue souverainement sur les recours en matière contentieuse administrative […]'); Jacques Chevallier, *L'Élaboration historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (Pichon & Durand-Auzias 1970) 199–202 observes that there were some exceptions to *justice déléguée*, but these are negligible for the purposes of this thesis. Further, the Council of State previously exercised *justice déléguée* under the Second Republic (1848–1851), see Jean-Bernard Auby and Marcel Morabito, 'Evolution and Gestalt of the French State' in Sabino Cassese, Armin von Bogdandy, and Peter Huber (eds), *The Administrative State* (OUP 2017) 165, 165 and 184.

[52] Giacinto della Cananea, *The Common Core of European Administrative Laws: Retrospective and Prospective* (Brill 2023) 24.

[53] David Capitant, 'Geschichte der Verwaltungsgerichtsbarkeit in Frankreich' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 1335, 1349; Jacques Chevallier, *L'Élaboration historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (Pichon & Durand-Auzias 1970) 201; Maurice Hauriou, *Précis de Droit Administratif, contenant le Droit Public et le Droit Administratif* (1st edn, Larose et Forcel 1892) 708.

[54] Albert Venn Dicey, *The Law of the Constitution* (John Allison ed, OUP 2019) 101–19. See also, Mark Walters, *AV Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (CUP 2020) 237; Giacinto della Cananea, *The Common Core of European Administrative Laws: Retrospective and Prospective* (Brill 2023) 6. On the absence of a pervasive pro-government bias, see Jacques Chevallier, *L'Élaboration historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (Pichon & Durand-Auzias 1970) 213–14, 217; Jean-Pierre Machelon, *La République contre les Libertés? Les*

displayed very visibly that the judgments were strictly-speaking issued by the Emperor,[55] not the Council of State.[56] This changed with the introduction of 'delegated jurisdiction'. After 1872, the State Councillors gave their own binding judgments, which thereafter were referred to as such; as 'judgments', not 'opinions'.[57]

Thus, the jurisdiction of the Council of State's adjudication department was separated from the head of the executive. To be clear, the Council of State had been the superior administrative court prior to the reform of 1872. Yet the Act of 24 May 1872 gave its adjudication department more independence by cutting of the ties to the head of state. Previously, the adjudication department was often considered not to be exercising genuinely 'judicial' powers, as expressed in the witticism that 'giving judgments on administrative disputes still is administering', rather than genuine judging.[58] The powers of administrative judges had been considered similar to those of the active administration. This was countered by a second witticism to the point that the private, criminal, or administrative nature of a dispute is irrelevant: 'judging is judging'.[59] This stressed that the powers of an administrative judge were at odds with those of administrators. Ultimately,

Restrictions aux Libertés Publiques de 1879 à 1914 (Presses de la Fondation nationale des sciences politiques 1976) 115–16.

[55] Or by the king, depending on the political regime.

[56] Jacques Chevallier, 'Réflexions sur l'arrêt Cadot' (1991) 9 Droits 79, 82.

[57] *Des arrêts*, not *des avis*.

[58] The witticism 'juger l'administration c'est encore administrer' dates back to Henrion de Pansey. Originally, this may have been aimed at justifying administrative courts separate from the 'ordinary' courts, but the point that administrative judges were considered as 'administrating' remains valid, nonetheless. Pierre-Paul-Nicolas Henrion de Pansey, *De l'Autorité Judiciaire en France* (Barrois 1827); Jacques Chevallier, *L'Élaboration historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (Pichon & Durand-Auzias 1970) 192; Jean-Louis Mestre, 'France: The Vicissitudes of a Tradition' in Peter Cane and others (eds), *The Oxford Handbook of Comparative Administrative Law* (OUP 2020) 24.

[59] Alexandre-François Vivien countered Pansey's saying by asserting that 'juger c'est juger'; Jacques Chevallier, 'Réflexions sur l'arrêt Cadot' (1991) 9 Droits 79, 83.

administrative judges came to be seen as different from both the 'ordinary' judges as well as the decision-makers of the active administration.[60]

This process of forming a new conception of administrative courts is apparent in the aftermath of the reform of 1872. As laid out above, 'delegated jurisdiction' *de jure* gave the Council of State more independence. Paradoxically, however, legal historians point out that *de facto*, the reform initially weakened the Council of State.[61] It is even argued that 'delegated jurisdiction' 'paralyse[d] the administrative judge' and prevented the State Councillors from developing administrative law doctrine further.[62] This is because the Council of State under the Second Empire enjoyed wide political power and authority to impose its 'opinions' on the administration because it acted on behalf of the head of state. Under 'delegated jurisdiction', by contrast, the Council of State could no longer rely on this authority. In simplified terms, the adjudication department of the Council of State needed to adjust to its more thorough separation from the executive, to handing down 'judgments' rather than 'opinions'.[63] This required a new institutional self-image.

The rejection of the so-called 'theory of the minister-judge' in the *Cadot* case (1889) shows that the Council of State successfully adjusted to its modified status. Until 1870, it was widely accepted that central government ministers when deciding a conflict between two

[60] Jacques Chevallier, *L'Élaboration historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (Pichon & Durand-Auzias 1970) 283–286, 291 maintains that when a distinction between the active administration and the administrative judiciary was drawn before 1872/1889, this was an ideal towards which the law ought to develop, whereas the distinction thereafter became a tool describing the positive law.

[61] Jacques Chevallier, *L'Élaboration historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (Pichon & Durand-Auzias 1970) 201–2.

[62] Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002) 171.

[63] Handing down *des arrêts* rather than *des avis*.

parties acted as administrative judges.[64] Where statute did not explicitly assign a conflict to the Councils of Prefecture or the Council of State, ministers were considered as being the default judge for administrative law cases, the *juge administratif de droit commun*.[65] This was known as the 'theory of the minister-judge'. In the 1880s, the Council of State dismissed the theory, most prominently in its judgment in *Cadot* (1889).[66] Mr Cadot had been employed as an engineer of bridges for the city of Marseille until he was dismissed by the mayor. Mr Cadot initially sued for damages before the 'ordinary' courts, but they had no jurisdiction over administrative acts. Subsequently, the Council of Prefecture declared it had no authority due to the lack of an explicit statutory assignment. Mr Cadot thus brought his grievance before the Minister of the Interior who according to the theory of the minister-judge was the default administrative judge. The minister's ambiguous response seemed to affirm his jurisdiction but to reject Mr Cadot's claim for damages.[67] The plaintiff then brought his claim before the Council of State. The State Councillors refused to consider the minister an 'administrative judge' and clarified instead that administrative decisions could be challenged directly before the Council of State.[68] In

[64] Jérémy Mercier, 'The Judicial Elaboration of Standards for Public Administrations in France' in Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 113, 115.

[65] Jacques Chevallier, *L'Élaboration historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (Pichon & Durand-Auzias 1970) 220–221.

[66] Council of State, 13 December 1889 (*Cadot*); the State Councillors already left behind the theory of the minister-judge implicitly in the early 1880s, see Jacques Chevallier, *L'Élaboration historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (Pichon & Durand-Auzias 1970) 223.

[67] On the minister's ambiguous response, see Council of State, 13 December 1889 (*Cadot*) as well as the *conclusions* of the Government Commissioner [*Recueil Lebon* (1889) 1148, 1152–53].

[68] The judgment in *Cadot* further abandoned the previous rule that prior to bringing a case before an administrative court, the plaintiff had to seek recourse before (higher) administrative authorities, see David Capitant, 'Geschichte der Verwaltungsgerichtsbarkeit in Frankreich' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 1335, 1354; John Allison, *The English Historical Constitution: Continuity, Change and European Effects* (CUP 2007) 78. The Government Commissioner Mr Jaegerschmidt declared in *Cadot*: 'Nous pensons […] que, partout où il existe une autorité ayant un pouvoir de décision propre, pouvant rendre des décisions administratives exécutoires, un débat contentieux peut naître et le Conseil peut être directement saisi […]'; 'executory' excluded mere announcements of public officials that needed a further administrative

dismissing the theory of the minister-judge, the Council of State set apart the ministers' executive functions from the judicial functions of the adjudication department in the Council of State.[69]

The theory of the minister-judge had been explicitly confirmed by the Council of State in the early and mid-19th century, and it was not seriously called into question before the 1860s.[70] Why did the Council of State reject it in *Cadot*? Given the brevity of French judgments, the State Councillors did not expressly justify the change of doctrine.[71] Yet the *conclusions* of the government commissioner are insightful, particularly so as the Council of State decided the *Cadot* case in accordance with them. The office of the Government Commissioner was created in 1831 with the aim of entrusting a member of the Council of State, who was not involved in making judgments, with the task of summarising and presenting the law as it stood.[72] The *conclusions* of the Government Commissioner contained a recommendation on how to decide the specific case and sometimes a

act prior to being executed, see Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 427.

[69] Jacques Chevallier, 'Réflexions sur l'arrêt Cadot' (1991) 9 Droits 79, 85 notes that some academics thereafter considered ministers a 'juge d'exception' where statute expressly assigned them a jurisdiction to decide administrative law cases.

[70] Jacques Chevallier, 'Réflexions sur l'arrêt Cadot' (1991) 9 Droits 79, 82; Jérémy Mercier, 'The Judicial Elaboration of Standards for Public Administrations in France' in Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 113, 115.

[71] The brevity of French judgments was discussed above in chapter 1 IV 3 (p 23).

[72] Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 949–52; Jérémy Mercier, 'The Judicial Elaboration of Standards for Public Administrations in France' in Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 113, 114; John Bell, 'The Role of Doctrinal Writing in Creating Administrative Law: France and England Compared' (2018) 15 Glossae. European Journal of Legal History 141, 146; John Bell and François Lichère, *Contemporary French Administrative Law* (CUP 2022) 14. Concerning the Government Commissioners' impact on the further development of administrative law doctrine, see Frédéric Rolin, *Conclusions prononcées par Jean Romieu (1888–1907): Essai sur la Théorie Générale du Droit Administratif de Jean Romieu* (La mémoire du droit 2019).

recommendation to develop the law further.[73] Importantly, the Government Commissioner represented the public interest neutrally conceived, not that of the government of the day.[74] In *Cadot*, the acting Government Commissioner put forward two main strands of reasoning as to why the minister should not be regarded as the default administrative judge. First, in a purely local matter such as the dismissal of a municipal engineer, the mayor acted on behalf of the city rather than as a subordinate to central government. The minister had no jurisdiction to oversee such local affairs. Second, the Government Commissioner brought up considerations of procedural fairness. He argued that it would not be fair if a decision on Mr Cadot's grievance were taken secretly in a ministerial office, 'without public proceedings, without contradictory debate, and without adhering to basic procedural rules'.[75] Since the minister did not follow any of these procedural requirements, the Government Commissioner dismissed the idea that the minister could act as default administrative judge.[76]

In addition to the two lines of reasoning put forth by the government commissioner, another factor motivating the change of doctrine in *Cadot* may have been the introduction of 'delegated jurisdiction'. Once the State Councillors under the Act of 24 May 1872 had the 'sovereign' jurisdiction to give judgments without needing approval by the head of state, it

[73] John Bell, 'The Role of Doctrinal Writing in Creating Administrative Law: France and England Compared' 15 Glossae. European Journal of Legal History (2018) 141, 141–143 and 146.

[74] Jérémy Mercier, 'The Judicial Elaboration of Standards for Public Administrations in France' in Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 113, 114.

[75] Council of State, 13 December 1889 (*Cadot*) [*Recueil Lebon* (1889) 1148, 1150] ('[…] après une instruction faite dans les bureaux des ministères, sans publicité, sans débat contradictoire et en dehors de toutes les formes judiciaires').

[76] Mr Jaegerschmidt further argued that since the theory of the minister-judge had been developed by doctrine rather than being grounded in statute, it was subject to change over time. Laferrière had already dismissed the theory in his writings, and the Council of State itself appeared to implicitly dismiss it in two judgments of the early 1880s, namely Council of State, 24 June 1881 (*Bougard*) and Council of State, 28 April 1882 (*ville de Cannes*); see Council of State, 13 December 1889 (*Cadot*) [*Recueil Lebon* (1889) 1148, 1151].

may have seemed no longer acceptable that ministers, at the very centre of the executive power, exercised judicial powers too, and even less so as 'default administrative judges'.[77] Thus, the State Councillors in *Cadot* defended the 'sovereign jurisdiction' to decide administrative law cases, which the Act of 24 May 1872 had conferred on them, against the ministers' customary jurisdiction as 'default administrative judges'.

Dismissing the 'theory of the minister-judge' entailed a considerable amount of academic work on the question of how to distinguish on a more abstract level between an administrator and an administrative judge. The French law professor Jacques Chevallier maintains that a 'purely material conception of the judicial function' prevailed prior to *Cadot*.[78] Resolving a dispute was considered sufficient to make a judge: 'the administrator is transformed into a judge at the moment he decides on the disputes arising from his own [prior] action'.[79] The judgment in *Cadot* put an end to this by distinguishing between judicial and non-judicial mechanisms of dispute-resolution. Resolving a conflict between two parties was no longer sufficient to make a decision-maker a 'judge' and his decision a 'judgment'. Certain principles of institutional design (such as a minimum degree of judicial independence) and basic procedural rules (such as the right to be heard and the public nature of proceedings) needed to be observed to make a decision a 'judgment' rather than an 'administrative act'.[80] The upshot was that certain (eg ministerial) decisions previously

[77] Jean-Pierre Machelon, *La République contre les Libertés? Les Restrictions aux Libertés Publiques de 1879 à 1914* (Presses de la Fondation nationale des sciences politiques 1976) 111 makes the additional point that the minister-judge could make a decision without being asked to or decide not to make a decision when asked to; he could also plead as a party before the appeal judge; all of this appeared inappropriate for (administrative) 'judges'.

[78] Jacques Chevallier, 'Réflexions sur l'arrêt Cadot' (1991) 9 Droits 79, 85 ('conception purement matérielle de la fonction juridictionnelle').

[79] Jacques Chevallier, 'Réflexions sur l'arrêt Cadot' (1991) 9 Droits 79, 86 ('l'administrateur se transforme en juge dès l'instant où il statue sur les litiges engendrés par sa propre action').

[80] Jacques Chevallier, 'Réflexions sur l'arrêt Cadot' (1991) 9 Droits 79, 86, 88, and 91; whilst Chevallier takes the formal view of *la juridiction* to be true, this thesis is not concerned with the philosophical truth of a

conceptualised as judgments were thereafter considered as 'administrative, not judicial, acts'.[81]

Ultimately, the introduction of a 'delegated jurisdiction' as well as the dismissal of the theory of the minister-judge in structurally similar ways underlined the separation between the Council of State's judicial functions and the executive functions of the head of state and central government ministers. Nonetheless, the highest French administrative court remained (and remains until nowadays) situated within the multi-purpose body of the Council of State. Whilst the distinction between judicial and administrative powers became more pronounced in the period covered by this thesis, France did not establish a clear-cut separation between administrative courts and the public administration.[82] The constitutional status of the Council of State and its adjudication department remained ambiguous. Édouard Laferrière, the State Councillor and academic who wrote the most important French treatise on administrative law in the late 1800s, described the adjudication department of the Council of State as an 'intermediary power, which is at the same time both executive and judicial'.[83] Similarly, the academic Maurice Hauriou noted in 1895 that administrative courts are 'a branch of the executive […] which tends to detach itself from the executive in order to come closer to the judiciary'.[84] In a similar vein, the French legal

specific notion of judicial powers, but in Chevallier's account of how *Cadot* changed conceptions of 'judicial' powers.

[81] Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 940–942 ('des actes d'administration et non des actes de juridiction').

[82] Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (PUF 2002) 174.

[83] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 1 (2nd edn 1896) 12 ('Ce pouvoir intermédiaire, qui tient à la fois de l'exécutif et du judiciaire […]'). On the significance of Laferrière's *Traité*, see Pascale Gonod, 'La Place du "Traité de la juridiction administrative" d'Édouard Laferrière dans l'Évolution du Droit Administratif Français' in Erk Volkmar Heyen and Guido Melis (eds), *Verwaltung und Verwaltungsrecht in Frankreich und England, 18./19. Jahrhundert* (Nomos 1996) 87.

[84] Maurice Hauriou, *Recueil Sirey*, vol 3 (1895) 41 ('[…] branche du pouvoir executif qui tend […] à se séparer du pouvoir exécutif pour se rapprocher du pouvoir judiciaire'); quoted by Jean-Pierre Machelon, *La République contre les Libertés? Les Restrictions aux Libertés Publiques de 1879 à 1914* (Presses de la Fondation nationale des sciences politiques 1976) 108; similarly, Gernot Sydow, *Die*

historian Grégoire Bigot maintains that the Council of State of the late 1800s separated 'the judiciary' and 'administration' in terms of functions, but not entirely in terms of institutions.[85] The State Councillors of the adjudication department still took part in deliberations of the 'purely administrative departments', and the Minister of Justice remained the president of the Council of State. As will be seen in chapters 3 and 4, this ambiguous constitutional status and the proximity between 'administrative courts' and 'the active administration' also shaped the legal rules and principles concerning the conditions under which the State Councillors reviewed administrative decisions.

Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen (CF Müller 2000) 230.

[85] Grégoire Bigot, *Ce Droit qu'on dit Administratif: Études d'Histoire du Droit Public* (La mémoire du droit 2015) 174 (the separation of '*justice et administration*').

III. The German Institutional Model: Administrative Courts

Similarly to France, judicial review in Germany in the late 1800s and early 1900s was construed as 'administrative courts' overseeing 'public administration'. But the institutional design of administrative courts, the constitutional foundations, and the broader historical contexts differed in many ways from France. The first section of this part examines the continuous and controversial debates on the institutional arrangements for overseeing administrative action throughout the 19th century. In the second section, I outline the precise institutional design of the German administrative courts in the late 1800s. Whereas separation of powers was the key constitutional principle informing the institutional arrangements in France, the so-called 'monarchic principle' and the *Rechtsstaat* were key in Germany.

1. Competing Models of Judicial Review

The crucial development in late-19th and early-20th century Germany was the introduction of separate administrative courts. Under the constitution of the German Empire (1871–1918), it was not the Empire at the federal level which was responsible for public administration and its judicial oversight, but the twenty-six constituent German states.[86] Many of these, and notably all the larger ones, introduced separate administrative courts between 1863 and 1900. The Grand-Duchy of Baden was the first German state to set up separate administrative courts in 1863/65.[87] The Kingdom of Prussia (1872/75), the Grand-

[86] Lilly Weidemann, 'Standards of Judicial Review of Administrative Action (1890–1910) in the German Empire' in Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 132.

[87] [Baden] Act of 24 October 1863 concerning the Interior Administration [*Badisches Gesetz vom 24. Oktober 1863, die Organisation der inneren Verwaltung betreffend*].

Duchy of Hessen (1874/75), the Kingdom of Württemberg (1876), the Kingdom of Bavaria (1878), and the Kingdom of Saxony (1900) followed suit.[88] Introducing separate administrative courts in the late 1800s was a compromise resulting from two opposing positions in a debate about the conception of judicial review.[89] Throughout the 19th century, some suggested that the ordinary courts ought to oversee administrative action, whereas others argued for review mechanisms within the executive. One of the consequences of the federal nature of the German Federation (1815–66), the North German Federation (1866–70) and the German Empire (1871–1919) was that the constituent states had been able to try out different institutional arrangements of how to oversee the lawfulness of administrative action for half a century before the first separate administrative courts were introduced in 1863.[90] The scholarly debates and the legislative developments at the level of both the Empire and the various constituent states were complex, contested, and multi-faceted.[91] I focus on the most important structures, arguments, and developments, and particularly those that stand out from a comparative perspective.

Proponents of the so-called *Justizstaat* model ('judiciary state') suggested that the ordinary courts ought to oversee administrative action. This had been prevalent in the 18th century, though with the important caveat that only certain administrative disputes were subject to judicial oversight, whilst others remained within the executive without any means of

[88] Lilly Weidemann, 'Standards of Judicial Review of Administrative Action (1890–1910) in the German Empire' in Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 132, 132–33.

[89] Thomas Würtenberger, 'Kontrolle von Verwaltungshandeln ab 1806: Justizstaat versus Administrativjustiz' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 31, 49 ('Kompromisslösung').

[90] Thomas Würtenberger, 'Kontrolle von Verwaltungshandeln ab 1806: Justizstaat versus Administrativjustiz' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 31, 49.

[91] Similarly on the complexity, Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 11.

bringing the dispute before the courts.[92] In the first half of the 19th century, advocates of the *Justizstaat* model frequently subscribed to a unitary conception of the law that rejected a division between public and private law.[93] Another key argument for a judicial oversight of administrative action by the ordinary courts was the independence of judges.[94]

The alternative model was termed *Administrativjustiz* ('administrative judiciary'). After the downfall of the Holy Roman Empire of the German Nation in 1806, the courts in many German states lost the jurisdiction to control administrative authorities.[95] Instead, appeal mechanisms were installed within the public administration. This was to an important degree due to the influence of France, particularly strong in the Southern-German states (Baden, Württemberg, Bavaria) and the Western-German states of the so-called Rheinbund.[96] The institutional design of the judiciary and the administration in France

[92] Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 12–15. The courts had jurisdiction only for *causae iustitiae* or *causae iudiciariae* whereas the public administration of the regional princes was competent to decide on *causae politiae*, ie conflicts that touched upon the common good, particularly policing. But such a public, or political, case turned into a *cause iustitiae* if the plaintiff could build a claim on a vested right or privilege.

[93] Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 17–18; Thomas Würtenberger, 'Kontrolle von Verwaltungshandeln ab 1806: Justizstaat versus Administrativjustiz' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 31, 36.

[94] Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 17–18.

[95] Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 25; Thomas Würtenberger, 'Kontrolle von Verwaltungshandeln ab 1806: Justizstaat versus Administrativjustiz' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 31, 32 and 40–42; under the Holy Roman Empire, the *Reichskammergericht* had jurisdiction over administrative authorities to a certain degree, but it was abolished in 1806.

[96] Thomas Würtenberger, 'Kontrolle von Verwaltungshandeln ab 1806: Justizstaat versus Administrativjustiz' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 31, 42; Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 30.

served as a model, particularly the Council of State.[97] Bavaria, for instance, in 1808 created a 'Secret Council' with advisory functions and the jurisdiction to decide on appeals against administrative decisions.[98] Württemberg set up a similar 'State Council' in 1819.[99] Certain scholars criticised that, on the *Administrativjustiz* model, the administration was a judge in its own cause, and that the decision-makers lacked judicial independence. But until 1848, this model was popular among both liberal and conservative jurists. Rather than trying to bring administrative decisions under the control of courts, many liberals argued for formalising the existing 'administrative review' mechanisms, for instance by way of statutory provisions on the right to be heard, an inspection of files, and a guarantee that a different administrative official from the primary decision-maker decided on review. Some of these demands were enacted in legislation on 'administrative review proceedings' (*Rekursordnungen*) in Baden, Bavaria, and Württemberg.[100]

As a rough approximation, it can be said that the *Justizstaat* model resembled the English model, whereas *Administrativjustiz* was largely inspired by the French system of the early 19th century. Yet it is important to note the different constitutional underpinnings. In

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[97] Thomas Würtenberger, 'Kontrolle von Verwaltungshandeln ab 1806: Justizstaat versus Administrativjustiz' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 31, 42.

[98] Lilly Weidemann, 'Standards of Judicial Review of Administrative Action (1890–1910) in the German Empire' in Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 132, 133; Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 35; the Bavarian 'Secret Council' was replaced by a 'State Council' (*Staatsrat*) in 1817.

[99] Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 31–35.

[100] Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 27; Thomas Würtenberger, 'Kontrolle von Verwaltungshandeln ab 1806: Justizstaat versus Administrativjustiz' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 31, 42; administrative appeals were called *Rekurs*, as opposed to a judicial appeal (*Klage*). No statute regulated administrative appeals at the beginning of the 19th century, but Baden enacted a *Rekursordnung* in 1833, Württemberg in 1855.

France, the strict understanding of separation of powers served as the theoretical foundation for review mechanisms within the executive: the judiciary ought not interfere with administrative matters. In early 19th-century Germany, by contrast, separation of powers was not a relevant constitutional principle.[101] Instead, the 'monarchic principle' meant that all public powers resided in the monarch, who was merely thought to delegate some of his powers on institutions which then exercised these powers on his behalf.[102] Courts did not have any powers which were genuinely theirs. Since all public powers ultimately resided in the monarch, it was considered impossible to subdue his administration to the courts.[103] Thus, the 'monarchic principle' justified *Administrativjustiz*.

The Frankfurt Constitution of 1849 stipulated that the oversight of the public administration by the executive 'comes to an end', and that henceforth 'the courts' were to decide on all infringements of the law.[104] But a few larger German states opposed the constitution. The

[101] Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 30 and 235; Bernd Wunder, 'Verwaltung, Amt, Beamter' in Otto Brunner, Werner Conze, and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe: historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol 7 (Klett 1992) 1, 72; Thomas Würtenberger, 'Kontrolle von Verwaltungshandeln ab 1806: Justizstaat versus Administrativjustiz' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 31, 38.

[102] *Monarchisches Prinzip*. See Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland, Vol 2: Staatsrechtslehre und Verwaltungswissenschaft, 1800–1914* (Beck 1992) 102–5; Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 30, 235; 'Wiener Schlussakte' of 1819/20 art 57, an addition to the Constitution of the German Federation of 1815 (*Deutsche Bundesakte*) declared: 'Da der deutsche Bund, mit Ausnahme der freien Städte, aus souverainen Fürsten besteht, so muß dem hierdurch gegebenen Grundbegriffe zufolge die gesammte Staats-Gewalt in dem Oberhaupte des Staats vereinigt bleiben, und der Souverain kann durch eine landständische Verfassung nur in der Ausübung bestimmter Rechte an die Mitwirkung der Stände gebunden werden.'

[103] Nikolaus Thaddäus Gönner, *Handbuch des deutschen gemeinen Processes*, vol 2 (2nd edn, Palm 1804) 30; cited by Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 31; Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 57–8, 66.

[104] Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 19–22; Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 67; Frankfurt Constitution of

Prussian King Frederick William IV dealt the final blow by rejecting the imperial crown offered to him by a democratically elected assembly. The constitution never entered into force. Yet the provision on the 'end' of administrative review revived modified versions of the earlier *Justizstaat* model, ie the idea that the ordinary courts ought to oversee public law conflicts.[105] Delegating the oversight of administrative action entirely to the executive (ie the *Administrativjustiz* model) was discredited after 1848.

In the 1860/70s, three models seemed possible. First, the academic Lorenz von Stein argued for 'judicial review' by the ordinary courts.[106] Second, the judge and academic Otto Bähr had initially argued for a similar *Justizstaat* model but nuanced his view after experiencing a major constitutional conflict in the State of Kurhessen in 1850. Bähr had been demoted and relocated to another court after declaring a tax increase unconstitutional and void.[107] No longer trusting the ordinary courts to deliver an effective judicial control of the executive, Bähr called for separate 'public law courts'.[108] Third, the academic and politician Rudolf von Gneist, who extensively studied the administrative landscape of England, suggested creating 'administrative courts' with independent judges within administrative authorities, and a separate Administrative High Court.[109] The question of which institution

28 March 1849, s 182: 'Administrative review comes to an end; the courts decide on all infringements of law.' ('Die Verwaltungsrechtspflege hört auf; über alle Rechtsverletzungen entscheiden die Gerichte.')

[105] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 67, 71, and 74.

[106] Lorenz von Stein, *Die Verwaltungslehre*, vol 1 (2nd edn, Cotta 1869), 403; cited by Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 71–74.

[107] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 76.

[108] Otto Bähr, *Der Rechtsstaat: eine publicistische Skizze* (Wigand 1864).

[109] Rudolf von Gneist, *Der Rechtsstaat und die Verwaltungsgerichte in Deutschland* (2nd edn, Springer 1879); Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 85; Thomas Würtenberger, 'Kontrolle von Verwaltungshandeln ab 1806: Justizstaat versus Administrativjustiz' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa*

ought to control the lawfulness of administrative action was closely related to doctrinal questions on the scope and intensity of review and to different views on the qualifications necessary to become an (administrative) judge. Von Stein, Bähr, and von Gneist each put forward comprehensive accounts of these institutional, doctrinal, and staffing dimensions of judicial review.[110] Many of the suggestions on how best to oversee the lawfulness of administrative action were based on ideas that had been discussed previously in 1848/9 and even earlier in the 19th century.[111] In addition to the various experiences and experiments made in the constituent German states, what German scholars perceived to be the French and the English models of judicial review played an important role throughout the 19th century.[112]

Yet the constitutional foundation of the debate on judicial review changed in the 1860/70s. As mentioned above, the idea that all state powers resided in the monarch (the 'monarchic principle') had justified *Administrativjustiz* in the earlier 19th century. In the 1860s, Lorenz von Stein brought into play the *Rechtsstaat*, or the 'State of law', as a counteracting constitutional principle or ideal.[113] This connected the debate on the judicial oversight of

(Springer 2019) 31, 48–49; Georg Nolte, 'General Principles of German and European Administrative Law - A Comparison in Historical Perspective' (1994) 57 MLR 191, 199.

[110] Thomas Würtenberger, 'Kontrolle von Verwaltungshandeln ab 1806: Justizstaat versus Administrativjustiz' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 31, 49.

[111] Thomas Würtenberger, 'Kontrolle von Verwaltungshandeln ab 1806: Justizstaat versus Administrativjustiz' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 31, 48–9; Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 74, Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 203. German historiography often overstated the importance of the debate between Bähr and von Gneist, but this has been revised in more recent scholarship.

[112] Erk Volkmar Heyen, 'Französisches und englisches Verwaltungsrecht in der deutschen Rechtsvergleichung des 19. Jahrhunderts: Mohl, Stein, Gneist, Mayer, Hatschek' in Erk Volkmar Heyen and Guido Melis (eds), *Verwaltung und Verwaltungsrecht in Frankreich und England, 18./19. Jahrhundert* (Nomos 1996) 178.

[113] The differences between the German *Rechtsstaat* and the English Rule of Law are discussed in chapter 4.

administrative action with constitutional law.[114] On von Stein's account, the *Rechtsstaat* required that the executive[115] was legally bound by statute and that processes were available to bring illegal administrative action and decision-making before the courts.[116] Despite all differences, Bähr and von Gneist grounded their conceptions on the *Rechtsstaat*, too.[117]

2. The late 1800s: Administrative Courts

The introduction of administrative courts was brought about by legislation, such as the Act of 1863 concerning the Interior Administration in the Grand-Duchy of Baden in South-Western Germany. The Act distinguished between 'administrative matters' and 'dispute-resolution in public law' and conferred these two functions on different kinds of institutions.[118] 'Administrative matters' were conferred on a set of administrative authorities, for instance the so-called 'District Offices'[119] at the lowest tier of local administration and the Ministry of the Interior at the top of the administrative hierarchy.

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[114] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 74.

[115] On von Stein's account, this included both central government as well as inferior and local administrative authorities. Most scholars thought that acts of government such as dissolving the legislative assembly or exercising military powers were not bound by the law; Mayer changed his view between the first edition and third edition of his textbook, maintaining in the latter that both government and the public administration were legally bound by the law; Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (1st edn, Duncker und Humblot 1895) 10–11; Mayer, *Deutsches Verwaltungsrecht*, vol 1 (3rd edn, Duncker und Humblot 1924) 2–3.

[116] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 72; on von Stein's account, the *Rechtsstaat* further required that legislation had to be 'constitutional', which meant that freely elected representative assemblies participated in the legislative process.

[117] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 88.

[118] [Baden] Act of 24 October 1863 concerning the Interior Administration, s 1 distinguishes between 'the interior administration' ('Die innere Verwaltung') and 'dispute-resolution in certain public law disputes' ('die Rechtspflege in bestimmten Streitigkeiten über öffentliches Recht').

[119] *Bezirksämter*.

'Dispute-resolution in public law', by contrast, was conferred on 'administrative courts'. The 'District Councils'[120] (not to be confused with the 'District *Offices*') acted as administrative courts of first instance, whilst the newly created Administrative High Court[121] chiefly acted as the court of second and last instance. Hence, the legislator in Baden differentiated between 'administrative' and 'judicial' matters and conferred the jurisdiction for each of these on a set of distinct institutions. Administrative matters were for administrative authorities of the active administration (such as the District Offices), whereas judicial matters were for administrative courts (ie the District Councils and the Administrative High Court).[122]

The other German states introducing separate administrative courts enacted similar statutes, differentiating two kinds of decision-makers: administrative authorities and administrative courts. The common feature of the various Acts is that only the Administrative High Courts were institutionally separated and independent from the executive.[123] The administrative courts of first and where they existed second (but not ultimate) instance, were institutionally incorporated within the public administration.[124]

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[120] *Bezirksräte*.

[121] *Verwaltungsgerichtshof*.

[122] In the academic literature, matters that were decided administratively were often referred to as 'administrative matters' (*Verwaltungssachen*), whereas matters subject to a judicial decision were referred to as 'administrative dispute matters' (*Verwaltungsstreitsachen*), see Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (Duncker und Humblot 1895) 178.

[123] Lilly Weidemann, 'Standards of Judicial Review of Administrative Action (1890–1910) in the German Empire' in Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 132, 136.

[124] The first-instance administrative courts were referred to as such (*Verwaltungsgerichte*) in the literature and in statute, eg [Baden] Act of 14 June 1884 concerning Judicial Review [Badisches Gesetz vom 14. Juni 1884, die Verwaltungsrechtspflege betreffend] s 2; Fritz Fleiner, *Institutionen des deutschen Verwaltungsrechts* (3rd edn, Mohr Siebeck 1913) 239: '… werden die Verwaltungsstreitsachen auf diesen Stufen durch Verwaltungsbehörden als Verwaltungsgerichte in einem besonderen Verfahren, dem Verwaltungsstreitverfahren, erledigt.' Otto von Sarwey, *Das öffentliche Recht und die Verwaltungsrechtspflege* (Laupp 1880) 695.

The Grand-Duchy of Baden can again serve as an example to clarify this institutional setup. As mentioned, the so-called District Councils acted as first-instance administrative courts. When acting as administrative court, the District Council exercised judicial powers. Yet the same District Council also exercised administrative powers as part of the active administration. Quantitatively, most of the District Council business was 'purely administrative' (as opposed to 'judicial') in nature and concerned matters as varied as facilitating trade, industry, agriculture, and forestry, and deciding on the necessity of public buildings and the placement of public roads. Regarding 'administrative matters', the combined 59 District Councils in Baden in the 1870s had an average annual workload of giving out 1000 licences for pubs and restaurants, 300 licences for commercial and industrial businesses, enacting 50 local by-laws, and checking 1800 municipality invoices. The 'judicial matters', by comparison, consisted in deciding an annual average of 400 administrative law cases.[125] The District Council was thus capable of wearing one of two hats. It acted as an administrative authority (ie as part of the active administration) in certain instances, but as an administrative court in others.

Otto Mayer, one of the most acclaimed German administrative law scholars of the period, distinguished the institutional nature of the District Council from its functional nature.[126] In terms of its institutional nature, the District Council was part of the public administration rather than a court of law. The 59 District Councils were established in 1863 as the lowest tier of state administration, and its members did not have the privileged status of judges.[127]

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[125] Gernot Sydow, 'Geschichte der Verwaltungsgerichtsbarkeit in Baden' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 143, 157.

[126] Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (Duncker und Humblot 1895) 161, 'Behördenart' and 'Thätigkeitsart'.

[127] Ina Bauer, 'Die Entstehung der Verwaltungsgerichtsbarkeit in Baden' in Verwaltungsgerichtshof Baden-Württemberg (ed), *Festschrift 150 Jahre Verwaltungsgerichtsbarkeit: Ursprung, Entwicklungslinien und Perspektiven im deutschen und im europäischen Kontext* (Boorberg 2014) 4, 6.

Each District Council consisted of one professional civil servant who presided over its sessions and between six and nine lay citizens appointed by Baden's Minister of the Interior.[128] This institutional structure made the District Council an administrative body rather than a court of law.[129] In instances where the District Council exercised judicial powers, Otto Mayer would say that 'the administrative authority, which institutionally belongs to the public administration, acts as a court of law'.[130] Regarding its institutional nature and organisational structure, the District Council was an administrative authority. But functionally speaking, in certain instances it exercised judicial powers as a first-instance administrative court.

The Administrative High Court, by contrast, can be described as 'a court' less ambiguously. It served mostly as court of appeal against judicial decisions ('judgments') of the District Councils. In certain matters enumerated in a statutory list, the Administrative High Court also served as court of first and last instance.[131] It consisted of a president and six administrative judges, each judgment being rendered by five of its members.[132] In terms of the qualifications necessary to serve as an administrative judge and the legal status and independence of administrative judges, they were comparable to judges of the ordinary

[128] Gernot Sydow, 'Geschichte der Verwaltungsgerichtsbarkeit in Baden' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 143, 159–60. The members of the administrative courts of first-instance were not independent, they could easily be removed, and they also dealt with matters of the active administration, see Martin Pagenkopf, *150 Jahre Verwaltungsgerichtsbarkeit in Deutschland* (Boorberg 2014) 16.

[129] In German language, this institutional structure as an administrative authority makes the Bezirksrat a *Verwaltungsbehörde* rather than *Gericht*. *Behörde* is the generic term for a public authority, *Verwaltungsbehörde* is an administrative authority. *Gericht* means a court. Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (Duncker und Humblot 1895) 178–79 defines an administrative court as 'eine Behörde, welche eigens dazu einbestellt ist, Verwaltungsrechtspflege zu üben.'

[130] Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (Duncker und Humblot 1895) 162: 'die der Verwaltungorganisation angehörige Behörde handelt wie ein Gericht'.

[131] Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (Duncker und Humblot 1895) 163.

[132] [Baden] Act of 24 October 1863 concerning the Interior Administration, s 1.

courts.[133] Thus, the Administrative High Court was a court of law, regarding both its institutional and functional nature.

Usually, the piece of legislation that introduced administrative courts also differentiated between matters to be decided by the active administration (via an 'administrative act'[134]) and those subject to a judicial decision by an administrative court (via a 'judgment'). In Baden, the jurisdiction of administrative courts initially extended to four subject-matters: disputes between individuals and their municipality (eg becoming a municipal citizen, or municipal suffrage), disputes in agriculture and forestry (eg water rights), disputes on taxes and fees levied by the municipalities or by the State of Baden, and disputes concerning health insurance and poor laws.[135] One subject-matter which did not fall under the jurisdiction of administrative courts in Baden was the issuing of commercial, industrial, and hospitality licences. For appeals against the refusal or withdrawal of such licences, the old 'administrative review' persisted.[136] Interestingly, there is no abstract criterion that rationalises the distinction between the conflicts subject to a decision by administrative courts and those conflicts which remained under the exclusive jurisdiction of the active administration. Legal scholars back in the period recognised the lack of an overarching logical rationale early on, maintaining laconically that the demarcation of administrative and judicial disputes simply had historical and organisational reasons. Giving an adequate

[133] Martin Pagenkopf, *150 Jahre Verwaltungsgerichtsbarkeit in Deutschland* (Boorberg 2014) 16.

[134] For an explanation of this 'core concept' in English language, see Mahendra Pal Singh, *German Administrative Law in Common Law Perspective* (Springer 2001) 63.

[135] [Baden] Act of 24 October 1863 concerning the Interior Administration, ss 5 and 15; [Baden] Act of 14 June 1884 concerning Judicial Review, ss 2–4; Gernot Sydow, 'Geschichte der Verwaltungsgerichtsbarkeit in Baden' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 143, 162; Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 84.

[136] Gernot Sydow, 'Geschichte der Verwaltungsgerichtsbarkeit in Baden' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 143, 162.

account of this demarcation required 'descending into the details of statutory law' of every German state.[137]

Regarding the first-instance administrative courts which also acted as administrative authorities, statute commonly established a precise vocabulary to distinguish between their administrative and judicial responsibilities. The Baden Act of 1863, for instance, stipulated that the District Council decided 'public law disputes'.[138] The kinds of disputes subject to the 'judgment' of an administrative court were then listed. Another section of the Act stipulated that 'the District Council further decides on administrative matters', which were again listed.[139] The difference between judicial and administrative decisions was marked by the contrast of 'public law disputes' and 'administrative matters', and by two different German verbs for 'deciding' (*entscheiden* and *beschließen*).[140] Similarly, the Baden Act of 1863 distinguished between appeals against judicial decisions of the District Council ('judgments') and appeals against its administrative decisions ('administrative acts').[141]

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[137] Karl von Goetz, *Die Verwaltungsrechtspflege in Württemberg* (Mohr 1902) 28–29: 'Mit allgemeinen Begriffen ist überhaupt auf diesem Gebiet nicht viel auszurichten […] So trägt die Grenzregulierung ein sehr positives, durch geschichtliche und organisatorische Verhältnisse bedingtes, selbst kasuistisches Gepräge […] Eine klare Darstellung dieses Rechtszustandes muß daher in das Detail des positiven Rechts des Einzelstaats hinabsteigen […]'. Similarly, Max von Seydel, *Bayerisches Staatsrecht*, vol 2 (2nd edn, Riedel 1896) 439: 'Eine Aufzählung der einzelnen Materien an dieser Stelle würde keinen wissenschaftlichen Werth haben. Angelegenheiten, welche zwar die innere Natur öffentlichrechtlicher Streitigkeiten haben, jedoch unter keine der vom Gesetze aufgeführten Materien fallen, können nicht im verwaltungsgerichtlichen Verfahren verfolgt werden.'

[138] [Baden] Act of 24 October 1863 concerning the Interior Administration, s 5 ('Streitigkeiten des öffentlichen Rechtes'.

[139] [Baden] Act of 24 October 1863 concerning the Interior Administration, s 6 ('der Bezirksrath beschließt ferner in folgenden Verwaltungssachen').

[140] '*Entscheiden'* is used for 'deciding judicially', whereas 'beschließen' means 'deciding administratively'. Similarly, Prussian legislation used '*entscheiden'* for judicial decisions whereas 'beschliessen' denoted administrative decisions. The [Saxony] Act of 19 July 1900 on Judicial Review [Gesetz über die Verwaltungsrechtspflege vom 19. Juli 1900] para 1 defines administrative matters to be decided by administrative courts as '*Verwaltungsstreitsachen'*. The [Bavarian] Act of 8 August 1878 concerning the installation of an Administrative High Court [*Gesetz vom 8. August 1878, betreffend die Errichtung eines Verwaltungsgerichtshofs*] is more confusing given the use of 'Verwaltungsrechtssache' in para 8 and other judicial matters in para 10.

[141] '*Erkenntnisse*' and '*Beschlüsse*'; an appeal before an administrative authority was called *Rekurs*, whereas an appeal before an administrative court was called (*Verwaltungs-)Klage*. I point to this difference by using 'administrative appeal' and 'judicial appeal'.

While the former were decided by the Administrative High Court, the latter mostly came before a higher administrative authority, ultimately a ministry.[142] It was common that the appellant, who wished to challenge an administrative decision, had to exhaust all administrative appeals available before eventually bringing a matter before an administrative court.[143] Certain matters were finally settled by a higher administrative authority (eg a ministry) while others subsequently came before an administrative court.[144] If an administrative authority and an administrative court had a disagreement on who was competent to decide on a specific case, the Administrative High Court decided on the correct allocation of the case in a few German states (eg in Prussia, Saxony, Bavaria), while a special Court of Competences was installed in others (eg in Baden and Württemberg).[145]

The other German states covered in this thesis had institutional setups similar to Baden, although sometimes with three rather than two instances of administrative courts. Further differences existed in the precise composition of the members of administrative courts and in the qualifications necessary to become an administrative judge. In most German states, the lower and middle instance courts consisted of a mixture of civil servants and lay citizens, whereas the Administrative High Courts consisted of persons qualified to serve as judge or senior civil servant.[146] While the Administrative High Courts were called

[142] [Baden] Act of 24 October 1863 concerning the Interior Administration, s 20.

[143] Thus differently from France, where the judgment in *Cadot* dismissed the requirement for planitiffs to seek redress within the administration before bringing a case before the Council of State.

[144] In Prussia, in the absence of other provisions, an administrative appeal ('Beschwerde') was excluded where a judicial appeal ('Klage im Verwaltungsstreitverfahren') was possible; see [Prussia] Act of 30 July 1883 on the Public Administration [*Gesetz über die allgemeine Landesverwaltung vom 30. Juli 1883*] s 50; appeals against acts of the police constituted an exception, here, the appellant had a choice between the two appeals; see paras 127–28 of the same Act; Ulrich Stump, *Preußische Verwaltungsgerichtsbarkeit, 1875–1914: Verfassung, Verfahren, Zuständigkeit* (Duncker und Humblot 1980) 121.

[145] Fritz Fleiner, *Institutionen des deutschen Verwaltungsrechts* (3rd edn, Mohr Siebeck 1913) 249.

[146] After 1883, Prussia had three instances of administrative courts, Kreisausschüsse (or Stadtausschüsse), Bezirksausschüsse and the Oberverwaltungsgericht, [Prussia] Act of 30 July 1883 on the Public Administration, s 7. The second-instance administrative courts consisted of one member qualified to serve as a judge, one member qualified for higher civil service, and three citizens elected by the regional assemblies

Verwaltungsgerichtshof or *Oberverwaltungsgericht* in every German state, the lower instance administrative courts bore different names, depending on the designation of the respective administrative authorities of the relevant state (eg 'District Council' in Baden).[147] Yet the common trend was that the lower administrative courts were institutionally not separated from the active administration. Only the Administrative High Courts were institutionally distinct bodies. This setup required a precise legal vocabulary to clarify whether the lower administrative courts (such as the District Councils in Baden) were to act judicially or administratively in a certain matter, and to clarify whether appeals against administrative decisions came before a higher administrative body or before an administrative court.

In many ways, the German administrative courts were a compromise between the two models of *Justizstaat* and *Administrativjustiz* discussed in the previous section. The lower-instance administrative courts within the executive can be considered as a formalised and slightly judicialised modification of the old *Administrativjustiz*. The fact that the Administrative High Courts were independent courts which were institutionally separated

(Provinzialvertretung). The High Administrative Court in Berlin consisted of an equal number of members qualified to serve as judges and members qualified to serve as higher civil servants; they were appointed for life by the king. Detlef Merten, 'Geschichte der Verwaltungsgerichtsbarkeit in Preußen' Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 179, 234; Mahendra Pal Singh, *German Administrative Law in Common Law Perspective* (Springer 2001) 23.

[147] Bavaria had Gemeindebehörden and Distriktverwaltungsbehörden as first instance courts, Kammer des Innern of the Kreisregierung as second instance, and a Verwaltungsgerichtshof. In Prussia the Kreisausschüsse acted as courts of first instance (Kreisverwaltungsgerichte), Bezirksverwaltungsgerichte as second-instance, and the Oberverwaltungsgericht as court of third instance. Württemberg created adjudication departments in the four Kreisregierungen as first-instance administrative courts and an independent Administrative High Court. Sachsen in 1900 introduced first-instance administrative courts within the Kreishauptmannschaften and an Administrative High Court. In the Grand-Duchy of Hessen in 1875, the previously existing Kreisausschüsse and Provinzialausschüsse took over as administrative courts of first and second instance, an independent Administrative High Court was introduced; Martin Pagenkopf, *150 Jahre Verwaltungsgerichtsbarkeit in Deutschland* (Boorberg 2014) Teil A; Heinrich Rehak, 'Geschichte der Verwaltungsgerichtsbarkeit in Bayern' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 387, 401; Dirk Tolkmitt, 'Geschichte der Verwaltungsgerichtsbarkeit in Sachsen' in ibid, 593, 605–08; Margrit Seckelmann and Christian Wagner, 'Geschichte der Verwaltungsgerichtsbarkeit in Hessen' in ibid, 303, 310–13.

from the executive, by contrast, satisfied the demands of judicial independence by the proponents of the *Justizstaat* model, even if they ended up being separate 'administrative' rather than 'ordinary courts'.

3. Summary

Similarly to France, judicial review in late-19th and early-20th century Germany was construed as 'administrative courts' overseeing 'public administration'. Yet the precise institutional frameworks, the constitutional foundations, and the broader historical contexts differed. In lieu of the French understanding of separation of powers, the interplay of 'the monarchic principle' and the *Rechtsstaat* built the key constitutional backdrop to judicial review in Germany. I interpreted the introduction of separate administrative courts between the 1860s and 1900 as a compromise between two opposing conceptions of review (*Administrativjustiz* and *Justizstaat*), which were discussed throughout the 19th century. Ultimately, only the Administrative High Courts were separate and independent institutions, the first-instance administrative courts being installed within the administrative hierarchy. The German legislators used a detailed vocabulary to differentiate between decision-makers of the active administration and administrative courts, as well as between matters to be decided by the former and those to be decided by the latter, thus crafting judicial review around specific notions of 'judicial' and 'administrative' powers.

IV. The English Remedial Model

In France and Germany, judicial review was construed as 'administrative courts' overseeing 'public administration', and the institutional arrangements were shaped by notions of judicial and administrative powers. English law took a different approach. In the absence of an entrenched division between public and private law, England had no separate administrative courts. Instead, judicial review was characterised by a remedial conception of law.[148] The English model of judicial review is outlined in the first section of this part. Thereafter, the second section examines the wide-ranging administrative reforms of the 19th and early 20th centuries and their impact on judicial review.

1. Institutions and Remedies

Frederic William Maitland observed in 1888 that 'about half the cases' of the Queen's Bench Division's modern reports dealt with 'rules of administrative law', by which he meant 'such matters as local rating, the powers of local boards, the granting of licenses for various trades and professions, the Public Health Acts, the Education Acts, and so forth.'[149] That English courts oversaw administrative decision-making was uncontroversial. Yet judicial review in England was fundamentally different from how French and German law approached the matter. The most obvious difference is that England did not have any designated 'administrative courts'. Further, despite the great variety of decision-makers responsible for administrative matters, England arguably had no 'public administration'.

[148] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 125.

[149] Frederic William Maitland, *The Constitutional History of England: A Course of Lectures* (CUP 1908) 505 warned that neglecting the 'volumes upon volumes of statutes' regulating these matters would lead to 'a false and antiquated notion of our constitution.'

The numerous decision-makers that we may call 'administration' in retrospect were neither designed nor conceived to form an abstract whole, a centralised and hierarchically organised 'public administration'.[150] As a result, England neither had 'administrative courts' nor a 'public administration', but courts were overseeing administrative action all the same.[151] In the absence of an institutional conception, judicial review was characterised by a variety of processes and remedies.

a) The Absence of Administrative Courts and Public Administration

In England, a variety of inferior and special courts had jurisdiction confined to a geographical area, a subject-matter, or an area of the law, for instance Justices of the Peace sitting as Courts of Summary Jurisdiction,[152] ecclesiastical courts, or the Court of Admiralty.[153] But England had no 'administrative' or 'public law' courts comparable to the French Council of State or the German administrative courts. This was due to the fact that English law in the 19th and early 20th centuries did not have an entrenched distinction between public and private law, neither in terms of institutions nor in substantive or

[150] Edward Jenks, *An Outline of English Local Government* (Methuen 1894) 14–15; Stuart Anderson, 'Local Government' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 423, 424–5; similarly, John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 72–73 and 79.

[151] Similarly, Robert Thomas, 'The Development of Administrative Law in the United Kingdom (1890–1910)' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 257, 264 and 275.

[152] Patrick Polden, 'Justices of the Peace and their Courts' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 907.

[153] Patrick Polden, 'The Civilian Courts and the Probate, Divorce, and Admiralty Division' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 692; RB Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts: 1500–1860* (CUP 2007); John Baker, *An Introduction to English Legal History* (5th edn, OUP 2019) ch 8.

procedural law.[154] In fact, the term 'public law' was largely unknown.[155] Maitland explained to a German-speaking audience in 1905 that if an English newspaper were to mention a book on 'public law', he would assume it to be on (public) international law.[156] English law was conceptualised as a unity, as illustrated by Albert Venn Dicey's insistence on 'the ordinary law of the realm' and 'the ordinary Courts'.[157]

The absence of a designated public law court can be traced back to the abolition of the Court of Star Chamber by the Long Parliament in 1641.[158] In the early 17th century, several courts established under the royal prerogative had jurisdiction over certain government-related matters (that we may refer to as 'public law' in retrospect). The Court of Wards had jurisdiction over feudal tenures, the Court of Requests over poor men's causes and the royal household. Star Chamber heard complaints against local and central government officials, such as the Justices of the Peace.[159] Yet, as John Allison puts it, the distinction between public and private law as well the prerogative courts 'came to be seen as a way of setting the King above the law.'[160] Although Star Chamber 'had not been a court of tyranny', it

[154] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 4–12 and ch 5.

[155] Similarly, Jason Varuhas, 'Taxonomy and Public Law' in Mark Elliott, Jason Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart 2018) 39, 42–43.

[156] Frederic William Maitland, *Korporation und Trust* (Hölder 1905) 4.

[157] Albert Venn Dicey, *The Law of the Constitution* (John Allison ed, OUP 2019) 97 and 100.

[158] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) ch 5; Peter Cane, *Controlling Administrative Power: an Historical Comparison* (CUP 2016) 30; Carol Harlow and Richard Rawlings, 'Administrative Law in Context: Restoring a Lost Connection' (2014) 1 Public Law 28, 31.

[159] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 154; John Baker, *An Introduction to English Legal History* (5th edn, OUP 2019) 127–28.

[160] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 6–7 and 154.

became 'clearly associated with the King and the royal prerogative'.[161] It was complained that Star Chamber was abused by the Stuart Kings, and that it stood in the way of judicial independence.[162] Allison makes the point that the abolition of the prerogative courts 'precluded the development of an English institutional distinction between public and private law.'[163] The Court of Star Chamber was still widely remembered in the late 19th century. Dicey, for instance, likened the Star Chamber to the French Council of State. On Dicey's curious historical narrative, French liberals in 1830 had similar goals to Englishmen in the 17th century, but only the latter had been successful in abolishing separate courts, thus preventing the development of an 'administrative law'.

> Long Parliament destroyed, and destroyed for ever, the arbitrary authority of the Star Chamber […], it did not suffer any system of administrative law to be developed in England. The French liberals, on the expulsion of the Bourbons [in 1830] neither destroyed the *tribunaux administratifs* nor made a clean sweep of *droit administratif*.[164]

With the prerogative courts abolished, the common law courts took on the supervisory jurisdiction over administrative matters, particularly the Court of King's Bench.[165] In fact, common lawyers' criticism of the prerogative courts had spurred their abolition.[166] According to John Baker, '[t]he supervisory role of the King's Bench became firmly established during the reigns of Elizabeth I and James I.' In principle, any exercise of

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[161] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 154.

[162] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 155; on Allison's account, the prerogative courts were abolished for three reasons: the association with the King, criticism of common lawyers 'envious of the widening conciliar jurisdiction', and Star Chamber's involvement in ecclesiastical politics.

[163] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 155.

[164] Albert Venn Dicey, 'Droit Administratif in Modern French Law' (1901) 17 LQR 302, 314–16.

[165] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 155.

[166] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 155.

authority thereafter fell 'under the control of the regular courts of law, so that the subject is furnished with a legal remedy when any official, however mighty, exceeds the power which the law gives him.'[167] The abolition of the prerogative courts and the development of a supervisory jurisdiction in the regular courts has shaped judicial review in the late 1800s and early 1900s (and beyond). The Judicature Acts of 1873/5 reorganised the superior courts, creating the Supreme Court of Judicature with the High Court of Justice (with several Divisions[168]) and the Court of Appeal.[169] The Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council functioned as courts of last resort for the United Kingdom and the remainder of the British Empire respectively.[170] It remained the case that there was no separate 'administrative court'.

Further, England had no 'public administration' akin to that of France and Germany. England 'survived into the nineteenth century with a rather low level of stateness'.[171] Until the end of the 18th century, Crown and Parliament left local authorities a considerable autonomy to deal with matters of internal administration. Local authorities operated largely

[167] John Baker, *An Introduction to English Legal History* (5th edn, OUP 2019) 153–54.

[168] Initially five (Queen's Bench, Common Pleas, Exchequer, Chancery, and the Probate, Divorce and Admiralty Division), but Common Pleas and Exchequer were absorbed into Queen's Bench Division in 1880.

[169] John Baker, *An Introduction to English Legal History* (5th edn, OUP 2019) 58–59; Patrick Polden, 'The Judicature Acts' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 757; Conor McCormick, 'The Historical Foundations of Judicial Review in the United Kingdom' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 193, 208.

[170] Judicial Committee Act 1833 (3 & 4 Will 4 c 41); Appellate Jurisdiction Act 1876 (39 & 40 Vict c 59); Patrick Polden, 'The Judicial Roles of the House of Lords and Privy Council, 1820–1914' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 528; Patrick Polden, 'General Introduction' in ibid, 525; John Baker, *An Introduction to English Legal History* (5th edn, OUP 2019) 151–53.

[171] Charles Tilly, 'Reflections on the History of European State-Making' in Charles Tilly (ed), *The Formation of National States in Western Europe* (Princeton University Press 1975) 34–35; quoted by Sabino Cassese, 'The Administrative State in Europe' in Sabino Cassese, Armin von Bogdandy, and Peter Huber (eds), *The Administrative State* (OUP 2017) 57, 61.

'independently from central government'.[172] The administrative arrangements formed what Martin Loughlin called 'a complex mosaic of parochial, manorial, borough and county institutions, originating in a jumble of local customs, common law, royal charters, and Acts of Parliament'.[173] Occasionally, this was described more dismissively as 'chaotic', a 'weltering mass of confusion', or 'a hotch-potch'.[174] The absence of an expression encompassing the variety of local and regional authorities is telling: they were not considered to form an abstract administrative whole. The term 'public administration' only gained currency in the English language in the latter part of the 19th century.[175] Conceptualising the different activities by various local authorities as connected was 'the work of the 1920s'.[176]

The absence of a hierarchically organised and centralised 'public administration' was linked to the absence of a distinction between public and private law and the absence of a conception of 'the State'. John Allison has pointed out that the English legal profession has

[172] Martin Loughlin, 'Evolution and Gestalt of the State in the United Kingdom' in Armin von Bogdandy, Sabino Cassese, and Peter Huber (eds), *The Administrative State* (OUP 2017) 451, 469, 473, and 478; similarly, John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 72–73 points out that the 17th-century revolutionary settlement between Parliament and the Crown 'precluded the establishment of a powerful centralized administration'.

[173] Martin Loughlin, 'Evolution and Gestalt of the State in the United Kingdom' in Armin von Bogdandy, Sabino Cassese, and Peter Huber (eds), *The Administrative State* (OUP 2017) 451, 473; similarly, Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 169.

[174] Stephen Sedley, *Lions Under the Throne: Essays on the History of English Public Law* (CUP 2015) 52, mentions 'the chaotic state of public administration in the early part of the [nineteenth] century'; Edward Jenks, *An Outline of English Local Government* (Methuen 1894) 10; William Cornish and others, *Law and Society in England 1750–1950* (2nd edn, Hart 2019) 88–90 calls English local government around 1884 'a hotch-potch'; similarly, John Bell, 'The Role of Doctrinal Writing in Creating Administrative Law: France and England Compared' (2018) 15 Glossae. European Journal of Legal History 141, 141–143.

[175] Gavin Drewry, 'Judicial Review: The Historical Background' in Michael Supperstone, James Goudie, and Paul Walker (eds), *Judicial Review* (5th edn, LexisNexis 2014) 41, 42.

[176] John Bell, 'The Role of Doctrinal Writing in Creating Administrative Law: France and England Compared' in 15 Glossae. European Journal of Legal History (2018) 141, 144; Martin Loughlin, 'Evolution and Gestalt of the State in the United Kingdom' in Armin von Bogdandy, Sabino Cassese, and Peter Huber (eds), *The Administrative State* (OUP 2017) 451, 453 and 469 asserts that 'there has never emerged in England a hierarchical and undifferentiated concept of administration.'

largely been 'insulated from political theory' and from conceptions of 'the State' of thinkers such as Benjamin Constant, Alexis de Tocqueville, and Émile Durkheim in France.[177] In lieu of 'public administration' or 'the State', English lawyers spoke of 'the Crown' or the individual person holding a certain office.[178] Where French and German lawyers would resort to a conception of 'the State', English lawyers used 'various vague conceptions, such as the Crown, officials, political superiors, officers of the Crown, and public or political persons'.[179] These terms did not need a concept of a 'state administration'.[180] Dicey is a good example for the scepticism of common lawyers towards abstract concepts of 'the State' or 'the administration': 'People talk about "the wisdom of the state." […] Because a person is a servant of the State, he does not possess superhuman wisdom; he is very much like the rest of the world.'[181] In his account of the Rule of Law, Dicey equated private individuals and officials by requiring that 'every man' be 'subject to the ordinary law of the realm'.[182] Repeatedly, he stressed that it was only possible in England to sue an official

[177] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 73–74.

[178] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 75.

[179] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 79.

[180] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 79.

[181] Albert Venn Dicey, 'Mill "On Liberty"' (1901) 104/7 Working Men's College Journal 37, 39; quoted by Mark Walters, *AV Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (CUP 2020) 251.

[182] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 79.

personally in tort just like any other person.[183] This was indeed not possible in France, where plaintiffs could instead sue the State before administrative courts.[184]

b) Processes and Remedies

Naturally, the absence of 'administrative courts' and a 'public administration' did *not* entail that English judges had no authority to oversee administrative action. To the contrary, judicial oversight of administrative action was crucial to Dicey's account of the Rule of Law, as was his insistence that the courts used the same legal techniques as in disputes between private individuals.

> Any official who exceeds the authority given him by the law incurs the common law responsibility for his wrongful act; he is amenable to the authority of the ordinary courts, and the ordinary courts have themselves jurisdiction to determine what is the extent of his legal power, and whether the orders under which he has acted were legal and valid. Hence the courts do in effect limit and interfere with the actions of the 'administration', using that word in its widest sense.[185]

Judicial review by 'the authority of the ordinary courts' was shaped by various processes and remedies.[186] The processes available to judicially review administrative decisions can be sorted into three groups: the prerogative writs, collateral challenges via actions for

[183] Albert Venn Dicey, *The Law of the Constitution* (John Allison ed, OUP 2019) 100–1, 398–400 and 408–9.

[184] The delictual liability of officials and the State changed fundamentally in the early 1900s in France in cases such as Council of State, 21 June 1895 (*Cames*), 10 February 1905 (*Tomaso Greco*), and 17 February 1905 (*Auxerre*); in the 1910s the Council of State established the 'principe de juxtaposition des responsibilités', according to which plaintiffs could sue both the official and the State; Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002) 288–93; François Burdeau, *Histoire du Droit Administratif: de la Révolution au début des années 1970* (Presses universitaires de France 1995) 294–97.

[185] Albert Venn Dicey, *The Law of the Constitution* (10th edn, Macmillan 1959) 389.

[186] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 122 and 125 speaks of a 'remedial conception of the law' in England, as opposed to a 'categorical approach' prevalent in France.

damages, and the equitable remedies of injunctions and declarations.[187] The conditions under which each of these remedies issued are more conveniently examined in chapter 4 on error of law review. The point I wish to make here is that judicial review in England was not conceived as oversight of 'administrative' decision-makers or powers in a technical sense.

The first means of challenging administrative decisions (broadly conceived) before the courts consisted in direct challenges via the writs which due to their close association with the King came to be known in the 18th century as 'prerogative writs'.[188] A decision-maker could be prohibited from taking a certain action (prohibition), compelled to do a certain thing (mandamus), or a decision could be quashed (certiorari).[189] None of these writs originally targeted decision-makers that would have been considered 'administrative' in nature, let alone part of a 'public administration'. The writ of prohibition was developed in the 13th century to control ecclesiastical courts, but was extended in the 16th and 17th centuries 'to all other kinds of judicial tribunal', such as conciliar courts, university courts, or the Court of Admiralty.[190] The writ of certiorari originally did not serve as a review mechanism but as 'a means of supplying information to a superior court by way of certification, especially from another court of record.'[191] When the writ was developed into a remedy to quash in the 17th century, it still issued primarily against inferior courts of

[187] As mentioned in chapter 1 IV 4 (p 27), statutory appeals are not a subject-matter of this thesis.

[188] John Baker, *An Introduction to English Legal History* (5th edn, OUP 2019) 155–61; SA De Smith, 'The Prerogative Writs' (1951) 11 Cambridge Law Journal 40, 40 and 53.

[189] These three were most important to judicial review in the late 1800s and early 1900s. I leave aside the writs of quo warranto and habeas corpus.

[190] John Baker, *An Introduction to English Legal History* (5th edn, OUP 2019) 155.

[191] John Baker, *An Introduction to English Legal History* (5th edn, OUP 2019) 159; Gavin Drewry, 'Judicial Review: The Historical Background' in Michael Supperstone, James Goudie, and Paul Walker (eds), *Judicial Review* (5th edn, LexisNexis 2014) 41, 46.

records, particularly Justices of the Peace.[192] The writ of mandamus stood slightly apart from prohibition and certiorari: it was not confined to inferior 'courts'.[193] The writ of mandamus developed in the early 17th century 'as a means of controlling borough and city authorities', particularly for the protection of an office or status.[194]

Thus, the writs of certiorari and prohibition originally served to oversee inferior 'courts', not decision-makers that were 'administrative' in nature. Yet this limitation allowed for a certain flexibility from the outset. Justices of the Peace, for instance, were generally categorised as 'courts of record'. Although they were responsible for summary judicial business and (until the early 19th century) for most local government matters in the counties, the High Court 'made little distinction between the judicial and administrative functions of the justices': certiorari issued to their administrative functions, too.[195] The requirement of a 'court of record' was interpreted more and more liberally so as to include Commissioners of Sewers and other statutory decision-makers such as the College of Physicians.[196] Eventually, the limitation of the writ of certiorari to 'courts of record' was dropped altogether. However, certiorari remained confined to 'judicial' acts, as opposed to

[192] Philip Murray, 'Process, Substance and the History of Error of Law Review' in John Bell and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016) 87, 90–92; Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 582.

[193] 3 Bla Com 110: 'a command, issuing in the King's name from the Court of King's Bench, and *directed to any person, corporation, or inferior court of judicature* within the King's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty […]' (accentuations are mine); quoted by Joshua Scholefield and Gerard Hill, *Appeals from Justices* (Butterworth 1902) 176.

[194] John Baker, *An Introduction to English Legal History* (5th edn, OUP 2019) 158.

[195] Gavin Drewry, 'Judicial Review: The Historical Background' in Michael Supperstone, James Goudie, and Paul Walker (eds), *Judicial Review* (5th edn, LexisNexis 2014) 41, 47; Louis L Jaffe and Edith G Henderson 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 LQR 345, 361 state that 'it is clear that many of the acts and proceedings of the Justices of the Peace were not "judicial", yet all of them were subject to review on certiorari and mandamus'.

[196] *Groenvelt v Burwell (1700)* 1 Ld Raym 454; Holt CJ classified the College of Physicians as a 'court of record' for 'where there is a jurisdiction erected de novo with power to fine and imprison, it is a Court of Record; for Courts of Record only can fine'; quoted by Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 584.

'ministerial' or 'administrative' acts, in the late 1800s and early 1900s.[197] This was a remnant of the earlier history of the writ targeting inferior courts rather than 'administrative' decision-makers in a technical sense.[198]

The second means of reviewing administrative decisions were actions for damages, such as trespass, action on the case, replevin, and trover.[199] In these collateral challenges, judges were required to examine whether decision-makers had acted unlawfully as a condition to give judgment on whether officials incurred civil liability.

Third, decisions could be challenged via the equitable remedies of injunctions and declarations. Injunctions could be mandatory or prohibitory.[200] A declaratory judgment, by contrast, merely stated the law on a certain contentious point, without granting a specific form of relief.[201] While the injunction was an important remedy for administrative law cases throughout the 19th century, purely declaratory judgments only gained importance in the 20th century.[202]

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[197] *R v London County Council: Re The Empire Theatre* (1894) LTR 638. In the early 1900s, certiorari was extended to apply to central government departments, too, see *Board of Education v Rice* [1911] AC 179.

[198] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 590; Stuart Anderson, 'Judicial Review' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 486, 508.

[199] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 254–56.

[200] Conor McCormick, 'The Historical Foundations of Judicial Review in the United Kingdom' in Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 193, 207; SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 329 points out that until the late 19th century all injunctions were worded in a prohibitory form, even if the effect was mandatory.

[201] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 367.

[202] *Dyson v A-G* [1911] 1 KB 410; *Dyson v A-G* [1912] 1 Ch 158; SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 323.

Actions for damages, injunctions and declarations could be brought against private individuals and persons exercising public powers alike.[203] These processes did not specifically target 'administrative' authorities. The remedies available to judicially review decisions thus did not target the oversight of 'administrative' decision-makers or powers in a technical sense. Certain processes initially targeted inferior 'courts' rather than administrative bodies (the writs of certiorari and prohibition), whilst others were available against exercises of all sorts of public powers (the writ of mandamus) or against public and private persons alike (actions for damages, injunctions, and declarations).[204]

2. Reforms, Readjustments, and Challenges of the 1800s and early 1900s

The institutional arrangements in which the English model of judicial review had developed in the 17th and 18th centuries changed decisively in the 1800s and early 1900s, particularly with regard to a limited administrative centralisation and the proliferation of statutory tribunals.[205] Although these developments did not fundamentally alter judicial review as outlined in the previous section, they necessitated certain readjustments. This brought to the fore notions of judicial and administrative powers in the early 1900s.

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[203] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 323; Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 254–56.

[204] A further means of challenging administrative decisions were statutory appeals. Although lying beyond the scope of this thesis (chapter 1 IV 4, p 27), it can be noted briefly that legislation provided for statutory appeals against decisions of all sorts of statutory decision-makers, regardless of whether they were an 'administrative body' or a 'court'.

[205] Similarly, Robert Thomas, 'The Development of Administrative Law in the United Kingdom (1890–1910)' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 257, 259; Bernardo Sordi, 'Révolution, Rechtsstaat and the Rule of Law: Historical Reflections on the Emergence and Development of Administrative Law' in Susan Rose-Ackerman, Peter L Lindseth, and Blake Emerson (eds), *Comparative Administrative Law* (2nd edn, Elgar 2017) 23, 29.

Over the course of the 19th century, central government took on more responsibility for matters of local government.[206] In the 18th century, Justices of the Peace had 'enjoyed […] an almost complete and unshackled autonomy' in local administration, subject only to the supervision of the superior courts of law.[207] As Martin Loughlin puts it, central government in the 19th century 'began to replace the courts as the primary agency for regulating local administration'.[208] In the early 1800s, central government was too small to supervise local administration. The Home Office, for example, employed a mere twenty persons in 1815.[209] With the Poor Law Commission of 1834, a first central government department had been created 'for the purpose of regulating and controlling local administration'.[210] In the late 1800s and early 1900s, the main central departments responsible for the supervision of local administrative affairs were the Local Government Board,[211] the Home Office, and (since 1899) the Board of Education.[212]

[206] Martin Loughlin, 'Evolution and Gestalt of the State in the United Kingdom' in Armin von Bogdandy, Sabino Cassese, and Peter Huber (eds), *The Administrative State* (OUP 2017) 451, 478–79; William Cornish and others, *Law and Society in England 1750–1950* (2nd edn, Hart 2019) 88.

[207] Sidney and Beatrice Webb, *English Local Government*, vol 4 (Cass 1922) 352; quoted by Martin Loughlin, 'Evolution and Gestalt of the State in the United Kingdom' in Armin von Bogdandy, Sabino Cassese, and Peter Huber (eds), *The Administrative State* (OUP 2017) 451, 478.

[208] Martin Loughlin, 'Evolution and Gestalt of the State in the United Kingdom' in Armin von Bogdandy, Sabino Cassese, and Peter Huber (eds), *The Administrative State* (OUP 2017) 451, 478–79.

[209] Martin Loughlin, 'Evolution and Gestalt of the State in the United Kingdom' in Armin von Bogdandy, Sabino Cassese, and Peter Huber (eds), *The Administrative State* (OUP 2017) 451, 478.

[210] Martin Loughlin, 'Evolution and Gestalt of the State in the United Kingdom' in Armin von Bogdandy, Sabino Cassese, and Peter Huber (eds), *The Administrative State* (OUP 2017) 451, 477–78.

[211] The Local Government Board emerged in 1871 from the consolidation of the Public Health Department of the Privy Council and the Local Act Branch of the Home Office, see Martin Loughlin, 'Evolution and Gestalt of the State in the United Kingdom' in Armin von Bogdandy, Sabino Cassese, and Peter Huber (eds), *The Administrative State* (OUP 2017) 451, 478; Christine Bellamy, *Administering Central-Local Relations, 1871–1919: The Local Government Board in its Fiscal and Cultural Context* (Manchester University Press 1988).

[212] Martin Loughlin, 'Evolution and Gestalt of the State in the United Kingdom' in Armin von Bogdandy, Sabino Cassese, and Peter Huber (eds), *The Administrative State* (OUP 2017) 451, 479.

The administrative reforms did not only concern the central supervision of local government, but also the institutional design of local authorities. The Municipal Corporations Act 1835 replaced the existing heterogenous borough constitutions with a standard form of municipal corporation as representative councils elected by the local ratepayers.[213] The Act declared the corporation generally responsible for the local administration of its area, but not for judicial business, thus separating 'the functions of justice from those of the administration'.[214] The Local Government Act 1888 created elected county councils to undertake governmental functions hitherto assigned to the justices in quarter sessions, thus delegating matters previously undertaken by justices to administrative bodies.[215] The Local Government Act of 1894 replaced the ancient system of parish government by vestries with urban and rural district councils.[216] Although the 19th-century administrative arrangements were still 'rather patchwork and complicated', the aforementioned Acts of 1835, 1888 and 1894 display a process of administrative reorganisation, streamlining, and a 'limited' administrative centralisation.[217]

Notions of 'judicial' and 'administrative' powers did not fundamentally guide these reforms, but they were recast incidentally. The Local Government Act of 1888, for instance,

[213] Municipal Corporations Act 1835 (5 & 6 Will 4 c 76).

[214] Martin Loughlin, 'Evolution and Gestalt of the State in the United Kingdom' in Armin von Bogdandy, Sabino Cassese, and Peter Huber (eds), *The Administrative State* (OUP 2017) 451, 476; Stuart Anderson, 'Local Government' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 423, 431.

[215] Stuart Anderson, 'Local Government' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 423, 466–68.

[216] Local Government Act of 1894 (56 & 57 Vict c 73); Martin Loughlin, 'Evolution and Gestalt of the State in the United Kingdom' in Armin von Bogdandy, Sabino Cassese, and Peter Huber (eds), *The Administrative State* (OUP 2017) 451, 476.

[217] Martin Loughlin, 'Evolution and Gestalt of the State in the United Kingdom' in Armin von Bogdandy, Sabino Cassese, and Peter Huber (eds), *The Administrative State* (OUP 2017) 451, 476; John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 73.

used the language of 'judicial' and 'administrative' in several sections. It created the county councils for 'the management of the administrative and financial business of that county',[218] transferred the 'administrative business of the justices of the county in quarter sessions' to county councils,[219] and distinguished 'administrative' and 'non-administrative' purposes or business,[220] as well as 'administrative and judicial arrangements' incidental to the Act.[221] The Act removed what was considered 'administrative' business from the courts of quarter sessions and instead transferred it to authorities that could be considered 'purely administrative' bodies, the county councils. Here, Parliament used the language of 'administrative' and 'judicial' powers.

Nonetheless, by contrast to France and Germany, the distinction between judicial and administrative powers did not have the same structural bearing for administrative justice. In England, there was no overarching commitment to differentiating between 'judicial' and 'administrative' decision-makers or powers. The Justices of the Peace – designated by Maitland as 'the most thoroughly English of all English institutions'[222] – were not the only bodies that did not neatly fit into the binary of judicial or administrative institutions. The multi-purpose institutions most characteristic for the 19th century were statutory tribunals. During their 'formative period' between the 1830s and the 1870s, various bodies were created to implement regulatory schemes in areas as varied as tax, land partition, poor laws, factories, public health, prisons, factories, and railways.[223] Dispute-resolution mechanisms

[218] Local Government Act of 1888 (51 & 52 Vict c 41) s 1.

[219] Local Government Act of 1888 (51 & 52 Vict c 41) s 3.

[220] Local Government Act of 1888 (51 & 52 Vict c 41) ss 38 sub-s 5, 40 sub-s 2, 46 sub-ss 2 and 7.

[221] Local Government Act of 1888 (51 & 52 Vict c 41) s 59.

[222] Frederic William Maitland, *Justice and Police* (Macmillan 1885) 79.

[223] Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (CUP 2007) 3 describes the period between the 1830s and the 1870s as the 'formative period' of the modern statutory tribunal.

were considered essential for the public acceptance of the new legislative schemes, but no established body in the legal system was deemed fit to address these disputes appropriately.[224] Hence, legislation regularly conferred the jurisdiction to decide disputes arising from the relevant legislation on the same authority whose primary task was the implementation of the regulatory scheme.[225]

The superior courts were considered to be unsuited for this kind of dispute-resolution due to their complex, slow, technical, and expensive procedure.[226] Further, there was the perception that judges, trained to solve legal problems, lacked expertise regarding the new regulatory schemes. The judges themselves were reluctant to implement these schemes, which they sometimes did not even consider as law.[227] Lord Campbell maintained in the House of Lords that the disputes arising out of the railway legislation had 'nothing at all to do with law'.[228] The proposed Act, he complained, 'sought to turn the Judges of the courts of common law into railway directors.' Despite having studied 'the laws of this country' for 'a great part of his life', he acknowledged being 'wholly unacquainted with railway management, as well as [with] the transit of goods by boat'.[229] In short, Lord Campbell resolutely argued that the courts were not the right institution to resolve disputes arising from the implementation of railway legislation.

[224] Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (CUP 2007) 38 and 51.

[225] Peter Cane, *Administrative Tribunals and Adjudication* (Hart 2009) 31.

[226] Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (CUP 2007) 44.

[227] Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (CUP 2007) 44.

[228] Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (CUP 2007) 54.

[229] Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (CUP 2007) 177.

The legislature itself did not regard dispute-resolution as an essentially distinct function from the implementation of the legislative schemes. As Chantal Stebbing puts it, dispute-resolution was seen as 'an element, albeit one of a judicial character, in a wider administrative process, and one which was too deeply embedded in the administrative nature and function of the organ to be perceived as a discreet […] concern'.[230] Conferring dispute-resolution on the implementing body itself was the logical solution to a legislature 'driven by essentially pragmatic motives and objectives'.[231] Thus, tribunals exercised both administrative and judicial functions, in varying degrees depending on the precise statutory tribunal.[232]

The question as to the judicial nature of tribunals existed since their very creation, but it was discussed in more detail in the late 19th century when more and more cases against tribunal decisions were brought before the superior courts.[233] The recurring issue was whether legal rules which before had been the privilege of courts of law were applicable to statutory tribunals, too. This concerned the questions of whether swearing before a tribunal constituted perjury,[234] whether there was immunity from action for defamatory statements made in the course of tribunal proceedings,[235] or whether tribunals could claim the right to

[230] Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (CUP 2007) 62–63.

[231] Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (CUP 2007) 62–63 and 70.

[232] Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (CUP 2007) 7–8 and 159 understands 'judicial' functions as synonymous with dispute-resolution. The Poor Law Commission, or the Poor Law Board as it became known in 1847, was generally considered not judicial. The Assessment Committee, which implemented the poor laws after 1862, did have adjudicatory powers. The three land rights tribunals created in the 1830s and 1840s (the Tithe Commissioners, 1836, the Copyhold Commissioners, 1841, and the Inclosure Commissioners, 1845) had extensive adjudicatory powers.

[233] Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (CUP 2007) 299.

[234] *R v Tomlinson* (1866) LR 1 CCR 49.

[235] *Seaman v Netherclift* (1876) 2 CPD 53; *Dawkins v Lord Rokeby* (1873) 8 LR QB 255; *Goffin v Donelly* (1881) 6 QBD 307; *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431.

determine their own procedure.[236] Each of these questions was discussed distinctly, and treating a tribunal as similar to a court in one respect did not necessarily entail doing so in other regards. Generally, however, by the end of the 19th century the courts had established that a dispute-resolution function alone did not suffice to make a tribunal a 'court of law', and that the statutory tribunals were, in the words of Chantal Stebbings, 'juridically administrative and not judicial bodies'.[237]

Oversight of administration by statutory tribunals and central government departments expanded even more in the early 1900s. After the liberal government came to power in 1905, Parliament enacted wide-ranging social and economic reforms often considered to have laid the foundations of the welfare state.[238] As Paul Craig puts it, these reforms 'necessitated the development of an administrative and adjudicative mechanism on a scale different from […] before.'[239] The 'constant theme' was that 'the ordinary courts were […] kept in the background.'[240] Instead, the authority to oversee administrative decision-making and to resolve administrative disputes was vested in statutory tribunals and central government departments. As Robert Thomas puts it, '[t]his had been a haphazard and

[236] *R v Assessment Committee of St Mary Abbotts, Kensington* [1891] 1 QBD 378; all cited by Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (CUP 2007) 301–3.

[237] Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (CUP 2007) 306.

[238] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 174; Robert Thomas, 'The Development of Administrative Law in the United Kingdom (1890–1910)' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 257, 263.

[239] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 174.

[240] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 174.

erratic development. When parliament enacted such powers, there had been little, if any, consideration given to constitutional principle. It was entirely pragmatic and ad hoc.'[241]

The wide-ranging economic and social policies, and the recourse to tribunals and central government bodies, stirred discussions. This led to the well-known controversies on 'administrative law' in the 1920s and 1930s, with Lord Hewart's *The New Despotism* (1929) FJ Port's *Administrative Law* (1929) and the *Donoughmore Report* (1932).[242] Yet similar discussions on 'the exaltation of the executive' already arose, for instance in the newspaper The Times, when the liberal government implemented its first reforms.[243] The suspicion was that central government departments considered themselves beyond the control of the courts and that the administration was no longer impartial but aligned with the aims of the government of the day.[244] The judiciary was largely sceptical of these developments.[245] Lord Chief Justice Alverstone warned that 'the Judges might be called upon in the future to protect the interests of the people against the Executive.'[246] In fact, both central government departments and statutory tribunals were generally still subject to

[241] Robert Thomas, 'The Development of Administrative Law in the United Kingdom (1890–1910)' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 257, 262.

[242] Lord Gordon Hewart of Bury, *The New Despotism* (Ernest Benn 1929); FJ Port, *Administrative Law* (Longmans 1929); The Committee on Ministers' Powers Report (HM Stationery Office, 1932) ('Donoughmore Report'); Joanna Bell, *The Anatomy of Administrative Law* (Hart 2020) ch 2.

[243] 'The Exaltation of the Executive' *The Times* (2 September 1909); quoted by Robert Thomas, 'The Development of Administrative Law in the United Kingdom (1890–1910)' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 257, 267.

[244] Robert Thomas, 'The Development of Administrative Law in the United Kingdom (1890–1910)' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 257, 267.

[245] Robert Thomas, 'The Development of Administrative Law in the United Kingdom (1890–1910)' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 257, 276.

[246] 'The Judges at the Mansion House' *The Times* (19 June 1909); quoted by Robert Thomas, 'The Development of Administrative Law in the United Kingdom (1890–1910)' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 257, 267.

judicial oversight by the superior courts. As Stuart Anderson puts it, one of the most important developments was that 'judges took for granted that principles of legality and fair procedure existed and that they should apply to new decision makers, however exalted.'[247] This resembles Dicey's observation in 1915:

> Modern legislation […] has undoubtedly conferred upon the Cabinet, or upon servants of the Crown who may be guided or influenced by the Cabinet, a considerable amount of judicial or quasi-judicial authority. This is a considerable step towards the introduction among us of something like the *droit administratif* of France, but the fact that the ordinary law courts can deal with any actual and provable breach of the law committed by any servant of the Crown still preserves that rule of law which is fatal to the existence of the *droit administratif*.[248]

However, the reach and intensity of judicial review over statutory tribunals and central government departments was contested and controversial. How the principles of judicial review applied to recently created statutory decision-makers was one of the major challenges in the period in question.[249] The right to be heard and review for error of law, examined in chapters 3 and 4 of this thesis, constituted two of the more problematic legal issues within this broader conundrum.[250]

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[247] Stuart Anderson, 'Judicial Review' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 486, 521.

[248] Albert Venn Dicey, 'The Development of Administrative Law in England' (1915) 31 LQR 148, 152.

[249] Similarly, Stuart Anderson, 'Judicial Review' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 486, 522.

[250] Delegated legislation and no-certiorari clauses constituted further problematic issues, but they are not subject-matters of this thesis; on these matters, see for example The Committee on Ministers' Powers Report (HM Stationery Office, 1932) ('Donoughmore Report') 40, 61, 65.

3. Summary

For England, I have argued that judicial review was not conceptualised as 'administrative courts' overseeing 'public administration'. Instead, judicial review was characterised by several processes and remedies which allowed the superior courts to review decision-makers of various institutional natures. Judicial review was not essentially shaped by notions of 'judicial' and 'administrative' powers. This did not change during the period covered by this thesis. Yet the wide-ranging administrative reforms of the 19th and early 20th centuries raised many difficult questions, for instance how legal rules and principles, which had been developed over several centuries in different circumstances, applied to recently created decision-makers, such as statutory tribunals and central government departments.

V. Comparison

The following comparative part draws out similarities and differences between the French, German, and English models of judicial review. The first section discusses the operational relevance of notions of judicial and administrative powers for the institutional design of decision-makers. The main argument of chapter 2 is substantiated in the second section: an institutional conception of judicial review, carefully crafted around notions of 'judicial' and 'administrative' powers, prevailed in France and Germany, whereas the judicial-administrative divide was much less important to the English remedial conception. In the third section, I suggest that the different models of judicial review are best understood against the backdrop of different constitutional underpinnings in each legal system. The fourth and final section compares different modes of effectuating legal change.

1. Notions of 'Judicial' and 'Administrative' Powers: Multi-Purpose Institutions

Notions of 'judicial' and 'administrative' powers played a role in judicial review in all three jurisdictions, but in different ways. In France and Germany, the judicial-administrative divide shaped the design of decision-makers. In England, there was no overarching commitment to distinguishing between judicial and administrative powers, and decision-makers were not generally designed with the distinction in mind. To substantiate this point, it is useful to examine multi-purpose institutions. It is a striking similarity that each of the three jurisdictions had decision-makers which exercised both administrative and judicial functions. The Council of State and the Councils of Prefectures in France as well as the first-instance administrative courts in Germany acted both as administrative courts and as part of the active administration. In England, Justices of the Peace, statutory tribunals, and

central government departments (such as the Local Government Board and the Board of Education) exercised both administrative and judicial functions.

But the multi-purpose institutions in France and Germany were different from the English ones in an important regard: the former were created by a legislature actively endorsing the distinction between judicial and administrative powers. Although conferring both functions on the same institution, the legislation on German first-instance administrative courts distinguished between administrative and judicial exercises of power, differentiated between administrative and judicial decision-making procedures, and set apart matters which were to be decided administratively from those to be decided judicially. In their function as administrative bodies, the District Councils in Baden proceeded administratively and handed down so-called 'administrative acts' (*Verwaltungsakte*).[251] In their function as first-instance administrative courts, the District Councils adhered to a judicial procedure and handed down 'judgments' (*Urteile*). Similarly, the 'purely administrative departments' and the 'adjudication department' of the French Council of State can be considered two distinct manifestations of one institution, with different decision-making procedures and types of decisions. The purely administrative departments of the Council of State issued 'administrative acts' (*des actes administratifs*), whereas its adjudication department gave 'judgments' (*des arrêts*).

The English statutory tribunals, by contrast, were created without regard to a distinction between administrative and judicial powers, which was mostly unmentioned in the legislation creating these statutory bodies. It was shown in the English part above that Parliament acted pragmatically and without a pervasive regard to constitutional principle when it conferred both the implementation of a regulatory scheme and the resolution of

[251] On this core concept of German administrative law, see Mahendra Pal Singh, *German Administrative Law in Common Law Perspective* (Springer 2001) 63.

disputes arising from it on the same institution.[252] In comparison, the French and German legislators were acutely attentive to the judicial-administrative divide. This is particularly palpable when considering the intricate vocabulary used in German legislation to differentiate between matters to be decided by administrative authorities and matters for administrative courts.[253] In England, Parliament occasionally used the categories of 'judicial' and 'administrative' in the administrative reforms of the 19th century, for example when delegating functions hitherto exercised by the Courts of Quarter Sessions on the newly created County Councils under the Local Government Act 1888.[254] But distinguishing between judicial and administrative powers was not a pervasive feature of English legislation in the ways it was in France and Germany.

In England, the language of 'judicial' and 'administrative' powers mostly came up at a later stage, namely when questions arose in the superior courts whether legal rules hitherto reserved to courts of law were applicable to tribunals (or central government departments), too. English judges thus applied the judicial-administrative distinction retrospectively to decision-makers which had been created without real regard to the distinction. This happened in a piecemeal fashion, given that these questions rarely arose at an abstract level but usually concerning a precise legal question in a specific case, such as whether swearing before a tribunal constituted perjury, whether there was immunity from action for defamatory statements, or how the principles of natural justice applied to a particular decision-making process.[255]

[252] Above, IV 2 (p 83).

[253] Above III 2 (p 59).

[254] Above, IV 2 (p 81).

[255] Above, IV 2 (p 84).

How precisely English judges in their legal reasoning used the language of 'judicial' and 'administrative' will be substantiated for the right to be heard and error of law review in chapters 3 and 4 of this dissertation. But it can be anticipated here that in the absence of an entrenched distinction between judicial and administrative decision-makers, the ways in which English judges classified certain functions as 'judicial' or 'administrative' did not necessarily align with a clearly discernible institutional nature of the decision-maker in question. Thus, although the Local Government Board was conceived as an 'administrative body', English judges could hold that it needed to 'act judicially' where it was entrusted with 'judicial duties'.[256] In France and Germany, by contrast, the institutional nature of a decision-maker generally aligned with the functional nature of its decision. For the multi-purpose institutions mentioned, this was possible due to the meticulous differentiation of judicial and administrative departments or manifestations of the same institution. French or German decision-makers of the active administration exercised 'administrative', as opposed to 'judicial' functions: they were not required to 'act judicially'. In France and Germany, a different set of legal rules and principles applied depending on whether the decision-maker was part of the active administration or an administrative court.

Viewed from a comparative perspective, the absence of an entrenched institutional distinction between judicial and administrative decision-makers made the English discussions on 'judicial', 'quasi-judicial', 'ministerial', and 'administrative' powers and functions seem so ill-suited.[257] These categories were extensively discussed in English law and they significantly shaped judicial review until the 1960s.[258] In late-19th and early-20th

[256] *R v Local Government Board ex p Arlidge* [1915] AC 120, 132. A detailed discussion follows below in chapter 3.

[257] The Committee on Ministers' Powers Report (HM Stationery Office, 1932) ('Donoughmore Report') 74–75; SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 29–51.

[258] Jeffrey Jowell, 'Restraining the State: Politics, Principle and Judicial Review' (1997) 50 Current Legal Problems 189, 191 makes the point that leaving behind the distinction between judicial and administrative

century France and Germany, 'judicial' and 'administrative' powers were reconceptualised and discussed at great length, too. For France, this was substantiated in the context of the rejection of the theory of the minister-judge and the ensuing scholarly discussions on what makes a decision-maker a judge. Broadly, lawyers moved from a 'purely material' conception of '*la juridiction administrative*' to a more formal conception. Deciding a conflict between two parties was no longer sufficient to make a decision-maker a 'judge' and his decision a 'judgment'; certain principles of institutional design (eg a minimum degree of judicial independence) and basic procedural rules (eg the right to be heard and the publicity of debates) were constitutive for the exercise of judicial powers, too.[259] This resembles the English discussions on the status of statutory tribunals in the late 1800s: dispute-resolution functions alone did not make a tribunal a 'court of law'.[260] Yet the constitutional underpinnings of these debates, which will be discussed in due course, were vastly different. France adhered to a strictly conceived notion of separation of powers, whereas England did not.[261]

For the practical side of judicial review, the most important difference between the multi-purpose institutions was that the English statutory tribunals and central government departments were generally subject to judicial review by the ordinary courts, even if the scope and intensity of review was contested and controversial. In France and Germany, the

powers was a condition to enter into the next phase of judicial review in the mid-1960s, particularly *Ridge v Baldwin* [1964] AC 40.

[259] Above, II 2 (p 49).

[260] Above, IV 2 (p 84).

[261] John Allison, *The English Historical Constitution: Continuity, Change and European Effects* (CUP 2007) 76 and 102.

multi-purpose institutions were themselves 'administrative courts'. They were not subject to oversight by 'the ordinary courts'.[262]

2. Institutional and Remedial Conceptions of Judicial Review

In the above parts on France, Germany and England, I outlined three different models of judicial review. The French and German institutional models of judicial review were carefully crafted around notions of 'judicial' and 'administrative' powers, whereas the English remedial model was much less attuned to the judicial-administrative divide.

In France and Germany, judicial review was construed as the judicial oversight by 'administrative courts' over the exercise of administrative powers by the 'public administration'. In England, by contrast, judicial review was not conceived as judicial oversight of 'administrative' decision-makers or powers. In addition to the obvious point that England had no separate 'administrative courts', I argued further that there was further no centralised and hierarchically organised 'public administration'. On the remedial conception, judicial review was characterised by a variety of processes and remedies available in the English superior courts. These processes did not target the oversight of 'administrative' powers in a technical sense. Certain processes initially targeted inferior 'courts' rather than administrative bodies (the writs of certiorari and prohibition), whilst others were available against exercises of all sorts of public powers (the writ of mandamus)

[262] Whilst judgments of the lower administrative courts in France and Germany (the administrative courts of first instance in Germany and, for example, the French Councils of Prefecture) could be appealed before the French Council of State and, respectively the German Administrative High Courts, judgments by administrative courts could not be appealed before the 'ordinary courts'.

or against public and private persons alike (actions for damages, injunctions and declarations).

The processes and remedies available in the French and German administrative courts were not mentioned so far since they have less explanatory force on the institutional conception of judicial review. Comparing the French and German processes to the English model, two points stand out. First, the institutional conception of judicial review in France and Germany was closely mirrored at the remedial level in the sense that there were processes specifically targeting the oversight of administrative powers exercised by the active administration. Second, compared to the variety of processes and the corresponding forms of relief in England, the French and German administrative courts were largely confined to quashing unlawful administrative decisions.

As will be recalled, in England decisions could not only be quashed (writ of certiorari), but decision-makers could also be prohibited from doing a certain thing (writ of prohibition, prohibitory injunction) or compelled to do a certain thing (writ of mandamus, mandatory injunction). Courts could also declare the law on a certain contentious point without giving a specific form of relief (declaration).[263] Further, officials incurred civil liability for unlawful decisions via actions for damages (collateral challenges via trespass, action on the case etc.). Yet none of these remedies was developed specifically for the purpose of overseeing a 'public administration'. Instead, the English remedies had diverse historical origins and were readjusted or developed further in order to serve as a means of judicially reviewing the exercise of administrative powers broadly conceived.[264]

[263] *Dyson v Attorney General* [1911] 1 KB 410; SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 370–73. This is discussed in more detail below in chapter 4.

[264] Similarly, Gavin Drewry, 'Judicial Review: The Historical Background' in Michael Supperstone, James Goudie, and Paul Walker (eds), *Judicial Review* (5th edn, LexisNexis 2014) 41, 44.

In France, the *recours pour excès de pouvoir* was developed by the adjudication department of the Council of State in the mid-19th century specifically for the purpose of overseeing administrative action.[265] Whilst it may be translated literally as 'action for ultra vires', it covered more ground than the English notion of 'ultra vires'.[266] The *recours pour excès de pouvoir* regrouped four precepts of review: an obvious lack of jurisdiction (*incompétence*), formal or procedural legal error (*vice de forme*), error of law (*violation de la loi et des droits acquis*), and a ground of review which resembled the English rationality review and the relevance and purpose grounds (*détournement de pouvoir*).[267] Importantly, where an administrative decision was unlawful on one of these grounds, the Council of State would merely quash the administrative decision.[268] The administrative authority (ie the primary decision-maker) then had to determine the consequences of the annulation, for instance by making a new decision.[269] The Council of State did not have general prohibitory or mandatory powers. Only on a different remedy, the *contentieux de pleine juridiction*, the Council of State could compel an administrative authority to do a certain thing, namely

[265] Grégoire Bigot, *Ce Droit qu'on dit Administratif: Études d'Histoire du Droit Public* (La mémoire du droit 2015) 41.

[266] Similarly, CJ Hamson, *Executive Discretion and Judicial Control: An Aspect of the French Conseil d'Etat* (Stevens 1954) 7.

[267] On the development of the *recours pour excès de pouvoir*, Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 1 (2nd edn, Berger-Levrault 1896) 17–18 and vol 2 (2nd edn, Berger-Levrault 1896) 402–13; on the four precepts of review, Grégoire Bigot, *Ce Droit qu'on dit Administratif: Études d'Histoire du Droit Public* (La mémoire du droit 2015) 52–59; Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002) 61–69; Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 962–75; critical towards distinguishing the different precepts of review, Léon Duguit, *Les Transformations du Droit Public* (Colin 1913) 192. For a case in which *détournement de pouvoir* resembles the English irrationality ground, Council of State, 16 March 1923 (*Abbé Gauthier*); for a case in which *détournement de pouvoir* resembles the English relevance and purpose grounds, Council of State, 22 May 1896 (*Carville*); both cases are discussed in Maurice Hauriou, *La Jurisprudence Administrative de 1892 à 1929*, vol 2 (Sirey 1929) 145–49 and 319–22.

[268] David Capitant, 'Geschichte der Verwaltungsgerichtsbarkeit in Frankreich' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 1335, 1367; Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 974; Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 1 (2nd edn, Berger-Levrault 1896) 17.

[269] Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 973.

paying damages or complying with the provisions of a contract.[270] But this process was constrained to certain kinds of disputes, such as actions for damages, disputes arising from government contracts, local elections, or monetary disputes, such as taxation.[271] The *Cadot* case discussed in the French part above concerned an action for damages and thus fell under the *contentieux de pleine juridiction*.

Similarly, the German administrative courts were largely confined to quashing administrative decisions. They had no prohibitory or mandatory powers.[272] In Germany, actions for damages were decided by the ordinary courts.[273] As for the administrative courts, mandatory judgments first came up in the British and American occupation zones after the Second World War, possibly inspired by the English mandatory injunctions and the writ of mandamus.[274] The legislation in the late 1800s and early 1900s merely stated

[270] In addition to the *recours pour excès de pouvoir* and the *recours de pleine juridiction*, two kinds of exceptional processes came before French administrative courts: *the recours d'interprétation* and *the recours de répression*. In the former, administrative courts authoritatively declared the content of an 'administrative act', for instance where an ambiguous administrative act was relevant to a dispute on property rights before an ordinary court, the latter (on account of the strict notion of separation of powers) having no jurisdiction to determine the content of an ambiguous administrative act. In the *recours de répression*, statute expressly gave an administrative court the jurisdiction to issue fines for contraventions of statute and regulations. Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 956; Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 602 and 630.

[271] The *recours de pleine juridiction* was also available in challenges of elections and in monetary disputes, eg on taxation or pensions; Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) Livre 5; Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 956–59; Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002) 269 asserts that the boundaries between the *recours pour excès de pouvoir* and the *contentieux de pleine juridiction* became blurry as the scope of the former was significantly extended in the late 1800s and early 1900s.

[272] Karl-Peter Sommermann, 'Entwicklungspfade europäischer Verwaltungsgerichtsbarkeit' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 1735, 1751–3; for the details on Prussia, see Detlef Merten, 'Geschichte der Verwaltungsgerichtsbarkeit in Preußen' in ibid, 179, 255; on Württemberg, see Martin Ibler, 'Geschichte der Verwaltungsgerichtsbarkeit in Württemberg' in ibid, 344, 382.

[273] Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (Duncker und Humblot 1895) 215–17.

[274] Sommermann, 'Entwicklungspfade europäischer Verwaltungsgerichtsbarkeit' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 1735, 1753.

that the German administrative courts were to quash unlawful administrative decisions. There was no consistent vocabulary for this process in the period covered by this thesis, but the academic Otto Mayer used and circulated the term *Anfechtungsklage*, which is still used nowadays.[275]

Ultimately, whilst the English prerogative writs, collateral challenges in actions for damages, and injunctions and declarations provided for various forms of reliefs, the French and German administrative courts were largely confined to quashing unlawful decisions. But the *recours pour excès de pouvoir* and the *Anfechtungsklage* specifically targeted the judicial oversight of administrative powers exercised by administrative bodies. Hence, the pivotal role of the distinction between judicial and administrative powers at the level of institutions ('administrative courts' overseeing 'public administration') was closely mirrored at the remedial level.

3. Constitutional Foundations

That judicial review was carefully crafted around notions of judicial and administrative powers in France and Germany, but not in England, can be explained when considering the respective constitutional foundations of judicial review. The key constitutional principles underlying the judicial oversight of administrative action differed between the three jurisdictions. Separation of powers was pivotal in France, whereas the interplay of the monarchic principle and the *Rechtsstaat* structured judicial review in Germany. In England,

[275] Karl-Peter Sommermann, 'Entwicklungspfade europäischer Verwaltungsgerichtsbarkeit' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 1735, 1751; in legislation, the remedy was sometimes referred to as '*Anfechtungsklage'* (Saxony), but also as '*Recurs zum Verwaltungsgerichtshof'* ('appeal to the Administrative High Court', Hessen), or '*(Rechts-)Beschwerde*' ('legal complaint', Württemberg).

the Rule of Law and broader notions of the supremacy of the common law were foundational for judicial review.[276]

The French conception of separation of powers shaped the institutional design of decision-makers. It was outlined above that separation of powers was understood to entail that the ordinary courts were forbidden to interfere with administrative matters. This gave rise to review mechanisms within the executive, namely in the Council of State. Over the course of the 19th century, these review mechanisms were formalised, and the adjudication department of the Council of State increased its independence from the executive. In a sense, executive review was 'judicialised'.[277] The introduction of 'delegated justice' in 1872 and the rejection of the 'theory of the minister-judge' in the judgment in *Cadot* in 1889 were two episodes in this broader development of an increasingly 'judicial' adjudication department in the Council of State, its growing independence and neater separation from the executive.[278]

In Germany, separation of powers was not a key constitutional principle. The discussions among German jurists on Montesquieu's doctrine of separation of powers, and the question of whether the three branches of government were separated in Germany are complex.[279] Particularly in the early-to-mid 19th-century, German jurists widely rejected separation of powers as 'revolutionary', 'democratic', and 'French', all adjectives being used in a

[276] Similarly, Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 235.

[277] John Allison, *The English Historical Constitution: Continuity, Change and European Effects* (CUP 2007) 77–78.

[278] For an account on how these legal developments related to broader social and political change, see Marie-Joëlle Redor, *De l'État Légal à l'État de Droit: L'évolution des conceptions de la doctrine publiciste française, 1879–1914* (Economica 1992) 317–26.

[279] Stefan Korioth, 'Monarchisches Prinzip und Gewaltenteilung – Unvereinbar?: Zur Wirkungsgeschichte der Gewaltenteilungslehre Montesquieus im Deutschen Frühkonstitutionalismus' (1998) 37 Der Staat 27.

derogatory sense.[280] The common opinion was that separation of powers was incompatible with 'the monarchic principle', ie the idea that all public powers resided within the monarch.[281] The monarch was thought merely to delegate some of his powers to institutions which then exercised these powers on his behalf. This principle was inscribed in several constitutions of the early 19th century, such as the Bavarian Constitutional Charter of 1818: 'The King is the head of State, assembles all State powers in his person, and exercises the same under the provisions of this Constitutional Charter given by him.'[282] The so-called *Wiener Schlussakte* of 1819/20, an addition to the Constitution of the German Federation of 1815 stipulated that 'the entire State powers [*Staatsgewalt*] must be assembled in the head of State'.[283]

The *Rechtsstaat* served as a sort of constitutional counterforce. It was invoked to subject the State powers, and particularly the public administration, to the law. This necessitated

[280] Stefan Korioth, 'Monarchisches Prinzip und Gewaltenteilung – Unvereinbar?: Zur Wirkungsgeschichte der Gewaltenteilungslehre Montesquieus im Deutschen Frühkonstitutionalismus' (1998) 37 Der Staat 27, 38.

[281] Stefan Korioth, 'Monarchisches Prinzip und Gewaltenteilung – Unvereinbar?: Zur Wirkungsgeschichte der Gewaltenteilungslehre Montesquieus im Deutschen Frühkonstitutionalismus' (1998) 37 Der Staat 27, 30; Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland, Vol 2: Staatsrechtslehre und Verwaltungswissenschaft, 1800–1914* (Beck 1992) 319; Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 235; Bernd Wunder, 'Verwaltung, Amt, Beamter' in Otto Brunner, Werner Conze, and Reinhart Koselleck (eds), *Geschichtliche Grundbegriffe: historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol 7 (Klett 1992) 1, 72; Thomas Würtenberger, 'Kontrolle von Verwaltungshandeln ab 1806: Justizstaat versus Administrativjustiz' in Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 31, 38.

[282] Eg the Bavarian Constitutional Charter of 1818, title II para 1: 'Der König ist das Oberhaupt des Staats, vereiniget in sich alle Rechte der Staatsgewalt, und übt sie unter den von Ihm gegebenen in der gegenwärtigen Verfassungs-Urkunde festgesetzten Bestimmungen aus.'

[283] *Monarchisches Prinzip*, Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 30 and 235; the 'Wiener Schlussakte' of 1819/20, an addition to the Constitution of the German Federation of 1815 (*Deutsche Bundesakte*), declared in art 57: 'Da der deutsche Bund, mit Ausnahme der freien Städte, aus souverainen Fürsten besteht, so muß dem hierdurch gegebenen Grundbegriffe zufolge die gesammte Staats-Gewalt in dem Oberhaupte des Staats vereinigt bleiben, und der Souverain kann durch eine landständische Verfassung nur in der Ausübung bestimmter Rechte an die Mitwirkung der Stände gebunden werden.'

an institution overseeing the lawfulness of administrative action. The competing conceptions under discussion in Germany were examined above.[284] They ranged from an administrative review from within the executive (similar to the French model in the early 19th century), to a judicial oversight by the ordinary courts (similar to the English model) to what became the German model of judicial review from the 1860s onwards. This was characterised by separate and independent Administrative High Courts and double-faced administrative courts of first instance within the hierarchy of the public administration, which acted as administrative courts in certain matters and as part of the active administration in others. This institutional setup was based on the notion of the *Rechtsstaat*, rather than on a strict understanding of separation of powers akin to that prevailing in France. Conversely, the notion of *état de droit* in France was a translation from the German *Rechtsstaat* and only gained wider currency after the Second World War.[285]

Comparing the German constitutional discourse to England, it becomes evident that even if the notion of separation of powers was widely rejected in the 19th century, German law nonetheless built on a distinction between judicial and administrative powers, which was unknown in England. The academic Lorenz von Stein, for instance, defined the concept of the *Rechtsstaat* as requiring that 'the executive' was bound by statute and that remedies were available to bring unlawful administrative action before 'the courts'.[286] Towards the end of the 19th century, Otto Mayer asserted that despite all the dismissive remarks by

[284] III 1 (p 52).

[285] RC van Caenegem, 'The Rechtsstaat in Historical Perspective' in RC van Caenegem, *Legal History: A European Perspective* (Hambledon 1991) 186; Marie-Joëlle Redor, *De l'État Légal à l'État de Droit: L'évolution des conceptions de la doctrine publiciste française, 1879–1914* (Economica 1992) 9–10 points out that Léon Duguit developed the principle of an *état de droit* in 1911, yet this did not have much of an (immediate) impact.

[286] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 72.

German scholars, German law 'has adopted the separation of powers following the French model', even if the principle was construed differently.[287]

In England, separation of powers had an uncertain constitutional status. As John Allison puts it, separation of powers was not a 'declared constitutional principle' but a 'customary historical constitutional practice' which was followed to various degrees of consistence, without being declared authoritatively.[288] Where English lawyers used a notion of separation of powers, this mostly served to emphasise the independence of judges.[289]

Whilst 'the executive' or 'the public administration' were a crucial component of the French and German understandings of separation of powers and the German notion of the *Rechtsstaat*, an abstract notion of 'public administration' did not exist in England. Instead, Dicey's account of the Rule of Law equated public officials with private persons and required that unlawful behaviour could be brought before 'the ordinary courts', regardless of whether a person had exercised public powers.[290] The further foundation of judicial review in England lay in the development of new remedies by the common law judges during the revolutionary struggles of the 17th century. As was mentioned above, the abolition of the prerogative courts, notably of Star Chamber in 1641, prevented the creation of a separate 'public law' or 'administrative courts' in England.[291]

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[287] Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (Duncker und Humblot 1895) 67–68: '… die vielverkannte Trennung der Gewalten, die wir nach französischem Vorbild übernommen und aller Verwahrungen ungeachtet in thatsächlicher Geltung und Übung haben'.

[288] John Allison, *The English Historical Constitution: Continuity, Change and European Effects* (CUP 2007) 75–76, 102.

[289] John Allison, *The English Historical Constitution: Continuity, Change and European Effects* (CUP 2007) 78–87.

[290] IV 1 (p 70, 72).

[291] IV 1 (p 70).

4. Legislative Reforms Effectuating Legal Change

Judicial review in 19th-century France and Germany was importantly reshaped by rationalist design from scratch, via legislation. Particularly in Germany, the legislation introducing administrative courts minutely regulated the institutional frameworks of judicial review. Similarly, the introduction of the Council of State (in 1799), its adjudication department (in 1806), and 'delegated jurisdiction' (in 1872) were the doing of the legislator. In 19th-century England, the legislator reformed the judiciary, brought about a limited administrative centralisation, created various new decision-makers, and delegated dispute-resolution functions to statutory tribunals and central government departments. However, the English model of judicial review, characterised by a variety of processes and remedies available in the superior courts, was not fundamentally altered by these reforms. As the Italian legal historian Bernardo Sordi puts it, there was:

> [no] epochal change in the state organization or the adoption of new legal categories comparable to the French *administration publique* or to the *Staatsgewalt* of the German tradition. Instead, […] England gradually grafted administrative innovations onto the fabric of common law, updating but not altering the furrow of tradition and the relative conceptual universe.[292]

Whilst the German and French legislators fundamentally reformed the model of judicial review in the 19th century, the English legislator merely created new decision-makers and statutory powers. When English judges faced the task of resolving disputes involving these new powers and decision-makers, they approached the matter with the processes and the precepts of review they had developed over several centuries.[293]

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[292] Bernardo Sordi, 'Révolution, Rechtsstaat and the Rule of Law: Historical Reflections on the Emergence and Development of Administrative Law' in Susan Rose-Ackerman, Peter L Lindseth, and Blake Emerson (eds), *Comparative Administrative Law* (2nd edn, Elgar 2017) 23, 29.

[293] Similarly, Gavin Drewry, 'Judicial Review: The Historical Background' in Michael Supperstone, James Goudie, and Paul Walker (eds), *Judicial Review* (5th edn, LexisNexis 2014) 41, 44; Conor McCormick, 'The Historical Foundations of Judicial Review in the United Kingdom' in Stefano Mannoni and Giacinto della

The respective importance of legislative reforms points to broader differences in how each legal system effectuated legal change over time. Legislators, judges, and academics played divergent roles in each jurisdiction in this regard.[294] The role played by each of these groups additionally depended on whether we look at the precepts of review or at the institutional arrangements of judicial review. In France and Germany, judges and academics significantly shaped the legal rules and principles on the conditions under which judges intervened with administrative action, ie the precepts of review.[295] Concerning the institutional arrangements for judicial review, however, legislators were key. Whilst the relevant legislation was (particularly in Germany) informed by academic debate, it was ultimately the German and French legislators who determined which institution oversaw the lawfulness of administrative action. In comparison to the introduction of separate administrative courts in Germany and the legislative reforms of the Council of State in France, the English model of review remained largely untouched by the administrative reforms effectuated by Parliament in the 1800s and early 1900s.

Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 193, 196, points to the contrast between the rationalisation of court structures via the Judicature Acts and the 'legislative vacuum in which the interconnected procedures and standards for judicial review had developed […], and which remained untouched by legislative intervention' between 1890 and 1910.

[294] On the broader picture, RC van Caenegem, *Judges, Legislators, and Professors: Chapters in European Legal History* (CUP 1987).

[295] John Bell, 'Comparative Administrative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 1250, 1267 and 1273; John Bell, 'The Role of Doctrinal Writing in Creating Administrative Law: France and England Compared' (2018) 15 Glossae. European Journal of Legal History 141, 151. This will be substantiated in chapters 3 and 4.

VI. Conclusion

In this chapter, I have argued that judicial review was construed institutionally as administrative courts overseeing decision-makers which together constituted a 'public administration' in France and Germany, whereas the English remedial conception of judicial review did not specifically target decision-makers of an 'administrative' nature. This aligns with the principal argument of this thesis: judicial review was carefully crafted around notions of 'judicial' and 'administrative' powers in France and Germany, but less so in England. Further, I have shown that the institutional arrangements of judicial review were shaped by divergent constitutional frameworks, notably the French understanding of separation of powers, the interplay of the 'monarchic principle' and the *Rechtsstaat* in Germany, and the Rule of Law in England. Examining how each legal system conceptualised 'judicial' and 'administrative' powers thus allowed us to assess similarities and differences between the three jurisdictions. Besides the fundamental discrepancy between the continental institutional models and the English remedial model, this analytical lens also brought to the fore differences between the institutional arrangements of France and Germany.

The design of decision-makers constitutes an integral part of the principal argument of the thesis. In addition, the present chapter laid the ground for the more doctrinally focused chapters. It will be seen that in a comparative perspective, procedural review (chapter 3) and review for error of law (chapter 4) are best understood against the backdrop of the different institutional and remedial frameworks in each jurisdiction.

Chapter 3 – Procedural Review: The Provision of a Hearing

I. Introduction

This chapter examines review on the ground of an unlawful decision-making procedure, especially for failure to give a hearing required by law. The aim is to investigate whether and how notions of 'judicial' and 'administrative' powers played a role in determining the procedural obligations of decision-makers to notify or hear affected parties when making a decision or taking measures adversely affecting them. The 'provision of a hearing' is thus understood broadly. Importantly, the term 'a hearing' as used in the present chapter is not confined to oral hearings but also encompasses written submissions. Giving affected parties an opportunity to participate in the decision-making process, be it via oral or written submissions, is a constitutive element of fair procedures. Other elements of procedural fairness, such as the rule against bias, or the duty to give reasons, are not the subject-matter of this chapter.

English, French, and German law had (and still have) different legal concepts addressing 'the provision of a hearing'. These will be explained in greater detail when discussing each jurisdiction. To give an example, the most common terms in England are 'the right to be heard' and the '*audi alteram partem*' principle.[1] The English ground of review concerned with the provision of a hearing is 'natural justice', or in modern terminology 'procedural fairness'.[2]

[1] Gavin Drewry, 'Judicial Review: The Historical Background' in Michael Supperstone, James Goudie, and Paul Walker (eds), *Judicial Review* (5th edn, LexisNexis 2014) 41, 46.

[2] Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) 127 and 137.

The political and historical backdrop of the chapter, as of the entire thesis, is the significantly increased scope and density of government activity and regulation in England, France, and Germany over the course of the 19th century.[3] Where public authorities regulate and possibly interfere with any area of life, opportunities for the subjects (or citizens) to speak up in order to raise objections, clarify the facts, and possibly put forward legal arguments, become more important in proportion to the expansion of the powers wielded by public authorities.[4]

In the context of the wide-ranging administrative reforms discussed in chapter 2, it was shown that in all three legal systems covered by this thesis, previously existing decision-makers were fundamentally reformed and numerous new decision-makers created. This raised the question of whether the provision of a hearing depended on the nature of the public authority involved. Were the parties heard in any event, regardless of whether the decision-maker was a court of law, an administrative authority, a multi-purpose body, or of indeterminate nature? Or did the institutional nature of the decision-maker have an impact on whether and how the affected parties could participate in the decision-making process?

The debates among English jurists in the late 1920s and early 1930s on the growing administrative state provide an insightful example for this interplay between considerable administrative reforms and the participation of affected parties in decision-making. In fact, the alleged inadequacy of departmental decision-making procedures was crucial to Lord

[3] Giacinto della Cananea, 'Commonality and Diversity in Administrative Justice: Fin de Siècle' in Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 3, 6; Stephen Sedley, *Lions Under the Throne: Essays on the History of English Public Law* (CUP 2015) 48.

[4] The interplay between major government growth and participation in decision-making has been analysed in some detail for the United States of America, often in the context of the New Deal in the 1930s and 1940s, but also in the decades thereafter. See Reuel E Schiller, 'The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law' (2007) 106 Michigan Law Review 399; Jerry L Mashaw, 'The American Model of Federal Administrative Law: Remembering the First One Hundred Years' (2010) 78 George Washington Law Review 975, 980; Charles A Reich, 'The New Property' (1964) 73 Yale Law Journal 733.

Hewart's criticism on 'administrative lawlessness' in *The New Despotism* (1929).[5] According to the *Donoughmore Report* (1932), largely a response to Lord Hewart, the desire to safeguard the principles of natural justice, 'more than any other factor […] has inspired the criticisms levelled against the executive, and against Parliament for entrusting judicial and quasi-judicial functions to the Executive.'[6]

The main argument of the present chapter is that judicial review on the ground of an unlawful decision-making procedure was carefully crafted around notions of 'judicial' and 'administrative' powers and decision-makers in France and Germany, but less so, and in a different sense, in England. Chapter 3 thus outlines the principal argument of the thesis insofar as an administrative decision was challenged on the ground of failure to give a hearing required by law.

It is useful to elaborate on this main argument insofar as it concerns English law. The reason is that English judges frequently used the language of 'judicial' and 'administrative' powers in their reasoning on whether affected parties needed to be heard. The judicial-administrative divide had a higher operational relevance in England for procedural review, when compared to the other two subject-matters examined in this thesis, namely the institutional dimension of judicial review (chapter 2) and judicial review on the ground of an error of law (chapter 4). It is crucial to be precise. My claim *is not* that notions of 'judicial' and 'administrative' powers were entirely absent or irrelevant to procedural review in England. To the contrary, they had a remarkable relevance up until the 1960s. The judicial-administrative divide was jettisoned only after Lord Reid expressed very

[5] Lord Gordon Hewart of Bury, *The New Despotism* (Ernest Benn 1929) 44, 47, and 167.

[6] The Committee on Ministers' Powers Report (HM Stationery Office 1932) ('Donoughmore Report') 76; Joanna Bell, *The Anatomy of Administrative Law* (Hart 2020) 42–45.

elementary doubts on its usefulness in *Ridge v Baldwin* (1964).[7] For the period between the 1860s and the 1910s, my claim is that notions of 'judicial' and 'administrative' powers shaped procedural review in England to an important degree, but less so and in a different sense than on the continent. In England, the distinction caused a lot of confusion. Notions of 'judicial' and 'administrative' powers did not crystallise into a clearcut distinction which could have provided English judges with reliable guidance on whether and how decision-makers needed to hear affected parties.

Crucially, and in stark contrast to French and German law, distinguishing between 'judicial' and 'administrative' powers in England did not have a legislative, institutional and constitutional underpinning. As was outlined in the previous chapter 2, French and German law operated with an entrenched distinction between judicial and administrative powers and decision-makers, whereas English law did not. The French and German legislators enacted meticulous statutory provisions, differentiating 'judicial' and 'administrative' powers, functions, decision-makers, and – as the present chapter will substantiate – decision-making procedures. In England, by contrast, although judges commonly invoked notions of 'judicial' and 'administrative' powers in their reasoning on the common law principle of natural justice, they could not build on an entrenched and legislatively predetermined distinction. As was explained in chapter 2, it was not a structural feature of English law generally to distinguish between judicial and administrative decision-makers.

Within the confines of this introduction, the overall argument of the present chapter necessarily remains a little abstract. This ought to change incrementally as the chapter progresses. The chapter's ensuing parts examine review on the ground of an unlawful

[7] *Ridge v Baldwin* (1964) AC 40; Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) 131–37.

decision-making procedure in France, Germany, and England, respectively, and analyse whether and how each legal system's approach to procedural review was shaped by notions of 'judicial' and 'administrative' powers. The chapter's final part offers a detailed comparative analysis, which substantiates the abovementioned main argument. Further, I draw out the different regulatory techniques used in each legal system, particularly concerning the scope of statutory rules and the interplay of written and unwritten law.

II. France: Judicial and Administrative Decision-Making Procedures

As was shown in the previous chapter 2, French law differentiated between 'administrative courts' (*la juridiction administrative*) and the various decision-makers of 'the active administration' (*l'administration active*). The present chapter illustrates that the legal rules on the provision of a hearing in France essentially depended on whether a decision-maker belonged to one or the other category, and on the corresponding 'judicial' or 'administrative' nature of his decision. When the adjudication department of the Council of State made a 'judgment' (*un arrêt*), the set of procedural rules differed from those applicable in instances where an administrative authority rendered an 'administrative act' (*un acte administratif*). The ensuing part on procedural review in France takes its cue from this discrepancy. The first section examines the decision-making procedure in the French administrative courts, whereas the second section investigates rules on the provision of a hearing in the active administration. Subsequently, the third section contrasts the two forms of procedures.

Two preliminary things ought to be explained right away.

First, several legal concepts pertaining to 'the provision of a hearing' existed in the French legal vocabulary. Interestingly, some of these legal concepts were primarily used in judicial proceedings, whereas others were mostly used for the active administration. This illustrates that a different conceptual and doctrinal framework applied, depending on whether a certain matter was decided by the 'judgment' of an 'administrative court' (eg the Council of State's adjudication department) or by an 'administrative act' rendered by a decision-maker of the 'active administration' (eg by a local administrative authority or by the 'purely

administrative departments' of the Council of State).[8] Concerning judicial proceedings, there was the idea that the parties of a dispute ought to be given the opportunity to respond to the remarks of the opposing party ('contradictory debate'[9]), or the idea that parties could present evidence and raise objections without an excessive degree of formality ('free defence'[10]). Whilst the orality of court proceedings was considered less important than in Germany and England, the 'public nature of debates' was seen as an important safeguard for ensuring the legitimacy of the judicial process in France.[11] The generic term 'judicial forms' was sometimes used to refer to the procedures of courts generally.[12] By contrast, the notion of '*vice de forme*' ('formal/procedural error'[13]) as one of the grounds of review in the so-called *recours pour excès de pouvoir* was used to refer to a procedural error in the active administration.

The second preliminary observation is that review on the ground of an unlawful decision-making procedure was less present in the case law of the French Council of State than in German and English courts. Possible reasons for this discrepancy will be discussed below.[14]

[8] The different departments of the Council of State were discussed above in chapter 2 II (p 42).

[9] *Le débat contradictoire*.

[10] *La libre défense*; eg Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 988 Berthélemy used 'la libre défense' in the context of the Councils of Prefecture; Jacques Chevallier, 'Réflexions sur l'arrêt Cadot' (1991) 9 *Droits* 79, 91.

[11] *La publicité des débats*; eg Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 520; Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 981–82; Jacques Chevallier, 'Réflexions sur l'arrêt Cadot' (1991) 9 *Droits* 79, 82 and 91.

[12] Eg, the 'conclusions' of the Government Commissioner in Council of State, 13 December 1889 (*Cadot*).

[13] *Vice de forme*; eg Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 520.

[14] Chapter 3 V 1 (p 168).

The consequence for the present inquiry on procedural review in France is that legal cases play a subordinate role in comparison to legislation and academic scholarship.[15]

1. Judicial Decision-Making in the Council of State

Oddly, it has been argued that '[t]here was almost no legislation at all on […] court proceedings' in the French administrative courts, and that 'rules and principles were quasi-entirely laid down in cases'.[16] While this may be correct for the earlier 19th century, the French legislator in the Act of 24 May 1872 in fact enacted meticulous rules for judicial proceedings in the Council of State.[17] Insofar as these statutory rules concerned 'the provision of a hearing' in the broad sense outlined above, three features stand out.

First, the statutory rules were general in scope, in the sense that they applied to judicial proceedings in the Council of State regardless of the precise subject-matter of the administrative decision under review. The procedural rules were not confined to specific administrative decisions (eg a closing order) or a specific subject-matter (eg housing). For example, all judgments by the Council of State were read out in a public session, and signed by the State Councillors involved.[18] The judgment expressly had to confirm the fulfilment of the applicable procedural rules.[19] The regulatory technique of enacting extensive

[15] On sources generally, chapter 1 IV 3 (p 21).

[16] Jean-Bernard Auby and Marcel Morabito, 'Evolution and Gestalt of the French State' in Sabino Cassese, Armin von Bogdandy, and Peter Huber (eds), *The Administrative State* (OUP 2017) 165, 186.

[17] Act of 24 May 1872 concerning the reorganisation of the Council of State *[loi du 24 mai 1872 portant la réorganisation du conseil d'État*].

[18] Act of 24 May 1872, s 22.

[19] Act of 24 May 1872, ss 15, 17–22.

statutory rules on procedure with a general scope constituted an important difference to the procedural rules for the active administration, as will be substantiated in due course.

Second, the rules pertaining to the provision of a hearing differed between the *recours pour excès de pouvoir* and the *recours de pleine juridiction*. As explained in the previous chapter 2, the *recours de pleine juridiction* was chiefly used in actions for damages against the State and in disputes on government contracts, whereas the *recours pour excès de pouvoir* was the general process by which a claimant could seek to have an administrative act annulled by the Council of State.[20]

The *recours pour excès de pouvoir* was the less rigid and more accessible process, especially insofar as legal representation by lawyers was not mandatory, and because there were hardly any court fees.[21] Importantly, the *recours pour excès de pouvoir* was directed against the administrative act in question, rather than against the author of that act. Since the primary decision-maker was not involved in the court proceedings, the *recours pour excès de pouvoir* had 'no defendant'.[22] Instead, the central government department responsible for the subject-matter of the administrative act under review could make submissions and give an opinion concerning the act.[23] In this in a certain sense non-contradictory process, the involvement of the claimant was relatively limited and largely confined to initiating the proceedings. The claimant had to submit a 'request'[24] to the

[20] Chapter 2 V 2 (p 96). The *recours de pleine juridiction* was also available in challenges of elections and in monetary disputes, eg on taxation or pensions; Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) Livre 5; Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 956–59.

[21] Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 972 and 983.

[22] Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 972–73.

[23] The central government department was not the 'defendant' because it was not the author of the act (ie the primary decision-maker); Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 972–73.

[24] *Une requête*.

Council of State, laying out the claim, the decision or action complained of, and all facts and legal arguments relevant to the case.[25] Thereafter, the adjudication department was in charge. After the relevant central government department made their submissions, the adjudication department wrote up a 'report'[26], summarising the decisive legal and factual questions raised by the case, and made a preliminary proposal on how the case ought to be decided.[27] After hearing the 'conclusions'[28] of the government commissioner, the adjudication department handed down its judgment.[29]

In the stricter *recours de pleine juridiction*, proceedings could only be initiated by one of the lawyers specially licensed to appear before the Council of State, who had to submit the 'request' for the claimant. This 'request' was served to the defendant who then had 15 days to select his (equally licensed) lawyer, and to submit a defence.[30] On the *recours de pleine juridiction*, the 'report' made by the adjudication department had to be served on the parties' lawyers at least four days before a public sitting took place, so as to allow the lawyers sufficient time to prepare 'oral observations' pertaining to the questions raised by the 'report'.[31] In this process, the affected parties were thus given an opportunity of being

[25] Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 984.

[26] *Un rapport*.

[27] *Le projet d'arrêt*; Act of 24 may 1872, s 15; Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 985; the Act of 22 April 1910 bearing on the fixation of the general budget […] [*loi du 8 avril 1910 portant fixation du budget général des dépenses et des recettes de l'exercice*] further sub-divided the adjudication department.

[28] *Les conclusions*; Act of 24 may 1872, ss 18–19.

[29] Act of 24 may 1872, s 19; Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 983.

[30] Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 972–73.

[31] Act of 24 may 1872, ss 17–18; Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 948; judgments in the recours de pleine juridiction were handed down by the 'assemblée publique du Conseil d'État statuant au contentieux', which consisted of six more State Councillors additional to the ones of the adjudication department.

heard at a relatively late stage in the proceedings. Via their lawyers, they could comment on the 'report' just before the government commissioner gave his 'conclusions'.

The third feature characterising the provision of a hearing before the Council of State was that the opportunities given to the affected parties to participate in the decision-making process primarily concerned written submissions. It was not provided for an oral hearing of the parties themselves. Only in the *recours de pleine juridiction* were the lawyers of the opposing parties given the opportunity to make 'oral observations'.[32] But even where an oral debate took place, this was 'merely complementary to the [written] report'.[33] The 'oral observations' of the lawyers were chiefly a means of clarifying their previous written submissions. In the *recours pour excès de pouvoir*, an oral hearing did not take place. The French academic Henry Berthélemy explained that the nature of the process as more accessible, more efficient, less rigid, and less costly, entailed that the claimant had no right to make oral observations on the 'report'.[34] As mentioned, the participation of the claimant in the *recours pour excès de pouvoir* was largely confined to making submissions and legal arguments at the early stage of initiating the proceedings. But the limited participation of the parties was not considered as problematic. Berthélémy, for instance, maintained that the primarily written form, given its efficiency, was preferable to the primarily oral nature of private law proceedings before the ordinary courts.[35]

Leading administrative law scholars, such as Henry Berthélémy, Maurice Hauriou, and Édouard Laferrière all discussed the judicial procedure before the Council of State in

[32] Act of 24 may 1872, s 18.

[33] Maurice Hauriou, *Précis de Droit Administratif, contenant le Droit Public et le Droit Administratif* (1st edn, Larose et Forcel 1892) 750.

[34] Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 984 fn 1.

[35] Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 982.

benevolent terms. It was common for French textbooks of the late 19th and early 20th centuries to outline the procedure of administrative courts in comparison to that of the ordinary courts (such as the Court of Cassation). Overall, Berthélemy made out four differences between the procedure of administrative and ordinary courts. On this account, the procedure of administrative courts was directed by the judge (rather than by the parties), simple and cheap (rather than complicated and costly), partly non-public (rather than entirely public), and primarily in written form (rather than primarily oral).[36] That Berthélémy, Hauriou, and Laferrière each compared the procedure of the Council of State to that of the ordinary courts illustrates that the procedure of administrative courts was essentially considered as being 'judicial' in nature; as a different and equally legitimate kind of 'court proceedings'.[37]

2. Procedural Rules for the Active Administration

Researching the decision-making procedures of the active administration is not an easy task. Treatises and textbooks on French administrative law mostly did not touch upon the decision-making procedure of the active administration. As discussed, the procedure of administrative courts was frequently outlined in comparison to that of the ordinary courts.

[36] Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 980; similarly, Maurice Hauriou, *Précis de Droit Administratif, contenant le Droit Public et le Droit Administratif* (1st edn, Larose et Forcel 1892) 750.

[37] Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 916 and 980; Maurice Hauriou, *Précis de Droit Administratif, contenant le Droit Public et le Droit Administratif* (1st edn, Larose et Forcel 1892) 749–58; Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 1 (2nd edn 1896) 10. Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002) 246 makes the point that the textbooks of Hauriou, Berthélémy, and Duguit were dominant in the first quarter of the 20th century. Léon Duguit, *Les Transformations Du Droit Public* (Armand Colin 1913) 181–221 has a theoretical outlook; its chapter on 'le contentieux administratif' does not contain a focused discussion of procedural fairness.

The fact that the procedure of administrative courts was different from that of the active administration was not expressly mentioned but taken to be self-evident. Interestingly, there was no vocabulary to distinguish between the procedure of administrative courts and that of the active administration. Berthélemy used 'la procédure des actions administratives' and 'la procédure administrative' as synonymous, both referring to the procedure of administrative courts.[38] It appears that a concept for the procedure of the active administration did not exist in the French legal vocabulary.

The absence of a concept for the procedure before the active administration points to an important difference in the scope of legislative rules. The detailed provisions made for the judicial decision-making procedure of the Council of State in the Act of 24 May 1872 were outlined in the previous section. Similarly, an Act of 22 July 1889 enacted procedural rules for the Councils of Prefectures, which acted as administrative courts in some matters designated by statute.[39] By contrast, no such general decision-making procedure applicable across different subject-matters (eg housing, poor laws etc) existed for administrative authorities. It is telling that the Act of 24 May 1872 only regulated the *judicial* decision-making procedure of the Council of State. Despite the fact that the Act's headline in the *Journal officiel de la République française* read 'on the reorganisation of the Council of State'[40] as a whole, rather than only its adjudication department, the Act did not touch upon

[38] Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 980; roughly translatable as 'the procedure of administrative actions' [ie actions to challenge administrative acts before the courts] and 'the administrative procedure'.

[39] The Act of 22 July 1889 on the procedure to follow before the Councils of Prefectures [*loi du 22 juillet 1889 sur la procédure à suivre devant les conseils de préfecture*] introduced a procedural standard broadly similar to that in the Council of State; the most important difference was that after the 'report' was read out publicly, and that parties in the Council of Prefecture could respond to it orally via a lawyer or speak for themselves. Similarly to the procedure in the Council of State, a Government Commissioner gave his '*conclusions'* on all relevant matters before a decision was taken and read out publicly; for certain judgments of the Councils of Prefecture, a special procedure with a lower procedural standard applied; on all of this, Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 987–88.

[40] '[p]ortant sur la réorganisation du Conseil d'État'.

the procedure of the three 'purely administrative departments'.[41] Similarly, although the Act of 22 July 1889 was published under the headline 'Act on the procedure to follow before the Councils of Prefectures' generally, it only laid down rules for *judicial* decision-making, not for matters in which the Councils of Prefectures acted as part of the active administration.[42] The procedure of the active administration was not regulated legislatively at the general level (ie applicable across different subject-matters). In fact, the lack of a general procedure for the active administration was for a long time considered 'an underdeveloped weak spot' of French administrative law.[43] This only changed in the latter half of the 20th century. As will be seen below, this constituted an important contrast to Germany.

Concerning the absence of scholarly accounts or discussions of the procedure of the active administration, a conjecture could be that the sheer multitude and variety of administrative decision-makers would have made such endeavour an unprofitable one.[44] Yet this was not so different from the various decision-makers acting as 'administrative court' in one specific subject-matter, such as the *Cour de comptes*, the *Conseils du contentieux des colonies*, or the *Conseil supérieur de l'instruction publique*, mentioned in chapter 2.[45] Berthélemy found a clever way of dealing with this variety of 'administrative courts'. In his treatise on administrative law, he first covered the procedural rules common to all administrative courts before subsequently discussing in more detail the procedure of the

[41] The design of the Council of State as a multi-purpose institution was discussed above in chapter 2.

[42] 'Loi du 22 juillet 1889 sur la procédure à suivre devant les conseils de préfecture' [in *Journal officielle de la République française*, 24 juillet 1889, 3637]. The Councils of Prefecture acted as 'administrative court' in some matters, but as part of the 'active administration' in others.

[43] Clemens Landenburger, *Verfahrensfehlerfolgen im französischen und im deutschen Verwaltungsrecht: die Auswirkung von Fehlern des Verwaltungsverfahrens auf die Sachentscheidung* (Springer 1999) 23.

[44] For the various administrative decision-makers in France, see Grégoire Bigot and Tiphaine Le Yoncourt, *L'Administration française: Politique, Droit et Société, vol 2, 1870–1944* (LexisNexis 2014).

[45] This was explained above in chapter 2 II 1 (p 41).

two most important ones: the Council of State and the Councils of Prefectures.[46] A similar approach would have been conceivable for the procedure of the various decision-makers constituting the active administration.

Édouard Laferrière's chapter on the *recours pour excès de pouvoir* in his famous treatise on administrative law may be the closest we get to an account of the procedures of decision-makers of the active administrative.[47] It will be recalled that that the notion of '*excès de pouvoir*' was much broader than the English 'ultra vires', the *recours pour excès de pouvoir* being the process by which a claimant could seek to have an administrative act quashed by the Council of State.[48] One among the four grounds of review Laferrière discussed was *le vice de forme* ('formal/procedural error').[49] It consisted 'in the omission or the incomplete or irregular fulfilment of formalities an administrative act is subject to via statute or regulation'.[50] To be clear, the *recours pour excès de pouvoir* for *vice de forme* concerned the form and procedure of administrative, not judicial, decision-making. Put differently, it is judicial review of an administrative act for a breach of a formal requirement. Laferrière considered formal requirements of administrative acts as guarantees against flawed administrative decision-making. Each formal requirement was a means 'to prevent an error,

[46] Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 980.

[47] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896).

[48] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 413, 'il provoque une décision qui est un acte de juridiction […] une annullation contentieuse'; similarly on the difference between excès de pouvoir and ultra vires, CJ Hamson, *Executive Discretion and Judicial Control: An Aspect of the French Conseil d'Etat* (Stevens 1954) 7.

[49] The other three being *incompétence*, *violation de la loi et des droits acquis*, and *détournement du pouvoir*.

[50] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 520 ('Le vice de forme consiste dans l'omission ou dans l'acccomplissement irrégulier des formalités auxquelles un acte administratif est assujetti par les lois et règlements.')

to avoid an injustice, and to ensure the wisdom and appropriateness of the decision'.[51] The complete omission of such formal requirement gave rise to formal illegality, and hence *excès de pouvoir*, because an authority did not have the power to render the administrative act in question without adhering to the prescribed form.[52] Irregularities in adhering to formal requirements generally made the administrative act voidable, too. Laferrière took the existing statutory or regulatory procedural rules for specific administrative acts very seriously, and he dismissed attempts to differentiate between crucial and less important formalities.[53]

That said, it is remarkable that Laferrière had nothing to say on procedural requirements of administrative acts at a general, more abstract, level. Procedural guarantees in active-administrative decision-making seem to have existed only where a statute or a regulation explicitly stipulated them. Laferrière gave a few examples: public inquiries, consulting experts, or measures targeting the parties to raise issues.[54] But all of these requirements applied to very specific administrative acts in one subject-matter. It appears that, insofar as the provision of a hearing in the active administration was concerned, there existed neither statutory rules with a wide scope nor unwritten general principles of fairness. The cases cited by Laferrière confirm this. The Council of State in review cases on the ground of a *vice de forme* merely imposed on administrative authorities the procedural rules laid down in statute and regulation for specific administrative acts. The Council of State did not

[51] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 520–25 ('un moyen d'éviter une erreur, d'empêcher une injustice, d'assurer la maturité et l'opportunité de la décision').

[52] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 521; similarly, Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 971.

[53] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 522.

[54] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 520.

invoke any unwritten principle or general conception on how affected parties ought to participate in administrative decision-making.

To provide a few examples, the Council of State found that the Prefect must hear the affected residents before declaring certain pavements a 'public utility', as laid down in an Act of 7 June 1845.[55] Before the President of the Republic merges several municipalities, an inquiry and a hearing of the municipalities concerned ought to take place, as laid down in an Act of 5 April 1884.[56] A Prefect intending to modify the regulations pertaining to a dam must obey the formalities of a Ministerial Regulation of 23 October 1851.[57] A Prefect cannot order a municipality to pay an allowance of 120 francs to a teacher without previous deliberation of the matter in the Municipal Council, as laid down in the Act of 5 April 1884. An official for the Ministry of Foreign Affairs cannot be replaced without due regard to the formal rules laid down in a decree.[58] A Mayor cannot make a demolition order regarding an allegedly dangerous wall without fulfilling the procedural requirements laid down in royal declarations, dating from 1729 and 1739, which stipulated that the owner ought to have an opportunity to raise objections, and that an architect ought to be consulted for his expertise.[59]

[55] Council of State, 7 August 1886 (*Besnier*); the Act of 7 June 1845 concerning the distribution of costs for the construction of pavements, s 2 [*loi du 7 juin 1845 concernant la répartition des frais de construction des* trottoirs] stipulated that pavements were mandatory; Bernard Landau, 'La fabrication des rues de Paris au XIXe siècle: Un territoire d'innovation technique et politique' (1992) 57 Les Annales de la Recherche Urbaine 24, 26.

[56] Council of State, 16 May 1886 (*communes de Cherré*); Act of 5 April 1884 relating to the organisation of municipalities [*Loi du 5 avril 1884 relative à l'organisation municipale*].

[57] Council of State, 1 March 1889 (*syndicat de la Viette*) ('les formalités éxigées par le circulaire ministérielle du 23 oct. 1851').

[58] Council of State, 21 April 1893 (*Zickel*).

[59] Council of State, 20 November 1882 (*Chassignon*), Declarations of the King of 18 July 1729 and 18 August 1730 (*déclarations du roi des 18 juillet 1729 et 18 août 1730*).

In all these cases, the Council of State found a *vice de forme* and annulled the administrative act under review. In each respective case, the disregarded procedural rule was laid down in legislation, in statute, regulation, or decree, which for specific administrative acts (eg demolishing orders) stipulated specific procedural requirements (eg giving the owner an opportunity to raise objections). The Council of State did not invoke any general principle or conception of fairness pertaining to the involvement of the parties. In administrative decision-making of the active administration, the provision of a hearing was simply a matter of applying legislative rules with a narrow scope.

3. The Two Forms of Procedure in Contrast

The previous two sections examined how affected parties could participate in 'judicial' decision-making before administrative courts and in 'administrative' decision-making before the active administration. In what follows, a summary contrasts the two forms of procedure.

The first major difference concerns the scope of rules on the provision of a hearing. For administrative courts, the French legislator enacted detailed procedural rules on how the parties could participate in decision-making. These rules were general in scope. Whether the decision in question concerned housing, poor laws, or the regulations of a dam, was relatively insignificant due to the fact that the rules on the provision of a hearing before administrative courts were applicable regardless of the dispute's subject-matter.[60] In the

[60] Except for the fact that the *recours de pleine juridiction* (with its slightly different procedure) rather than the *recours pour excès de pouvoir* was available for certain subject-matters, such regional elections or taxation.

active administration, by contrast, the provision of a hearing was hardly addressed at the general level, neither by legislation nor by scholars. Rules on the decision-making procedure in the active administration existed only regarding specific procedural requirements for specific administrative acts (eg hearing the individual affected by a demolishing order).

The second difference between the procedural rules in administrative courts and the active administration concerns the interplay of written and unwritten law. Rules on the procedure of the active administration existed only in statute, regulation, and decree. In cases on administrative decisions challenged for *vice de forme*, the Council of State did not invoke any unwritten law or general principle pertaining to fair procedures. For the proceedings in administrative courts, I outlined above the detailed provisions laid down in statute, namely in the Act of 24 May 1872 for the Council of State. Additionally, academics and judges were to some degree also guided by non-positive conceptions of the judicial process, which went beyond what was laid down in legislation. In scholarly discussions, this was evident in the use of more abstract legal concepts, which were not taken from statute, such as the principles of a 'contradictory debate' or a 'free defence'.[61] Against the backdrop of the French conception of the separation of powers, which conceptualised the judiciary as merely 'the mouth which pronounces the words of the statute', non-positive conceptions of fair procedures rarely appeared openly and clearly defined in judgments.[62] Thus, these conceptions may not have been sufficiently clear to qualify as 'legal sources' in a narrow sense. But non-positive ideas could be influential in judgments, nonetheless. In the *Cadot* case, which I discussed in chapter 2, for example, the Government Commissioner invoked

[61] Mentioned above, 3 II (p 112).

[62] DW Allen, *Montesquieu's 'The Spirit of the Laws': A Critical Edition* (Anthem 2023) 170–172 ('Des trois puissances dont nous avons parlé, celle de juger est en quelque façon nulle. […] les juges de la nation ne sont […] que la bouche qui prononce les paroles de la loi').

the notion of 'judicial forms' ('*les formes judiciaires*'), which apparently provided one of the decisive arguments.[63]

A means of accounting for the existence of non-positive conceptions of the procedure in administrative courts is the fact that many of the rules on procedure in the Council of State had initially been developed by the State Councillors in case law before they were laid down in the Act of 24 May 1872.[64] Thus, French jurists were familiar with non-positive conceptions pertaining to the procedure of administrative courts. This was not the case insofar as the active administration was concerned.

4. Summary

Whether and how French law gave affected parties an opportunity of being heard depended essentially on whether an administrative court gave a 'judgment' or whether an administrative authority rendered an 'administrative act'. This aligns with the main argument of the present chapter insofar as it concerns French law, namely that judicial review on the ground of an unlawful decision-making procedure was carefully crafted around notions of 'judicial' and 'administrative' powers.

The nature of the decision-maker as an 'administrative court' or as part of the 'active administration' guided the inquiry as to the applicable procedural rules. For judicial decision-making in the Council of State, the French legislator enacted detailed and

[63] Chapter 2 II 2 (p 48).

[64] John Bell and François Lichère, *Contemporary French Administrative Law* (CUP 2022) 5–6; Jean-Bernard Auby and Marcel Morabito, 'Evolution and Gestalt of the French State' in Sabino Cassese, Armin von Bogdandy, and Peter Huber (eds), *The Administrative State* (OUP 2017) 165, 183–86.

extensive rules on the provision of a hearing with a general scope, although with slight differences between the *recours pour excès de pouvoir* and the *recours de pleine juridiction*. The means of affected parties to participate in the decision-making consisted primarily in written submissions. Only in the *recours de pleine juridiction* did the parties' lawyers make 'oral observations', and even then, they played a merely subordinate role. In the active administration, the legislator enacted no generally applicable procedural rules with a general scope; rules on the participation of the parties existed only for specific administrative acts. Further, the Council of State did not invoke any unwritten conceptions or principles on fair procedures in the active administration, whereas such non-positive conceptions did play a limited role in administrative courts.

III. Germany: Judicial and Administrative Decision-Making Procedures

The ensuing part examines the German approach to judicial review on the ground of failure to give a hearing required by law, and whether the applicable rules were shaped by notions of judicial and administrative powers.

The first section examines the legal concepts in German law pertaining to the provision of a hearing. Similarly to France, some German legal concepts mostly applied in judicial proceedings, whilst others were confined to administrative proceedings.

The second section outlines the 'standard picture' of procedural review in Germany. On this 'standard picture', the judicial or administrative nature of a decision determined the applicable procedural rules; further, the procedural standard was much higher in judicial than in administrative proceedings. To an important degree, the standard picture builds on the analysis of the previous chapter 2: German legislators enacted detailed statutory rules differentiating between judicial and administrative institutions, decisions, and – as the present chapter establishes – decision-making procedures.

The third section adds nuance to the 'standard picture'. I argue that the judicial or administrative nature of a decision in certain instances merely provided a starting point to the judicial inquiry on the procedural obligations of decision-makers (rather than entirely determining the applicable procedural rules), and that the differences in procedural standard between judicial and administrative proceedings were less pronounced than is generally assumed.

The fourth section summarises the findings and draws out similarities and differences to procedural review in French law.

1. German Legal Concepts for 'the Provision of a Hearing'

The introduction to chapter 3 defined 'the provision of a hearing' in abstract terms as pertaining to the question of whether and how a public decision-maker must notify and hear an individual when making a decision or taking measures adversely affecting this individual. German law had several legal concepts for 'the provision of a hearing', and they can be placed into three groups. Certain concepts mostly referred to judicial proceedings, whilst a second group of concepts was used equally in judicial and administrative contexts, a third group being more common in administrative decision-making. The so-called 'right to a judicial hearing' is an example for the first group, it was used for proceedings in court.[65] Sometimes, and mostly in judicial decision-making, a formal 'summons of the parties'[66] stood at the outset of the involvement of the parties. The requirement of 'public and oral proceedings'[67], too, mostly applied to judicial proceedings. Notions falling in the second group, applicable to both judicial and administrative settings, were the idea that the interests of the parties needed to be protected at all stages ('protection of the interests of the parties'[68]), and that neglecting their interests could result in 'procedural flaws'.[69] Similarly, statute, scholars and judges used unspecific verbal constructions such as 'the parties are heard' or 'after hearing the parties' to refer to the participation of the parties in judicial and

[65] *Anspruch auf rechtliches Gehör*. Translated literally, *rechtliches* Gehör would be a 'legal hearing', but translating to 'judicial hearing' makes it clearer that the term referred (and still refers) to a hearing in court; Grundgesetz art 103 para 1 uses '*rechtliches Gehör*' in this sense, referring to courts only, not to administrative authorities; Barbara Remmert, 'GG Art 103 Abs 1' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz-Kommentar* (102th edn, CH Beck 2023) para 1; Wilhelm Krais, *Handbuch der inneren Verwaltung im diesrheinischen Bayern*, vol 1 (2nd edn, Stuber 1881) 68.

[66] *Ladung der Beteiligten*.

[67] *Öffentlichkeit und Mündlichkeit des Verfahrens*; eg Friedrich Xaver Affolter, *System des badischen Verwaltungsrechts, zugleich ein kurzgefasstes Lehrbuch des badischen Verwaltungsrechts* (Braun 1904) 27.

[68] *Wahrung der Interessen der Beteiligten.*

[69] *Verfahrensfehler*.

administrative decision-making. In the third group, the language of 'a hearing' as a noun (by contrast to 'the right to a judicial hearing') mostly referred to the provision of a hearing before administrative authorities.[70]

The fact that certain legal concepts chiefly applied to either judicial or administrative proceedings allows us to deduce, as an initial conjecture, that notions of 'judicial' and 'administrative' powers were indeed crucial to the provision of a hearing in Germany. Otherwise, the existence of a concept for hearing the parties before courts specifically ('the right to a judicial hearing') would seem to make little sense.

In the following, I mostly focus on unspecific verbal constructions (eg 'after hearing the parties') and on the notion of 'public and oral proceedings'. Explaining the precise normative content of every single one of the abovementioned German concepts is thus superfluous. The verbal constructions (eg 'after hearing the parties') are relatively straightforward. How 'public and oral proceedings' were connected to 'the provision of a hearing', however, is not as self-evident, and thus calls for an explanation.

The introduction to chapter 3 defined 'the provision of a hearing' as entailing *both oral and written* means of participating in decision-making processes. For France, it was shown that affected parties participated in the Council of State's judicial decision-making primarily by the means of written submissions. In Germany, by contrast, whether and how affected parties ought to be heard was commonly discussed under the notion of 'public and *oral* proceedings'. In fact, where the proceedings were (public and) oral, the affected party could

[70] *Anhörung*. The difference between the two concepts is clearer in German language: *Anhörung* and *rechtliches Gehör*. Regarding the law nowadays, see for example the Act on Administrative Procedure of 1976 [Verwaltungsverfahrensgesetz] s 28, where the *Anhörung Beteiligter* ('hearing of interested parties') requires that parties are given the opportunity to express their view before an administrative act is handed down. Whilst *Anhörung* historically mostly referred to administrative proceedings, the term is nowadays used for court proceedings too; for examplem, the *Anhörungsrüge* ('hearing appeal') in the Code of Administrative Cour Procedure of 1991 [*Verwaltungsgerichtsordnung*] s 152a, is an appeal against a court (!) acting contrary to procedural fairness.

commonly make oral submissions prior to the making of a decision. The Bavarian Act concerning the installation of an Administrative High Court (1878) exemplifies this. According to the Act, judicial decisions in the second instance administrative courts[71] required 'public and oral proceedings' (ss 31 and 33) and 'a summons of the parties' (s 35). In the public session, after a member of the senate summarised the facts of the case, the parties, 'are heard' (s 36).[72] The provision that the parties 'are heard' was linked to the 'public and oral' nature of the proceedings, to a summons of the parties, and to the judicial nature of the decision. The Bavarian Act of 1878 thus interlaced several of the above-mentioned legal concepts, thereby creating a normative web of provisions on the participation in decision-making.

2. The Standard Picture

The 'standard picture', which broadly characterised review on the ground of an unlawful decision-making procedure in Germany, entails two propositions: first, the distinction between judicial and administrative powers determined the applicable procedural rules; second, the procedural standard was much higher in the exercise of judicial powers than in the exercise of administrative powers, to the degree that hearing the affected parties was almost entirely irrelevant in the latter.

[71] The County Governments (*Kreisregierungen*) acted as administrative courts of second instance in Bavaria.

[72] The [Bavarian] Act of 8 August 1878 concerning the installation of an Administrative High Court [*Gesetz vom 8. August 1878, betreffend die Errichtung eines Verwaltungsgerichtshofs*] s 36: 'In der öffentlichen Sitzung […] werden die Betheiligten mit ihren Erinnerungen und Anträgen gehört, und die etwa erforderlichen Beweisaufnahmen vollzogen.'

In scholarly accounts, the provision of a hearing was considered one of the main distinguishing criteria between the exercise of judicial powers by administrative courts and the exercise of administrative powers by the active administration. To illustrate this, I draw on Otto Mayer's seminal textbook *Deutsches Verwaltungsrecht*, first published in 1895.[73]

Juxtaposing an abstract concept of 'judicial powers' with one for 'administrative powers', Mayer deduced that the provision of a hearing was one of the main differences. The technique of taking abstract concepts as a starting point to a legal analysis can be considered a common technique among German jurists at the time.[74] In this specific instance, Mayer contrasted the concept of *Verwaltungsrechtspflege*,[75] roughly translatable as judicial review of administrative action, with the exercise of administrative powers in what he called 'the ordinary course of the public administration'.[76] Different decision-making procedures were one of the key distinguishing factors. In the exercise of administrative powers in 'the ordinary course of public administration', so-called 'administrative acts' (*Verwaltungsakte*[77]) could be rendered without giving the addressee an opportunity of

[73] Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (Duncker und Humblot 1895).

[74] On the so-called *Begriffsjurisprudenz*, see Rudolf von Jhering, 'Unsere Aufgabe' in (1857) 1 Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts 1; Ralf Sennecke, 'Rudolf von Jhering anno 1858: Interpretation, Konstruktion und Recht der sog Begriffsjurisprudenz' (2013) 130 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung 238; Hans-Peter Haferkamp, 'Die sogenannte Begriffsjurisprudenz im 19. Jahrhundert – reines Recht?' in Otto Depenheuer (ed), *Reinheit des Rechts: Kategorisches Prinzip oder regulative Idee?* (Verlag für Sozialwissenschaften 2010) 79.

[75] Translated more literally, *Verwaltungsrechtspflege* is 'the administration of administrative justice'. Due to the fact that the latter half of this long compound word, *Rechtspflege*, in the late 1800s came to denote judicial powers, *Verwaltungsrechtspflege* concerned the exercise of judicial powers to decide administrative cases, or in modern English terminology: judicial review of administrative action. The meaning of the term *Verwaltungsrechtspflege* evolved during the 1800s. In the Frankfurt Constitution of 28 March 1849, s 182, *Verwaltungsrechtspflege* meant 'administrative review', ie the supervision of administrative decision-making within the executive; see Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (Cf Müller 2000) 21.

[76] Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (Duncker und Humblot 1895) 172–74 ('*im gewöhnlichen Gang der Verwaltung*').

[77] For an explanation of this 'core concept' in English language, see Mahendra Pal Singh, *German Administrative Law in Common Law Perspective* (Springer 2001) 63.

being heard. The addressee then found out about the administrative act only once the act was delivered. Such an 'assault', as Mayer called it, could never be considered a 'judgment' (*Urteil*).[78] For the notion of *Rechtspflege* (or judicial powers), by contrast, Mayer considered it essential that affected parties were given the opportunity of participating in the making of the decision by expressing their views, thus having a certain influence on a decision before it is rendered. According to Mayer, the provision of a hearing was essential to *Rechtspflege* in any area of law; be it private, criminal, or administrative law.[79]

Verwaltungsrechtspflege comprised judicial review of administrative action both in Administrative High Courts and in the lower instance administrative courts. As discussed in detail in chapter 2, the latter were institutions with a dual remit which acted as administrative authority in some matters and as administrative court in others. As an example for such institution, I examined the District Council in the Grand-Duchy of Baden.[80] One of the essential differences between the District Council acting judicially and administratively was seen in the more solemn procedure when acting as administrative court.[81] Anecdote has it that Mayer joked in his lectures, the most important difference consisted in the circumstance that smoking was permitted when the District Council acted as administrative authority but prohibited during judicial business.[82] More generally, German administrative law scholars saw the decision-making procedure, and especially the

[78] Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (Duncker und Humblot 1895) 172 ('[n]iemals … ein solcher Überfall als ein Urteil angesehen werden. Begriffswesentlich ist für alle Rechtspflege, daß vor ihrem Urteil die davon Betroffenen sich darüber aussprechen und darauf einwirken können.')

[79] Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (Duncker und Humblot 1895) 172–74.

[80] Chapter 2 III 2 (p 59).

[81] Walter Jellinek, 'Die Anfänge der Verwaltungsgerichtsbarket in Baden und in Württemberg' (1952) Die öffentliche Verwaltung 580.

[82] Ina Bauer, 'Die Entstehung der Verwaltungsgerichtsbarkeit in Baden' in Verwaltungsgerichtshof Baden-Württemberg (ed), *Festschrift 150 Jahre Verwaltungsgerichtsbarkeit: Ursprung, Entwicklungslinien und Perspektiven im deutschen und im europäischen Kontext* (Boorberg 2014) 6.

provision of a hearing, as one of the main differences between the exercise of administrative powers by the active administration and the exercise of judicial powers by administrative courts.[83]

While deducing qualities from an abstract concept, such as *Verwaltungsrechtspflege*, was a common technique among German jurists, their accounts were convincing only insofar as they were by-and-large consistent with what had been laid down in statute, given that the legislators in the different German states were responsible for enacting rules on decision-making procedures. These statutory rules largely aligned with the above-mentioned 'standard picture': the distinction between judicial and administrative powers determined the applicable procedural rules, and the standard of procedural fairness was fundamentally higher in the exercise of judicial powers than in an administrative setting. The crucial relevance of the distinction between judicial and administrative powers for the provision of a hearing is most obvious in Prussian legislation.

The Prussian Act on the Public Administration of 1883 distinguished between a purely 'administrative' decision-making procedure and a 'judicial' decision-making procedure for administrative disputes.[84] The latter was largely modelled on the civil procedure rules adhered to by the ordinary (private law) courts.[85] The Prussian Administrative High Court was obliged to adhere to the judicial procedure. The bifurcated lower instance administrative courts followed the judicial procedure in matters designated as 'judicial' by

[83] For example, Wilhelm Krais, *Handbuch der inneren Verwaltung im diesrheinischen Bayern*, vol 1 (2nd edn, Stuber 1881) 57 and 68–69.

[84] *Beschlußverfahren* (administrative procedure) and *Verwaltungsstreitverfahren* (judicial procedure), [Prussia] Act of 30 July 1883 on the Public Administration [*Gesetz über die allgemeine Landesverwaltung vom 30. Juli 1883*] s 54.

[85] Ulrich Stump, *Preußische Verwaltungsgerichtsbarkeit 1875–1914: Verfassung, Verfahren, Zuständigkeit* (Duncker und Humblot 1980) 122.

statute; in all other matters, they adhered to the administrative procedure.[86] One of the most important differences between the two procedures was the orality of judicial proceedings. An administrative court adhering to the judicial procedure was obliged to hear the parties orally if one of the parties so requested.[87] In the administrative procedure, by contrast, the administrative authority usually decided without an oral hearing, unless the decision-maker considered an oral hearing necessary to clarify the facts of the case. In administrative proceedings, it was impossible for the parties to request an oral hearing.[88]

A study on administrative courts in Prussia during the German Empire found that the main purpose of the requirement of an oral procedure was to give the addressee an opportunity of participating in the decision-making.[89] Where an affected party had to raise objections in written form in the administrative procedure, he did not know precisely which facts the decision-maker considered essential, and was thus compelled to give a broad and lengthy account in order to make sure he addressed all relevant points. The orality of the judicial procedure thus guaranteed a higher procedural standard than that in administrative proceedings.[90]

Hence, on the 'standard picture', whether a decision was 'judicial' or 'administrative' in nature determined the applicable procedural rules on the provision of a hearing. The procedural standard was fundamentally higher in judicial than in administrative

[86] [Prussia] Act of 30 July 1883 on the Public Administration, para 54.

[87] [Prussia] Act of 30 July 1883 on the Public Administration, ss 64, 67, and 68.

[88] [Prussia] Act of 30 July 1883 on the Public Administration, s 119 stipulated that even where an administrative authority considered an oral hearing necessary, the scope of the ensuing hearing was restricted to the facts; parties could not discuss points of law.

[89] Ulrich Stump, *Preußische Verwaltungsgerichtsbarkeit 1875–1914: Verfassung, Verfahren, Zuständigkeit* (Duncker und Humblot 1980) 122.

[90] Ulrich Stump, *Preußische Verwaltungsgerichtsbarkeit 1875–1914: Verfassung, Verfahren, Zuständigkeit* (Duncker und Humblot 1980) 124.

proceedings. Participation was crucial to the former, but negligible in the latter. Many cases do indeed display this clear-cut distinction between judicial and administrative decision-making and their respective procedural standards.

In certain cases, Administrative High Courts reminded the administrative courts of first (or second, but not last) instance to adhere to the legal rules on judicial proceedings when acting as administrative court, rather than to the rules on administrative proceedings, which they had to adhere to when acting as administrative authority. Such is a judgment of the Administrative High Court of Bavaria, rendered on 16 January 1880, which declared a decision void for breach of the statutory rules on the provision of a hearing.[91] In substance, the dispute between a municipality and the State of Bavaria concerned the maintenance and funding of a public road.[92] The municipality complained before the Administrative High Court that the County Government had turned down their appeal against the primary decision *in a non-public sitting*.[93] While the details of the case are complex, the issues relevant to the purposes of the present chapter are relatively simple. Key to the case is the circumstance that the Bavarian County Governments acted as administrative authority in some matters and as administrative court in others; thus in some ways similar to the District Councils in Baden. Since the Bavarian Act of 1878 stipulated that conflicts about the public nature of roads were subject to a judicial decision, the County Government in this specific

[91] Administrative High Court of Bavaria, 16 January 1880 [Königlich Bayerisches Staatsministerium des Innern (eds), *Sammlung von Entscheidungen des Königlich-Bayerischen Verwaltungsgerichtshofes, vol 1: 1880* (Straub 1881) 95].

[92] In German public law during this period, the municipality was not conceptualized as part of the State, but rather in opposition to it, as a group of citizens with legal personhood; Fritz Fleiner, *Institutionen des deutschen Verwaltungsrechts* (3rd edn, Mohr Siebeck 1913) 250–51; Mahendra Pal Singh, *German Administrative Law in Common Law Perspective* (Springer 2001) 37.

[93] The local administrative authority (the *Bezirksamt* of Münchberg; a purely administrative authority) had made an order requiring the municipality of Hallerstein to maintain and fund a public road; Hallerstein argued it had not been heard when the road in question was declared public, and that the road was entirely unnecessary, and thus appealed to the County Government of Upper Franconia (*königliche Regierung Oberfrankens*).

case was bound to act *judicially,* ie as administrative court, not as administrative authority.[94] According to the same Act, judicial decision-making required a summoning of the parties and public and oral proceedings.[95] Since the County Government in this specific instance had made its decision in contravention of these 'fundamental statutory provision[s]', the Administrative High Court decided that the decision of the County Government was void.[96] This aligned with the abovementioned 'standard picture': administrative courts had to adhere to the stricter 'judicial' decision-making procedure.

The setup of the bifurcated institutions capable of wearing one of two hats, acting as administrative authority in some matters and as administrative court in other matters, seems to have stirred some confusion at the time. There are several similar decisions in which Administrative High Courts quashed the judgments of lower instance administrative courts because the latter had mistakenly followed an administrative rather than a judicial procedure.[97] There is evidence of the opposite, too. While the Bavarian case demonstrated that administrative courts had to follow judicial proceedings, a judgment of the Administrative High Court of Saxony of 24 October 1908 clarified that the judicial procedure was *not applicable* to administrative authorities.[98] In the case before the Administrative High Court of Saxony, the plaintiff claimed that she had to be heard by a local administrative authority, arguing that the statutory provisions on the procedure of

[94] [Bavarian] Act of 8 August 1878 concerning the installation of an Administrative High Court, s 8 no 34.

[95] [Bavarian] Act of 8 August 1878 concerning the installation of an Administrative High Court, ss 31, 33 and 35.

[96] Administrative High Court of Bavaria, 16 January 1880 [Königlich Bayerisches Staatsministerium des Innern (eds), *Sammlung von Entscheidungen des Königlich-Bayerischen Verwaltungsgerichtshofes, vol 1: 1880* (Straub 1881) 95, 102.]

[97] Eg Administrative High Court of Baden, 10 January 1865 and 24 January 1865 [Friedrich Wielandt (ed), *Die Rechtsprechung des Großherzoglich-Badischen Verwaltungsgerichtshofs vol 1, 1864–1890* (Braun 1891) 77 no 106].

[98] Administrative High Court of Saxony, 24 October 1908 (Nr 37 I S) [*Jahrbücher des Königlich-Sächsischen Oberverwaltungsgerichts,* vol 12 (Roßberg 1909) 104].

administrative courts applied to the local administrative authority, too.[99] The relevant section in the Act on Administrative Justice in Saxony of 1900 stipulated that judgments of administrative courts 'are not to be based on facts or pieces of evidence in regard to which the parties had no opportunity to be heard and to bring objections'.[100] The Administrative High Court rejected applying this provision to administrative authorities.

> Other than in special cases[101] not relevant here […], there are for the purely administrative procedure[102] no legal provisions according to which the individuals concerned are to be informed of, and heard in regard of the investigations of public authorities before an administrative authority makes a decision.[103]

The court held that administrative authorities had to follow the administrative procedure, not a judicial one. That affected parties were not generally heard prior to an administrative authority taking a decision resembles Mayer's point that an 'assault' constituted the typical mode of administrative decision-making. Thus, the case from Saxony upheld 'the standard picture' by confirming that administrative authorities had to follow the administrative procedure and the corresponding lower procedural standard. Whether a decision was 'judicial' or 'administrative' in nature determined the applicable rules on the provision of

[99] In substance, the case concerned an appeal against a concession granted to the owner of a paper factory to build a weir, by a person holding the fishing rights downstream of the weir and complaining that due to the weir no water had flown in the stream for five years. The plaintiff claimed that she ought to be heard by the local administrative authority (*Amtshauptmannschaft*) before the latter made any orders in relation to the owner of the paper mill. The case came before the Administrative High Court after an unsuccessful administrative appeal (*Rekurs*) before a superior administrative authority (*Kreishauptmannschaft*).

[100] [Saxony] Act of 19 July 1900 on Judicial Review [Gesetz über die Verwaltungsrechtspflege vom 19. Juli 1900] s 25.

[101] 'Special cases' alludes to the existence of some statutory rules on the requirement of a hearing for specific administrative acts; but no such special rules existed regarding the regulation of the weir.

[102] 'Das reine Verwaltungsverfahren' meant the procedure of the active administration; ie what Mayer called 'the ordinary course of public administration'.

[103] Administrative High Court of Saxony, 24 October 1908 (Nr 37 I S) [*Jahrbücher des Königlich-Sächsischen Oberverwaltungsgerichts,* vol 12 (Roßberg 1909) 104, 108].

a hearing, and the administrative procedure was characterised by a lower procedural standard.

3. Deviations from the Standard Picture

Whilst up to this point the historical sources fitted 'the standard picture', a further analysis illustrates some deviations and nuances. The ensuing section shows that the applicable decision-making procedure was not entirely determined by the judicial or administrative nature of the decision in question, and that the difference in the procedural standards in judicial and administrative proceedings could sometimes be smaller than assumed by 'the standard picture'.

The Administrative High Court of Saxony on 24 October 1908 delivered another judgment on the provision of a hearing in a case where a third person challenged an administrative act, which an administrative authority[104] had rendered in favour of the plaintiff.[105] On the successful administrative appeal by the third party, the Ministry of the Interior quashed the initial decision, thus deciding in favour of the third party and to the disadvantage of the plaintiff. Subsequently, the plaintiff brought an action before the Administrative High Court against the decision of the Ministry of the Interior, and complained that he had not been heard prior to the quashing of the administrative act which had been passed in his

[104] *Kreishauptmannschaft*.

[105] Administrative High Court of Saxony, 24 October 1908 (Nr 342 I S) [*Jahrbücher des Königlich-Sächsischen Oberverwaltungsgerichts*, vol 12 (Roßberg 1909) 97]. The report of the judgment does not mention the specific kind of administrative act; this encapsulates the German approach to administrative law, striving for generally applicable rules to abstract forms of action, such as the *Verwaltungsakt* (administrative act).

favour.[106] Since the Ministry of the Interior was part of the active administration, standards of an administrative procedure rather than those of a judicial one applied. But the Administrative High Court held that a hearing was required, nonetheless.

> Although the proceedings before authorities of the active administration in the ordinary course of the public administration are *generally informal, at least some procedural standards must be observed*, for instance when, as in the current case, several interested parties are opposed to each other […] One of these standards, not of written yet *unwritten law*, is that the person, in whose favour an administrative act was rendered, *is heard before said act*, on account of an appeal by another interested party, *can be altered* to the disadvantage of the addressee.[107]

The Administrative High Court quashed the decision and demanded that the Ministry decide anew after hearing the plaintiff. Thus, the court clarified that the distinction between judicial and administrative powers was not always conclusive of the applicable procedural rules: decision-makers of the active administration were obliged to hear affected parties *if there were good reasons* for such requirement. Similarly, The Administrative High Court of Bavaria in a judgment of 30 March 1903 held that even primary administrative decision-makers[108] must hear the parties prior to issuing administrative acts where necessary, for instance in order to establish the facts of the case.[109]

Legislation provided further deviations from the abovementioned 'standard picture'. In some German states, legislators enacted rules which went against the idea that the distinction between judicial and administrative powers was conclusive of the applicable

[106] In both cases of the Administrative High Court of Saxony from 24 October 1908 (Nr 37 I S and Nr 342 I S), a third party challenges an administrative act addressed to another party. In the former, the third party complained she had not been heard properly, whereas in the latter it was the addressee of the administrative act who complained he had not been heard.

[107] Administrative High Court of Saxony, 24 October 1908 (Nr 342 I S) [*Jahrbücher des Königlich-Sächsischen Oberverwaltungsgerichts*, vol 12 (Roßberg 1909) 97]; accentuations are mine.

[108] In this case the *Bezirksamt*, or District Office.

[109] Administrative High Court of Bavaria, 30 March 1903 [Königlich Bayerisches Staatsministerium des Innern (ed), *Sammlung von Entscheidungen des Königlich-Bayerischen Verwaltungsgerichtshofes vol 24: 1903* (Straub 1904) 447, 450].

procedural standard. The Regulation on the Procedure in Administrative Matters, enacted in the Grand-Duchy of Baden in 1884, for instance, can be considered a procedural code for administrative authorities. One provision stipulated that in the context of administrative decision-making by the District Council, the parties ought to be heard at an early stage.[110] In several judgments, the Administrative High Court of Baden annulled administrative decisions which did not fulfil the procedural standards set out in this regulation.[111] But a violation of provisions on the provision of a hearing in administrative decision-making did not automatically lead to the quashing of that decision. The Administrative High Court held that it was for the court to determine the consequences of such violation. Where it was unlikely that the procedural flaw had an impact on the administrative decision, the court did not quash it.[112] It appears that procedural flaws were more easily accepted in administrative decision-making than in judicial proceedings.

The procedural code for the administrative authorities in Baden showcases a distinctive feature of the German law on decision-making procedures, namely the existence of legislative rules with a general scope on the procedure of the public administration. Rather than exclusively enacting rules for administrative decision-making on a function by function basis (ie for specific subject-matters or administrative acts, such as planning permissions), some German legislators enacted procedural rules for the public administration with a broad scope.[113] Some of these rules applied to all administrative

[110] [Baden] Regulation of 31 August 1884 on the Procedure in Administrative Matters [*Verordnung vom 31.8.1884, das Verfahren in Verwaltungssachen betreffend*] para 20.

[111] Administrative High Court of Baden, 28 January 1896, 7 February 1899, 14 July 1904 [Ernst Behr (ed), *Die Rechtsprechung des Großherzoglich-Badischen Verwaltungsgerichtshofs vol 3, 1896–1910* (Braun 1911) 215 nos 389, 392, 396].

[112] A procedural flaw had no consequence, for example, where the individual had other means of being heard, or where the procedural flaw was 'cured' by a later hearing in the judicial proceedings; Administrative High Court of Baden, 26 January 1901 and 15 May 1900 [Ernst Behr (ed), *Die Rechtsprechung des Großherzoglich-Badischen Verwaltungsgerichtshofs vol 3, 1896–1910* (Braun 1911) nos 395 and 397].

[113] Another example are the Prussian provisions on the *Beschlußverfahren*; above, III 2 (p 133).

functions altogether, while others applied to all administrative functions exercised by one administrative decision-maker (eg the District Council in Baden). As was outlined above, French law did not have any such statutory rules with a wide scope on decision-making in the active administration.[114]

Although some German legislators enacted procedural rules with a broad scope for both administrative courts and the public administration, the procedural standard was nonetheless stricter in administrative courts than in administrative authorities. The Baden Act on *Verwaltungsrechtspflege* of 1884, which amended a previous Act of 1863, stipulated that the proceedings in administrative courts were oral and public.[115] Further, administrative courts could not base a judgment on any facts or pieces of evidence in regard of which the parties did not have an opportunity of being heard.[116] The Regulation on the Procedure in Administrative Matters of 1884 had no comparable general provision for the decision-making of the active administration. The Regulation merely stated that parties had the right to inspect the records at any time, and that administrative authorities were obliged to give reasons for their decisions.[117] Provisions more closely related to these on the procedure of administrative courts only applied to the administrative procedure in the District Council, eg oral and public proceedings.[118] The District Council acting administratively thus had to adhere to a stricter procedure than other administrative authorities. It seems there was a trend towards raising the procedural standard of the active

[114] II 2 (p 117).

[115] [Baden] Act of 14 June 1884 concerning Judicial Review [Badisches Gesetz vom 14. Juni 1884, die Verwaltungsrechtspflege betreffend] s 6 ('Die Verhandlung der Parteien über den Rechtsstreit vor dem erkennenden Gericht ist eine mündliche und erfolgt in öffentlicher Sitzung.')

[116] [Baden] Act of 14 June 1884 concerning Judicial Review, s 5 ('Kein Thatumstand oder Beweismittel darf der Entscheidung zu Grund gelegt werden, worüber nicht den Parteien Gelegenheit gegeben war, sich zu äußern.')

[117] [Baden] Regulation of 31 August 1884 on the Procedure in Administrative Matters, ss 3 and 8.

[118] [Baden] Regulation of 31 August 1884 on the Procedure in Administrative Matters, ss 20, 22, and 23.

administration in Germany in the late 1800s and early 1900s. This reduced the discrepancy between the procedural standards in judicial and administrative proceedings to some degree.

The 'standard picture' needs further nuancing when taking into consideration that the decision-making procedure in administrative courts was in some cases less strict than one would assume after reading the abovementioned accounts by German administrative law scholars. First, statute in Baden stipulated that judicial appeals which were found to be inadmissible were usually rejected without an oral hearing.[119] Second, and similarly, in the first instance administrative courts in Bavaria, a public and oral procedure was only required if mentioned expressly in a statute, or if requested by both parties.[120] Third, although the purpose of hearing the affected parties was to protect their interests, individuals in some cases expressly demanded a lower procedural standard. Since a public and oral hearing meant travelling to court, it required both time and financial means.[121] Against this backdrop, legislation in Baden allowed the Administrative High Court to decide cases without an oral hearing if the parties were absent, and if the appellant asked the court to make the decision based on the facts established by the previous instance.[122] The Administrative High Court was careful to limit the laxer procedural standard to the

[119] [Baden] Act of 14 June 1884 concerning Judicial Review, s 41 no 6.

[120] [Bavarian] Act of 8 August 1878 concerning the installation of an Administrative High Court, s 27 sub-s 1; Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 160; Karl Freiherr von Stengel, *Lehrbuch des deutschen Verwaltungsrechts* (Enke 1886) 246; Edgar Loening, *Lehrbuch des deutschen Verwaltungsrechts* (Breitkopf und Härtel 1884) 832.

[121] Johann Caspar Bluntschli, 'Verwaltung und Verwaltungsrechtspflege' (1864) 6 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 265, 288.

[122] [Baden] Act of 14 June 1884 concerning Judicial Review, s 39; see also, Administrative High Court of Baden, 3 December 1887; quoted in Friedrich Wielandt (ed), *Die Rechtsprechung des Großherzoglich-Badischen Verwaltungsgerichtshofs vol 1, 1864–1890* (Braun 1891) 90 Nr 138.

statutory exceptions expressly provided for.[123] In some cases, however, it gave judgment without hearing the parties orally.

Ultimately, while the 'standard picture' in many cases adequately captures the relevance of the distinction between 'judicial' and 'administrative' powers for procedural review, there were some deviations and exceptions. The distinction between judicial and administrative powers did *not* determine the applicable procedural rules in a conclusive sense. The distinction rather served as a starting point to the inquiry on whether and how affected parties ought to be heard. In the exercise of judicial powers, the parties usually had to be heard prior to a judgment being passed, and the proceedings were usually public and oral. In the exercise of administrative powers, by contrast, the rule of thumb was that parties usually did not have to be heard before an administrative act was rendered, and the proceedings were generally neither public nor oral. Deviating from the standard picture required justification and, if a court went beyond the legislative rules, explicit judicial reasoning. Adhering to the 'standard picture', by contrast, for instance by holding that it is necessary to hear the parties prior to giving 'judgment', appears to have been considered as largely self-explanatory.

4. Summary and Comparison with France

In lieu of a mere summary of the German part, it is useful to draw out three points on similarity and difference with France.

First, an important similarity between France and Germany concerned the circumstance that the rules on the provision of a hearing essentially depended on whether the decision in

[123] Eg Baden Administrative High Court 4 January 1888 [Friedrich Wielandt (ed), *Die Rechtsprechung des Großherzoglich-Badischen Verwaltungsgerichtshofs vol 1, 1864–1890* (Braun 1891) 96 no 152].

question was judicial ('a judgment') or administrative ('an administrative act'). A different set of procedural rules applied to administrative courts and to decision-makers of the active administration. Broadly, the participation of affected parties was considered more important in administrative courts, the procedural standard being higher than in the active administration. Against this backdrop, it was crucial for administrative judges hearing procedural review cases to consider whether a decision was judicial or administrative in nature. In this sense, review on the ground of an unlawful decision-making procedure in France and Germany was carefully crafted around notions of 'judicial' and 'administrative' powers.

Second, a difference between France and Germany is noticeable in the scope of statutory rules on the provision of a hearing. As will be recalled, the French legislator enacted extensive statutory rules on the procedure of administrative courts (such as the Council of State and the Councils of Prefecture) at a general level, ie applicable across subject-matters. For the procedure of the French active administration, by contrast, statutory rules on the participation of affected parties only existed sparsely for specific administrative acts or subject-matters.[124] In Germany, legislators (at least in some German States) enacted statutory rules with a broad scope on the procedure of both administrative courts and the active administration. As examples for such general procedural rules for the public administration, I examined the Prussian statutory rules on the 'administrative decision procedure', as well as the Baden Regulation concerning the Procedure in Administrative Matters of 1884. Nonetheless, even where such general statutory rules on the procedure of the active administration existed, the legislatively ordained procedural standard was lower than in administrative courts.

[124] II 2 (p 117).

Third, a further difference between Germany and France concerned the interplay between written and unwritten law. In Germany, judicial reasoning on the provision of a hearing largely built on written law, namely the legislatively ordained distinction between judicial and administrative decisions, decision-makers, and the respective statutory procedural rules. Yet I illustrated that, where necessary, administrative judges in Germany also invoked 'standards […] of […] unwritten law'.[125] Importantly, non-positive law was brought into play for the decision-making of the active administration, too. With regard to the procedures of administrative courts, non-positive conceptions going beyond what was laid down in statute were very common and influential in Germany, for instance in Otto Mayer's writing.[126] For France, I have argued that non-positive conceptions of administrative court procedures existed, but that their operational relevance was rather limited after the Act of 24 May 1872.[127] In reviewing 'administrative acts', rendered by 'the active administration', on the ground of a procedural legal error (*vice de forme*), the Council of State to my knowledge did not invoke any unwritten law. It appears that unwritten standards or principles on hearing the affected parties in the decision-making of the active administration did not exist in France; the Council of State merely applied the existing statutory rules.

[125] III 3 (p 139).

[126] II 2 (p 131).

[127] II 3 (p 124).

IV. England: Judicial and Administrative Powers in Natural Justice

As will be recalled, the main argument of the present chapter is that procedural review was carefully crafted around notions of 'judicial' and 'administrative' powers in France and Germany, but less so, and in a different sense, in England. This argument is substantiated in the following insofar as it concerns English law. It is *not* my claim that notions of 'judicial' and 'administrative' powers were entirely absent or irrelevant to procedural review in England. In fact, English judges frequently used the distinction between 'judicial' and 'administrative' powers as a means of crafting a doctrinal framework for questions pertaining to the participation of affected parties. Yet these attempts were, arguably, not very successful. They were ultimately dismissed by Lord Reid in *Ridge v Baldwin* (1964).[128] In the late 1800s and early 1900s, the ways in which English judges used notions of 'judicial' and 'administrative' powers were ambiguous. Seen from a comparative perspective, crafting a doctrinal framework around notions of 'judicial' and 'administrative' powers was fraught with complexity in England due to the absence of an entrenched institutional and constitutional distinction between 'judicial' and 'administrative' powers. This is the main reason why the distinction caused a lot of confusion in England, and why it was less pivotal to procedural review in England than it was in France in Germany.

The first section outlines how notions of 'judicial' and 'administrative' powers came up in English cases on the common law principle of natural justice. Second, a 'flexible' approach to procedural review prevailed in the late 1800s. Notions of 'judicial' and 'administrative' were used in a loose sense, and they stood in a very close connection to the question of

[128] *Ridge v Baldwin* (1964) AC 40; Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) 131–37.

what natural justice required in a given case. The third section gives a comparative perspective on the flexible approach. Fourth, I discuss a more 'taxonomic' approach to procedural review, introduced by the House of Lords in the judgment in *Arlidge* (1914).

1. Judicial and Administrative Powers in Decision-Making Procedures in England

Although the distinction between judicial and administrative powers did not have the overarching importance for the English legal system it had in Germany and France, the distinction was by no means irrelevant to decision-making procedures. For the Supreme Court of Judicature, for instance, generally applicable procedural rules were laid down in the Judicature Acts 1873–1875.[129] Statutory rules with a similarly wide scope on the decision-making procedure of administrative authorities, by contrast, did not exist. This was to some degree due to the fact that the various local, regional, and central decision-makers in England were not conceived as forming an abstract administrative whole or a centralised and hierarchically organised 'public administration'.[130] Legislative rules on administrative decision-making only existed regarding specific procedural requirements for specific decisions, such as a public local inquiry in the context of closing orders, or a notice prior to taking down a sign dangerously jutting out over the street.[131] In this respect,

[129] For example, Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) ss 68–74 and sch 1; Supreme Court of Judicature Act 1875 (38 & 39 Vict c 77) ss 16–21 and sch 1.

[130] This was discussed above in chapter 2 IV 1 a (p 72).

[131] The requirement of holding a public local inquiry prior to deciding an appeal on a closing order, laid down in the Housing and Town Planning Act 1909 (9 Edw 7 c 41) s 39 sub-s 1, was discussed in *R v Local Government Board ex p Arlidge* [1915] AC 120; the requirement of a notice to the owner prior to taking down his dangerous sign was laid down in the Act (6 Will 4 c 25) s 82, and discussed in *A-G v Hooper* [1893] 3 Ch 483.

concerning the absence of statutory procedural rules generally applicable to administrative decision-making, England was similar to France.

However, statutory provisions were generally less important to the provision of a hearing in England when compared to French and German law. In England, the right to be heard and the *audi alteram partem* principle were grounded in the common law principle of natural justice.[132] The specific requirements of natural justice in a given case were commonly construed using verbal constructions such as giving the parties an 'opportunity of being heard', giving 'prior notice', or 'notifying' the parties.[133] While it was shown above that many of the German and French legal concepts pertaining to 'the provision of a hearing' were commonly employed in *either* judicial *or* administrative settings, it is worth noting that the English terms 'the right to be heard' and 'natural justice' could, and can until nowadays, refer to any decision-maker. This constitutes a noticeable contrast. It hints at the fact, established in detail in chapter 2, that distinguishing between 'judicial' and 'administrative' powers and decision-makers was much less a structural feature of the English legal system than in France and Germany. In addition, the English notions of 'the right to be heard' and 'natural justice' applied in private law contexts, too.[134] This reflects that England did not have an entrenched division between public and private law.[135]

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[132] Gavin Drewry, 'Judicial Review: The Historical Background' in Michael Supperstone, James Goudie, and Paul Walker (eds), *Judicial Review* (5th edn, LexisNexis 2014) 41, 46.

[133] The notion of 'natural justice' itself was invoked in *Cooper v Wandsworth Board of Works* (1863) 143 ER 414, *Smith v R* (1878) 3 App Cas 614, and *R v Local Government Board ex p Arlidge* [1915] AC 120; 'the right to be heard' was less commonly used during the late 1800s and early 1900s and appears to have gained broader currency during the 20th century; '*audi alteram partem*' was used in *Lapointe v L'Association de Bienfaisance et de Retraite de la Police de Montreal* (1906) AC 585, and *R (on the prosecution of Wray) v Darlington School Governors* (1844) 115 ER 257.

[134] Eg *Wood v Woad* (1873–74) LR 9 Ex 190 (on the expulsion of a member of a mutual insurance company); *R v The Company of Fishermen of Faversham* (1799) 8 TR 352; *Innes v Wylie* (1844) 1 Car & K 257; cited by Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 270.

[135] John Allison, *A Continental Distinction in the Common Law: a Historical and Comparative Perspective on English Public Law* (OUP 2000).

Leaving these institutional and constitutional backdrops aside for just a moment, it is remarkable how frequently English judges invoked notions of 'judicial' and 'administrative' powers in their judicial reasoning on natural justice. The distinction was used a means of crafting a doctrinal framework. English judges relied on characterising certain powers (decisions, functions, duties, or decision-makers) as 'judicial' or 'administrative' as a means of resolving whether and how affected parties needed to be heard. Broadly speaking, a decision-maker's obligation to hear affected parties was more rigorous, and the procedural standard higher, where English judges characterised a certain decision as being 'judicial', than where a decision was taken to be 'administrative' in nature. This resembled French and German law, which similarly provided for a higher procedural standard in the exercise of 'judicial', as opposed to 'administrative', powers. However, as will be seen in due course, this result was achieved in fundamentally different ways, and the details of the procedural obligations differed significantly, too. Further, English judgments on the provision of a hearing did not always build on notions of 'judicial' and 'administrative' powers. In some instances, English judges reasoned and decided on the procedural obligations of decision-makers without invoking any notions of 'judicial' and 'administrative' powers.[136]

Where English judges in the late 1800s and early 1900s did build on characterising certain powers as 'judicial' or 'administrative', they used various terms. There was no generally accepted legal vocabulary. To the contrary, the unclear and constantly evolving legal language reflected the absence of an entrenched institutional and constitutional distinction between 'judicial' and 'administrative' decision-makers, as well as the administrative

[136] Eg *Brutton v Vestry of St George's Hanover Square* (1871–72) LR 13 Eq 339; *Masters v Pontypool Local Government Board* (1878) 9 Ch D 677. Whilst these two cases concerned actions for an injunction in the Court of Chancery and the Chancery Division of the High Court respectively, other injunction cases on natural justice did build on notions of 'judicial' and 'administrative' powers, eg *Fisher v Jackson* [1891] 2 Ch 84 and *A-G v Hooper* [1893] 3 Ch 483.

reforms discussed in chapter 2. While judges occasionally used the category of 'judicial powers',[137] or 'judicial proceedings',[138] they sometimes asked instead whether a decision-maker had to 'act judicially',[139] or whether it needed 'to act as a Court'.[140] In the late 1800s, these expressions were by and large used as synonymous. Administrative powers were occasionally described only negatively as being 'not judicial', without a positive category.[141] Further, the notion of 'ministerial' powers, or 'acting ministerially', was used as the opposite of 'judicial' powers.[142] At times, 'ministerial' denoted the absence or the very limited 'discretion' of a decision-maker, whereas it meant 'administrative' in other instances.[143] But 'ministerial' powers regularly entailed a lower procedural standard.[144] In natural justice cases, the language of 'administrative' and 'executive' powers itself only gained currency during the 1910s.[145]

In the previous chapter 2, it was shown that the wide-ranging administrative reforms of the 19th century were achieved without real regard to a distinction between judicial and

[137] *Cooper v Wandsworth Board of Works* (1863) 143 ER 414, 418.

[138] *Capel v Child* (1832) 149 ER 235, 244; *Re Hammersmith Rent-Charge* (1849) 154 ER 1136, 1140.

[139] *Cooper v Wandsworth Board of Works* (1863) 143 ER 414, 420; *R v Local Government Board ex p Arlidge* [1915] AC 120, 123 and 132.

[140] *Vestry of St James and St John, Clerkenwell v Feary* (1890) 24 QBD 703, 711; *A-G v Hooper* [1893] 3 Ch 483, 489.

[141] *A-G v Hooper* [1893] 3 Ch 483, 489.

[142] Eg *Cooper v Wandsworth Board of Works* (1863) 143 ER 414, 420.

[143] SA de Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 30.

[144] Since charactersing decisions as 'ministerial' regularly entailed a lower procedural standard (than decisions characterised as 'judicial'), 'ministerial' can, for the purposes of the present chapter, be treated as synonymous to the other notions for 'administrative'.

[145] *R v Local Government Board ex p Arlidge* [1915] AC 120, 'administrative bodies' (132), 'functions' (132), 'executive functions' (132), 'executive officers' (138), 'administrative action of the local authority' (144), 'administrative orders' (149), 'administrative acts' (150). The term 'administrative' was already used in *Board of Education v Rice* [1911] AC 179, 182.

administrative powers.[146] Sometimes, Parliament legislated right across the distinction, for instance in the context of statutory tribunals. In the absence of a legislatively ordained distinction between judicial and administrative powers and decision-makers, the fact that English judges in natural justice cases relied on drawing such distinction is far from self-explanatory. The point is best explained when compared to French and German law.

As was explained in chapter 2, legislators in France and Germany crafted institutions consciously around notions of 'judicial' and 'administrative' powers. In general, it was easy to distinguish 'administrative courts' and decision-makers of 'the active administration'. Even where institutions of a dual remit (such as the lower instance administrative courts in Germany or the French Council of State) acted judicially in certain matters and administratively in other matters, it was in principle simple to tell whether a decision-maker exercised judicial or administrative powers in a specific instance.[147] As previously explored in chapter 3, the judicial or the administrative nature of the decision-maker and his decision entailed a different set of procedural rules on the provision of a hearing, and thus shaped procedural review.

By contrast to their German and French counterparts, English judges did not have a legislatively predetermined and clear-cut categorisation of judicial and administrative powers and decision-makers to work with. Instead, English courts retrospectively applied the distinction between 'judicial' and 'administrative' to decision-makers that had been created without a pervasive regard to the distinction. This had an important consequence for procedural questions on the provision of a hearing. In their attempts of crafting a

[146] Chapter 2 III 2 (p 79).

[147] As discussed above for Germany, these institutions of dual remit did stir some confusion. Nonetheless, it was in principle simple to tell whether a decision-maker acted judicially or administratively because statute expressly and extensively determined which matters were judicial and which were administrative.

doctrinal framework, English judges in natural justice cases were commonly doing two things at the same time: drawing the boundaries between what is 'judicial' and what is 'administrative' as well as determining the legal significance of categorising a certain decision as either 'judicial' or 'administrative'. How precisely English judges approached this twofold query will be examined in the ensuing sections.

2. The Flexible Approach

For large parts of the late 19th and early 20th centuries, English judges used the distinction between 'judicial' and 'administrative' powers to address legal questions pertaining to the provision of a hearing in a flexible way. The two categories were employed in a loose sense. They were very closely linked to the question of what natural justice required in a given case, taking into consideration other issues like the rights or interests touched upon by the decision in question, the gravity of the decision, and statutory context.

In the famous case of *Cooper v Wandsworth Board of Works* (1863), the defendants destroyed Mr Cooper's house because the latter had failed to observe a statutory requirement to inform the Board of Works of his intention to build seven days in advance.[148] Mr Cooper complained he was not informed of the demolition in advance, let alone given an opportunity of being heard. The defendants argued that, since the statute in question did not mention a hearing, they were not obliged to hear Mr Cooper. Since the Act in question in fact did not explicitly determine whether a hearing needed to be given, statutory context brought the judges only thus far. In their reasoning, Wills J and Byles J classified the demolition order as being 'judicial' in nature, but this was ultimately not decisive for the

[148] *Cooper v Wandsworth Board of Works* (1863) 143 ER 414.

outcome.[149] Byles J reasoned that 'the board are wrong whether they acted judicially or ministerially'.[150] Similarly, Wills J held that the case falls under a 'rule […] of universal application', as opposed to a rule applicable to judicial powers only. The universally applicable rule was that any decision-maker invested with powers 'to affect the property of one of Her Majesty's subjects' must give an opportunity of being heard.'[151] Strictly speaking, characterising the powers exercised by the Board of Works as judicial was thus not decisive for the requirement to hear Mr Cooper prior to taking down his house.

Yet it is important to note that the reasoning as to why a hearing was required was very similar to the reasoning on characterising the decision as being judicial. For both issues, the judges in in the Court of Common Pleas relied on the 'enormous consequences' of the demolition order, and especially on the fact that it affected property rights.[152] Hence, the gravity of the decision in question was crucial for the assertion that the powers were judicial *and* for the assertion that a hearing was required.

That said, the judicial or administrative nature of the demolition order was only one out of two main lines of reasoning on the provision of a hearing. A second strand of reasoning built on statutory context. The judges held that a hearing facilitated the purpose of the statutory scheme rather than undermining it. The idea was that hearing affected parties would improve the Board of Works' decision-making, for example by establishing the facts where a timely notice got lost in the postal services.[153] On the question of whether a hearing

[149] *Cooper v Wandsworth Board of Works* (1863) 143 ER 414, 418 and 420.

[150] *Cooper v Wandsworth Board of Works* (1863) 143 ER 414, 420.

[151] *Cooper v Wandsworth Board of Works* (1863) 143 ER 414, 418.

[152] *Cooper v Wandsworth Board of Works* (1863) 143 ER 414, 417–420.

[153] *Cooper v Wandsworth Board of Works* (1863) 143 ER 414, 417 and 421; Joanna Bell, *The Anatomy of Administrative Law* (Hart 2020) 60.

was required, statutory context thus complemented the reasoning as to the 'judicial' nature of the demolition order.[154]

In the decades after *Cooper* (1863), notions of 'judicial' and 'administrative' powers gained currency as a doctrinal tool influencing how precisely affected parties ought to be given an opportunity of being heard. Interestingly, although the judicial nature of the statutory powers was strictly speaking not decisive in *Cooper*, the case was thereafter often cited as an authority to the point that judicial powers required a stricter procedural standard. For instance, Wills J in *Hopkins v Smethwick Local Board of Health* (1890),[155] cited *Cooper* and reasoned that ordering the destruction of a house 'from the nature of the thing done […] must be a judicial act, and justice requires that the man should be heard' in this regard.[156] Although the judicial nature of the decision was not decisive in *Cooper*, it was crucial to Wills J's reasoning in *Hopkins*. Characterising a certain decision as 'non-judicial', by contrast, entailed a less strict procedural standard, to the effect that it was sufficient to notify an affected party *after* an order was made rather than *before* making the order.[157] In the exercise of administrative powers, it lay upon the affected party to raise objections and to ask for a hearing *after* he was notified of the initial order.[158] Where a

[154] Statutory context was crucial, similarly to today, see Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) 13.

[155] *Hopkins v Smethwick Local Board of Health* (1890) 24 QBD 712.

[156] *Hopkins v Smethwick Local Board of Health* (1890) 24 QBD 712, 715.

[157] *Vestry of St James and St John, Clerkenwell v Feary* (1890) 24 QBD 703 (an order requiring the addressee to furnish proper doors and coverings to a water-closet).

[158] *A-G v Hooper* [1893] 3 Ch 483, 489 (an order to take down a large sign, which dangerously jutted out over the footpath and parts of the road); Stirling J held that the commissioners 'were not bound to act as a Court' when issuing the removal order.

decision was considered as being 'judicial', by contrast, the decision-maker had an obligation to organise a hearing prior to making an order.[159]

Naturally, a decision-maker's obligation to give affected parties an opportunity of being heard did not exclusively depend on the judicial or administrative nature of the decision, but on many different elements of a case. Yet the distinction was frequently invoked by judges across various subject-matters and regulatory schemes. The rule of thumb was that the procedural standard was stricter in the exercise of judicial powers than in the exercise of administrative powers.[160]

Crucially, how exactly judges drew the boundaries between 'judicial' and 'administrative' remained largely unclear. Occasionally, powers were classified as either 'judicial' or 'administrative' without giving any explanation at all.[161] Judges frequently built on the gravity of the decision in question, namely looking into which rights or interests of the affected parties were concerned. Where exercising certain statutory powers had more severe consequences for affected parties, especially where property rights were affected, decisions were more likely to be characterised as 'judicial'.[162] Further, judges relied on statutory context to characterise certain decisions as 'judicial' or 'administrative'. This could take various forms, such as the precise wording of a statutory provision, the existence of procedural requirements expressly laid down in statute, or the existence of appeal

[159] *Fisher v Jackson* [1891] 2 Ch 84, 85 (the dismissal of a school's principal for alleged negligence); North J considered the vicar's authority over the principal as 'judicial'.

[160] Compare to SA de Smith, 'The Right to a Hearing in English Administrative Law' in (1955) 68 Harvard Law Review 569, 577 claims that '[n]o clear principles can be deduced from the miscellany of cases dealing with the duty to give prior notice of impending administrative action.'

[161] *Smith v R* (1878) 3 App Cas 614, 625.

[162] *Cooper v Wandsworth Board of Works* (1863) 143 ER 414; similarly, *Hopkins v Smethwick Local Board of Health* (1890) 24 QBD 712, 714.

clauses.[163] Yet arguments from statutory context were rarely compelling, given that English statutes did not generally differentiate between administrative and judicial powers in the way German and French legislation did.

The English approach to procedural review in the late 1800s can be characterised as 'flexible'. English judges frequently invoked notions of 'judicial' and 'administrative' in their reasoning on what the common law principle of natural justice required in a given case, and the two things were closely connected. Yet it remained unclear how precisely the boundaries between 'judicial' and 'administrative' were drawn. Beyond the fact that the procedural standard was generally stricter in the exercise of 'judicial' powers, the precise legal consequences of characterising a certain decision as 'judicial' or 'administrative' remained unclear, too. Additionally, there was ambiguity around the object of the distinction. Was the specific decision under review being classified as 'judicial', the decision-maker, the decision-maker's procedural obligations, or was it a combination of these, the latter in some way following from one of the former?

3. A Comparative Perspective on the Flexible Approach

Similarly to France and Germany, the procedural obligation of a decision-maker to hear affected parties was stricter where English decision-makers were making decisions of a 'judicial' nature, as opposed to 'administrative' decisions. Similarities are especially noticeable between German and English non-positive conceptions of judicial powers,

[163] In *Vestry of St James and St John, Clerkenwell v Feary* (1890) 24 QBD 703, 711, Lord Esher MR held that 'there are no words' in the Metropolis Management Amendment Act 1862 (25 & 26 Vict c 102) suggesting that the vestry 'is to act as a Court'. In *Cooper v Wandsworth Board of Works* (1863) 143 ER 414, 418, Wills J held that the statutory language of coming 'under the jurisdiction of the vestry or board' made it 'clear that these boards do exercise judicial powers'; Erle CJ argued that the existence of an appeal clause 'would evidently indicate that many exercises of the power of a district board would be in the nature of judicial proceedings'.

insofar as they presupposed hearing the affected parties prior to giving a judgment. Some of the writings of the German administrative law scholar Otto Mayer strongly resemble the reasoning of English judges to the point that exercising judicial powers required a prior hearing of affected parties.[164]

Yet, as was mentioned above, French and German judges could build on legislation that clearly differentiated between judicial and administrative decision-makers, decisions, and decision-making procedures. In France and Germany, determining the precise procedural obligations of 'judicial' and 'administrative' decision-makers was largely an exercise in applying statutory provisions. English judges, by contrast, could neither build on a legislatively ordained distinction between 'judicial' and 'administrative' powers, nor was determining the precise procedural obligations of decision-makers merely an exercise in applying statute. Thus, English judges had to do a lot of the work which was being done by legislators in France and Germany.

On the English 'flexible approach', judges were drawing the boundaries between 'judicial' and 'administrative', and they were at the same time determining the legal consequences of so classifying a certain decision.[165] Operationalising the distinction was very closely connected to determining its legal significance. Whilst English judges mostly inferred the due procedural standard from the 'judicial' or 'administrative' nature of a decision, it was equally normal to infer, vice versa, the judicial or administrative nature of a decision from the due procedural standard. English judges reasoned either way. In *Hopkins*, for example, Wills J in his discussion of an earlier case inferred the 'non-judicial' nature of a primary

[164] Above, III 2 (p 131).

[165] An exception to this were cases in which the institutional nature of English decision-makers was clear, for example *Capel v Child* (1832) 149 ER 235, 244, where a bishop acted as an ecclesiastical court ('Consistory Court of London').

decision from the fact that a statutory provision explicitly denied the requirement of a hearing.[166]

Occasionally, the requirements of natural justice were so closely associated with the nature of a decision as 'judicial' or 'administrative', that asking whether a decision was 'judicial' could be taken as almost synonymous to asking whether a hearing was necessary. A striking example is the case of *Palgrave Gold Mining Co v McMillan* (1892).[167] Lord Hobhouse in this case set out to explain why the appointment of an arbitrator was a non-judicial act, but his reasoning instead ended up making the point that a hearing was not required (rather than making the point that the act was non-judicial).[168] The distinction between judicial and administrative powers came to be associated so closely with the requirement of a hearing that the two issues merged into one in discussion. In these instances, 'judicial' powers and 'the provision of a hearing' were inseparable, almost tautological, concepts.

Accounting for this, one could make the point that English judges used the categories of 'judicial' and 'administrative' in an inherently normative way. Since French and German judges could largely rely on the normative work previously undertaken by the legislator, using the categories of 'judicial' and 'administrative' did not generally require taking highly normative decisions on the part of German and French judges. English judges, by contrast, had to do this normative work themselves. Categorising certain powers as being

[166] In *Hopkins v Smethwick Local Board of Health* (1890) 24 QBD 712, Wills J discussed *Cheetham v Mayor of Manchester* (1875) LK 10 CP 249. The statutory context in *Cheetham* was the Manchester Improvement Act 1867 (30 Vict c 36) s 38, which expressly stipulated that if there is 'imminent danger' from a building, 'the corporation shall and may, without any presentment, notice, or other formality' take down the building. In *Hopkins*, Will's J discussed *Cheetham* to make the point that '[T]he language of an Act of Parliament may […] be so strong as to shew that the act is not a judicial act', thus limiting 'the natural inference as to the nature of the act.' Wills J thus inferred the 'non-judicial' nature of the decision in *Cheetham* from the absence of a requirement of a hearing.

[167] *Palgrave Gold Mining Co v McMillan* [1892] AC 460, an appeal from the Supreme Court of Nova Scotia to the Privy Council and strictly speaking not an English case; yet the case was frequently discussed together with the other English cases mentioned in this chapter.

[168] *Palgrave Gold Mining Co v McMillan* [1892] AC 460, 470.

'judicial' or 'administrative' was a doctrinal tool, doing bits of the normative work necessary to resolve whether and how affected parties needed to be heard.[169] However, a risk resulted from the fact that, although it often remained unclear how English judges drew the boundary between 'judicial' and 'administrative', the distinction had a remarkable legal significance, effectively deciding the outcome of many cases.[170] Despite the fact that it was largely unclear how precisely the distinction between 'judicial' and 'administrative' was drawn, once the nature of a decision was established, the procedural obligations of the decision-maker were portrayed as self-evident, as easily deducible from the nature of the act.[171] The actual normative work of deciding whether, how, and why affected parties needed to be heard, was occasionally overlooked. The resulting danger was that 'judicial' and 'administrative' could be employed as mere conclusionary labels rather than a meaningful doctrine supporting the judges in doing the normative work necessary for deciding difficult procedural questions. The distinction between 'judicial' and 'administrative' powers ran the risk of being treated as something it was not, a self-evident analytical tool.

4. A more Taxonomic Approach: Arlidge

In *R v Local Government Board, ex p Arlidge* (1914), the House of Lords reconceptualised how the boundaries between 'judicial' and 'administrative' powers were drawn as well as

[169] Stephen Sedley, *Lions Under the Throne: Essays on the History of English Public Law* (CUP 2015) 66 notes that in using the labels of judicial and administrative powers, the Victorian judges were able 'to a significant extent to choose where they were prepared to intervene'.

[170] Similarly, Philip Joseph, 'False Dichotomies in Administrative Law: From There to Here' (2016) New Zealand Law Review 127, 131 argues that the terms 'judicial' and 'administrative' were 'used loosely without any apparent deliberation, although the choice of label effectively decided the case.'

[171] Eg *Smith v R* (1878) 3 App Cas 614.

the legal significance of the distinction.[172] Their Lordships thus attempted to craft a new doctrinal framework for procedural review. The approach in *Arlidge* was more 'taxonomic' in that it differentiated several objects which were being distinguished as 'judicial' or 'administrative': institutions, the nature of specific decisions, and procedural duties.

Given the importance of the case, it is useful to outline the dispute in some detail. The Local Government Board was a central government department overseeing local administration in England and Wales between 1871 and 1919.[173] Mr Arlidge complained that the Board had not heard him properly when deciding on his appeal against a closing order made by the Hampstead Borough Council. First, whereas the appeal was decided anonymously by one of the Board's officials, Mr Arlidge argued that he ought to know the exact person deciding his appeal. Second, he claimed he needed to be heard orally by the person who actually decided his appeal, and to hear the Borough Council present their arguments orally before this decision-maker. Third, Mr Arlidge asserted that he was entitled to see the report, which an inspector had submitted to the Board after holding a public local inquiry; this would allow him to bring objections to the report and be heard in this regard.[174]

Ultimately, the House of Lords framed the case as depending on whether the procedural obligations of the Local Government Board were similar to those of a court of law.[175] If this were the case, Arlidge's three arguments would be persuasive. In court proceedings,

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[172] *R v Local Government Board ex p Arlidge* [1915] AC 120.

[173] Christine Bellamy, *Administering Central-Local Relations, 1871–1919: The Local Government Board in its Fiscal and Cultural Context* (Manchester University Press 1988).

[174] *R v Local Government Board ex p Arlidge* [1915] AC 120, 123–25; as required by the Housing and Town Planning Act 1909 (9 Edw 7 c 40) s 39 sub-s 1, an inspector on behalf of the Board had held a public local inquiry, attended by the Mr Arlidge and his solicitor, the Hampstead Borough Council and the London County Council.

[175] *R v Local Government Board ex p Arlidge* [1915] AC 120, 130, Viscount Haldane LC referred the conflicting views in the Court of Appeal on whether an analogy could be built to the procedure of a court of justice; see also, Albert Venn Dicey, 'The Development of Administrative Law in England' (1915) 31 LQR 148, 150–51.

the claimant knows which judge makes a decision; a court usually hears both parties orally; and a court usually discloses the evidence upon which it grounds its decision. The English judgments discussed in the previous sections on 'the flexible approach' neither determined expressly that the various statutory decision-makers had to emulate the proceedings of a court of law, nor did they explicitly make the point that the procedural obligations of the two kinds of decision-making bodies differed fundamentally. In *Arlidge*, the House of Lords approached the matter by differentiating between the institutional nature of the Local Government Board, the nature of the decision under review, and the nature of the Local Government Board's procedural obligations.

The discussion on the institutional nature of the Local Government Board focused on the changes brought about by the Housing and Town Planning Act 1909[176] in comparison to its predecessor, the Housing of the Working Classes Act of 1890.[177] The crucial change was that powers previously residing within Courts of Summary Jurisdiction and Courts of Quarter Sessions were conferred on local borough councils and the Local Government Board; institutions, which Viscount Haldane LC categorised as 'administrative bodies'.[178] Further, the Lord Chancellor differentiated between the nature of specific decisions. Deciding on an appeal, for instance, was 'judicial'.[179] The procedural obligations of the Local Government Board constituted the third component of distinguishing between 'judicial' and 'administrative'. The Lord Chancellor held that 'administrative bodies' when

[176] 9 Edw 7 c 40.

[177] 53 & 54 Vict c 70.

[178] *R v Local Government Board ex p Arlidge* [1915] AC 120, 132.

[179] *R v Local Government Board ex p Arlidge* [1915] AC 120, 132, Viscount Haldane LC held that by delegating the authority to decide an appeal, Parliament entrusted the Local Government Body with 'judicial duties'; he further distinguished between the nature of the decision appealed against ('an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court').

deciding an appeal must 'act judicially'. But this did not entail mirroring the procedure of courts of law. Instead, 'acting judicially' meant adhering to basic unwritten procedural safeguards and the respective statutory provisions:

> [W]hen the duty of deciding an appeal is imposed, those whose duty it is to decide it must *act judicially*. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. *But it does not follow that the procedure of every such tribunal must be the same*. In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. *But what that procedure is to be in detail must depend on the nature of the tribunal*. […] When […] Parliament entrusts it [the Local Government Board] with *judicial duties* [ie deciding an appeal], Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own […][180]

The 'procedure which is its own' referred to the statutory provisions on the Local Government Board.[181] Thus, the procedural obligations of the Local Government Board depended on its institutional nature ('the nature of the tribunal'), the nature of the specific decision in question ('the duty of deciding an appeal', 'judicial duties'), and first and foremost: statute. The Housing and Town Planning Act 1909 did not mention any of the three procedural duties claimed by Mr Arlidge. The basic procedural requirements were not violated either, given that Mr Arlidge was given the chance of presenting his case in the context of the public local inquiry. Therefore, the Local Government Board was not under any of the duties claimed by Mr Arlidge.

Viscount Haldane's speech can be read as an attempt to craft a new framework for procedural issues, moving away from the earlier flexible approach. Their Lordships in *Arlidge* settled that statutory (and in a broad sense 'administrative') decision-makers did

[180] *R v Local Government Board ex p Arlidge* [1915] AC 120, 132; italics are mine; similarly, *Board of Education v Rice* [1911] AC 179, 182 (Lord Loreburn LC).

[181] *R v Local Government Board ex p Arlidge* [1915] AC 120, 133.

not have to emulate the procedure of courts of law.[182] To this end, they differentiated between several objects which could be classified as 'judicial' or 'administrative': institutions, decisions (or functions), and procedures. The notion of 'administrative efficiency' played an important part in positing a fundamental difference between courts and statutory administrative decision-makers. Lord Shaw made the point that '[j]udicial methods may, in many points of administration, be entirely unsuitable, and produce delays, expense, and public and private injury. […] if administration is to be beneficial and effective, it must be the master of its own procedure.'[183] In none of the previously discussed English cases was 'administration' used as a free-standing noun.[184] It appears that the diffusion of a collective noun regrouping the variety of administrative decision-makers coincided with a closer attention to the internal logic of administrative, as opposed to judicial, business.

In positing such a fundamental difference between courts and statutory administrative decision-makers, *Arlidge* marked 'the beginning of a different approach to procedural review': the judges became 'more deferential'.[185] Lord Shaw's assertion that the

[182] *R v Local Government Board ex p Arlidge* [1915] AC 120, 140, 146, 137, and 132–133; Lord Parmoor held that 'in a hearing before some tribunal other than a Court of law there is no obligation to adopt the regular forms of legal procedure. It is sufficient that the case has been heard in a judicial spirit […]'. Lord Moulton held that the 1909 Act did not intend 'that the Local Government Board should act in a purely judicial capacity.' Lord Shaw contended that the fundamental flaw in the decision of the Court of Appeal was that they assumed that 'judicial methods or procedure should apply to departmental action.' Similarly, *R v Judge Amphlett* [1915] 2 KB 223, 238.

[183] *R v Local Government Board ex p Arlidge* [1915] AC 120, 137–8, Lord Shaw further noted that while 'lawyer-like methods may find especial favour from lawyers', a judiciary imposing 'its own methods on administrative or executive officers is a usurpation.'

[184] In previous cases, 'administration' as a noun was used only in conjunction with other nouns, eg 'the administration of the English law' or 'the administration of justice' in *Capel v Child* (1832) 149 ER 235, 246, 'the administration of the trust' in *Fisher v Jackson* [1891] 2 Ch 84, 91, and the 'administration' of 'large [statutory] powers' and 'the administration of justice' in *Cooper v Wandsworth Board of Works* (1863) 143 ER 414, 417.

[185] Joanna Bell, *The Anatomy of Administrative Law* (Hart 2020) 39–40; similarly, Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) 62.

administration ought to be the 'master of its own procedure' illustrates this.[186] Lord Moulton took this one step further:

> [I]f the statute had authorized them [the local authority] to do these acts without giving any appeal [to the Local Government Board], the legislation might be considered to be unwisely drastic, but it would have to be recognized and enforced by the Courts, and *no such question as to whether or not it was 'contrary to natural justice' could possibly be considered by the Courts*. […] These rules are *beyond the criticism of the Courts*, and it is not their business to add to or take away from them, or even to discuss whether in the opinion of the individual members of the Court they are adequate or not.[187]

Lord Moulton's speech suggested that in reviewing statutory administrative bodies, the courts were restrained to applying the plain statutory text without relying on any form of common law reasoning.[188] 'Contrary to natural justice' no longer seemed to be an available ground of judicial review.[189] Instead, the Local Government Board according to Lord Moulton had to follow the rules laid out in statute 'because they are imposed by statute, and for no other reason, and whether they give much or little opportunity for […] quasi-litigious procedure depends solely on what Parliament has thought right'.[190]

On a brief comparative note, it can be discerned that Lord Haldane's framework resembled the German approach to procedural review: statute primarily determines the applicable procedural rules; unwritten principle comes into play only exceptionally, where necessary. Lord Moulton's speech, by contrast, was closer to the French position: statute entirely determines the procedure of administrative decision-makers, no unwritten general principle could possibly be considered in court.

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[186] *R v Local Government Board ex p Arlidge* [1915] AC 120, 137–38.

[187] *R v Local Government Board ex p Arlidge* [1915] AC 120, 150; accentuations are mine.

[188] I do not mean to suggest there is such thing as a 'plain' or 'literal' meaning of a statutory text, I merely try to paraphrase Lord Moulton's speech.

[189] Similarly sceptical with regard to the term 'natural justice', *R v Local Government Board ex p Arlidge* [1915] AC 120, 138 (Lord Shaw).

[190] *R v Local Government Board ex p Arlidge* [1915] AC 120, 150.

Positing an essential difference between the decision-making procedures of courts and (statutory) administrative decision-makers brought English law closer to both French and German law. But it remains the case that only the French and German legislators generally differentiated between judicial and administrative decision-makers ('administrative courts' and 'the active administration'), decisions ('judgments' and 'administrative acts') and decision-making procedures. German legislation was especially detailed in this regard. In England, by contrast, even once the House of Lords in *Arlidge* crafted a more taxonomic approach to procedural review, the judges could not build on similar distinctions predetermined by Parliament. Classifying decision-makers, decisions (or functions), and decision-making procedures continued to be a task for the English judges. The vocabulary used by their Lordships in *Arlidge* to differentiate between 'judicial' and 'administrative' remained slightly ambiguous and less precise than the French and German legal vocabulary.

5. Summary

English judges used notions of 'judicial' and 'administrative' powers to craft a doctrinal framework for procedural questions on the provision of a hearing. On the 'flexible' and inherently normative approach prevalent between the 1860s and 1900, notions 'judicial' and 'administrative' powers were very closely associated with the requirements of natural justice in a specific case. Characterising a certain decision as 'judicial' entailed a stricter procedure than that required in the exercise of 'administrative' powers, but drawing the boundaries was fraught with complexity. In a comparative perspective, the underlying reason for the problems around the judicial-administrative divide in England was the absence of a legislatively ordained distinction between judicial and administrative powers.

In *Arlidge*, the House of Lords attempted to craft a more 'taxonomic' approach to procedural review by untangling different objects that could be classified as 'judicial' or 'administrative': institutions, decisions (or functions), and procedural obligations. Nonetheless, drawing these distinctions as well as determining their legal significance remained in the hands of English judges, whereas a lot of this work had been done by the legislators in France and Germany.

V. Comparison

The present chapter has established that in France, Germany, and England alike, notions of 'judicial' and 'administrative' had a certain relevance for how judges reviewed decisions on the ground of an unlawful decision-making procedure. In substantiating this for each jurisdiction, I pointed out similarities and differences between the three jurisdictions in the previous parts. Therefore, the ensuing comparative analysis can be relatively concise. The first section considers existing comparative scholarship on the history of procedural review and reflects on the appropriate terms of comparison. Second, I compare the regulatory techniques used in each legal system, especially the scope of statutory rules on decision-making procedures, and the interplay of statutory rules and unwritten principle. The third section substantiates the main argument of the present chapter. Fourth, given that the distinction between judicial and administrative powers was fraught with problems in England, I address the intricate question of the distinction's origins.

1. The Terms of Comparison

Two recent comparative accounts of the history of procedural review are relevant to the present chapter. Considering these accounts illustrates how the comparative framework adopted in this thesis sheds new light on the history of procedural review; it further puts the issues examined into a broader perspective.

In his study on the administrative world in Europe around 1900, the Italian legal historian Stefano Mannoni classifies jurisdictions according to general standards of procedural fairness and the 'sophistication' of the respective case law. The exemplary jurisdiction with

a ‘sophisticated set of procedural rules for officials’ was Austria, and Germany came close to ‘the Austrian standard of quality’.[191] England represents the middle ground, ‘a duty of fairness is affirmed without entering into too much detail’. France is placed in the bottom group, ‘the legendary sophistication of its case law not touching upon the issue of procedure’.[192] On Mannoni’s account, German cases thus set a more ‘detailed’ standard of procedural fairness for administrative decision-makers than English cases, which in turn were more ‘sophisticated’ than French cases on fair procedures.

Given the complexity of procedural review, it is debatable whether these are practical terms of comparison. The cases discussed in this chapter differed in terms of the facts and legal principles at play. To name only a few more obvious criteria, it is possible to differentiate between various decision-makers, subject-matters, affected rights and interests, and the practical consequences of decisions. Further, legal concepts for ‘the provision of a hearing’ did not have precise counterparts in other jurisdictions. How are we to measure and compare the standards of procedural fairness resulting from the requirement of a written notice in an English case, public but chiefly written proceedings in France, or public and oral proceedings being required only when requested by the affected parties or by the decision-maker, as in the Bavarian administrative courts of first instance and in the Prussian procedure for administrative authorities? These issues are not incommensurable, but they do not easily add up to a general standard of procedural fairness or to a degree of ‘sophistication’ of the legal rules. It was therefore not my aim in this chapter to establish a hierarchy between the procedural (fairness) standards in England, France and Germany.

[191] Stefano Mannoni, ‘The Administrative World of Yesterday’ in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 311, 313.

[192] Stefano Mannoni, ‘The Administrative World of Yesterday’ in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 311, 314.

The German law professor Gernot Sydow put forward an alternative comparative and historical account. This focuses on whether the respective systems of administrative law were structured around decision-making procedures and procedural review, and whether the latter took centre stage in the further development of administrative law during the 19th century. For German administrative law of the 1800s, Sydow maintains that procedural rights and obligations played an insignificant role. Instead, the so-called 'forms of action' of the public administration took centre stage: administrative acts, regulations, government contracts and so forth.[193] Stating the formal conditions and legal consequences of different forms of administrative action in abstract terms made it possible to develop more substantive legal concepts essential to the *Rechtsstaat* (eg 'legal force', 'legitimate expectations', and 'determinacy').[194] According to Sydow, while German administrative law was structured around these 'forms of action' of the public administration, French and English administrative law were structured, and developed, from the perspective of judicial oversight.[195] English administrative law in particular centered around procedural safeguards.[196]

Sydow's argument is valid. Procedural fairness was less omnipresent in German administrative law discourse when compared to England. In Germany, procedural fairness was neither one of the main issues discussed by administrative law scholars, nor one of the main controversial issues in administrative courts. Review on the ground of an error of law,

[193] *Handlungsformen der Verwaltung*: *Verwaltungsakt*, *Rechtsverordnung*, *öffentlich-rechtlicher Vertrag*; Gernot Sydow, 'Deutsches Verwaltungsrecht und ausländisches Verwaltungsrecht' in Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, vol 1 (CF Müller 2021) 637 para 38; for an explanation of these 'forms of action' of the public administration, see Mahendra Pal Singh, *German Administrative Law in Common Law Perspective* (Springer 2001) chs 2–4.

[194] *Bestandskraft, Vertrauensschutz, Bestimmtheit*.

[195] Gernot Sydow, 'Deutsches Verwaltungsrecht und ausländisches Verwaltungsrecht' in Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, vol 1 (CF Müller 2021) 637 para 75.

[196] Gernot Sydow, 'Deutsches Verwaltungsrecht und ausländisches Verwaltungsrecht' in Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, vol 1 (CF Müller 2021) 637 para 72.

for instance, was much more topical in Germany.[197] Similarly, procedural fairness was not the primary concern of administrative law scholars and judges in France. Other matters were discussed more continuously, comprehensively, and controversially.[198] In England, as Sydow points out, judges were indeed particularly concerned with decision-making procedures. This can be explained with the common law's traditional focus on procedures, and with the English judge's hesitance to review decisions on the merits.[199]

The discrepancy points to the fact that neither 'judicial review' nor 'administrative law' existed in identical ways in the different jurisdictions.[200] Quite the contrary, the notions of judicial review, *le contentieux administratif*, and *Verwaltungsrechtspflege*, as well as administrative law, *droit administratif*, and *Verwaltungsrecht*, have to be understood against the backdrop of the respective legal system. These terms designate legal issues and areas of the law with limited overlap, rather than being 'equivalents' in a strict sense. As explained above, the lack of a concept for 'judicial review' and 'administrative law' in the late 1800s and early 1900s was characteristic for English law.[201]

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[197] Similarly, Lilly Weidemann, 'Standards of Judicial Review of Administrative Action (1890–1910) in the German Empire' in Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 132, 160.

[198] Eg the *recours pour excès de pouvoir*, the theory of the minister-judge, the delictual liability of the State and its officials, the so-called 'government acts' (*actes de gouvernement*), generally exempt from judicial review, and 'discretionary acts' (*des actes d'administration pure*), partially exempt from judicial oversight; Achille Mestre, 'L'évolution du droit administratif (doctrine) de 1869 à 1919' (1922) 51 Bulletin de la Société de Législation Comparée 247, 254; Maurice Hauriou, 'Le développement de la jurisprudence administrative depuis 1870' (1922) 51 Bulletin de la Société de Législation Comparée 236.

[199] John Baker, *Introduction to English Legal History* (5th edn, OUP 2019) 60.

[200] Gernot Sydow, 'Deutsches Verwaltungsrecht und ausländisches Verwaltungsrecht' in Wolfgang Kahl and Markus Ludwigs (eds), *Handbuch des Verwaltungsrechts*, vol 1 (CF Müller 2021) 637 paras 1 and 5.

[201] Chapter 1 IV 4 (p 25).

2. Regulatory Techniques: Written and Unwritten law

The accounts of Mannoni and Sydow are useful insofar as they place the issues examined in this chapter in a broader perspective. The ensuing sections substantiate the findings of comparing the three jurisdictions through the comparative angle adopted in this chapter, namely whether and how notions of 'judicial' and 'administrative' powers shaped procedural review. One noticeable difference between the three legal systems concerned the regulatory techniques used for enacting rules on judicial and administrative decision-making procedures. Further, judges relied on unwritten law to a different extent.

As seen above, the French legislator enacted detailed rules on the judicial decision-making procedures of the Council of State (in the Act of 24 May 1872) and the Councils of Prefecture (in the Act of 22 July 1889). Affected parties raised their interests chiefly in written form, and chiefly at the beginning of the proceedings, especially in the *recours pour excès de pouvoir*.[202] Concerning the decision-making procedure in the active administration, there were no generally applicable statutory rules. Legislative rules on the procedure of the active administration only existed sporadically and with a narrow scope for specific administrative acts (eg a demolishing order) and specific procedural duties (eg making an inquiry).[203]

In the German states which introduced administrative courts in the late 1800s, it will be recalled that legislators enacted statutory rules on how affected parties ought to be heard in the proceedings of administrative courts, using various legal concepts, such as 'hearing'

[202] II 1 (p 116).

[203] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 520–21.

the parties, 'summoning' the parties, protecting 'the interests of the parties', and 'public and oral proceedings'.[204] Regarding the procedure of the active administration, a variety of subject-matter specific rules with a narrow scope stipulated that affected parties ought to be heard in some way. However, the legislators in Baden and Prussia also enacted rules for the decision-making procedure of the public administration with a wide scope, which were generally applicable across subject-matters.[205]

For England, I explained that whilst there were some statutory rules for the decision-making procedure of the Supreme Court of Judicature (particularly the Judicature Acts 1873–1875)[206], a code or statute on the general decision-making procedure of administrative authorities did not exist. In this respect, concerning the non-existence of statutory procedural rules generally applicable to (active-)administrative decision-making, England was similar to France. However, crucial to whether and how affected parties needed to be heard in England was the common law principle of natural justice. This was generally thought applicable in both administrative and judicial decision-making, the exception being Lord Moulton's speech in *Arlidge*.

The operational relevance of unwritten principle was highest in England. The key issue in procedural review cases in the late 1800s and early 1900s was whether and how the common law principles of natural justice applied to statutory decision-makers. In *Cooper*, Byles J famously held that 'although there are no positive words in the statute requiring that the party shall be heard, […] the justice of the common law will supply for the omission

[204] III 1 (p 128).

[205] III 3 (p 133, 140).

[206] For example, Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) ss 68–74 and sch 1; Supreme Court of Judicature Act 1875 (38 & 39 Vict c 77) ss 16–21 and sch 1.

of the legislature'.[207] This displays a willingness, or in other words a low threshold, to complement procedural rules laid down by Parliament with common law principle. In the decades after *Cooper*, English judges typically combined an interpretation of the relevant statutory provisions with common law reasoning, the latter often serving as a means of interpreting gaps or open-textured statutory provisions. *Arlidge* brought an important change in this regard. In particular Lord Moulton constrained common law reasoning with his assertion that 'no such question as to whether or not it was "contrary to natural justice" could possibly be considered by the Courts.'[208] The reasoning of Viscount Haldane LC took a similar, although less radical form: statute determined the procedure of statutory administrative bodies as long as basic unwritten principles were adhered to.[209]

For German administrative courts, it was shown that judicial reasoning on the provision of a hearing was largely constrained to applying the statutory provisions on the respective procedural rules for judicial or administrative decision-making. Only exceptionally did courts invoke unwritten law. Arguably, judges in civil law jurisdictions generally invoked unwritten principle less readily and less obviously than their counterparts in common law systems.[210] More specifically, the administrative courts in Germany had only been created since the 1860s and were still in the process of establishing their authority and ensuring their legitimacy and acceptance.[211] This explains to some degree why the German administrative courts were rather reserved in the exercise of their statutory competences.

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[207] *Cooper v Wandsworth Board of Works* (1863) 143 ER 414, 420.

[208] *R v Local Government Board ex p Arlidge* [1915] AC 120, 150 (Lord Moulton).

[209] IV 4 (p 162).

[210] Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (3rd edn, Mohr Siebeck 1996) 250–65.

[211] Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 219.

This cautious and reserved judicial disposition was particularly prevalent in Southern German administrative courts.[212] The Administrative High Court of Saxony, by contrast, was found to be occasionally 'quite creative and innovative in the further development of procedural law.'[213] It is useful in this regard to reassess one of its judgments discussed above in the section focusing on Germany.

> '[1.] *Although* the proceedings before authorities of the active administration in the ordinary course of the public administration are *generally informal*, [2.] *at least some procedural standards* must be observed […] One of these *standards, not of written yet unwritten law*, is that the person, in whose favour an administrative act was rendered, is heard before said act, on account of an appeal by another interested party, can be altered to the disadvantage of the addressee.'[214]

This displays a two-step approach. In the first step, the legal reasoning built on the statutory rules and the general conception of the difference between judicial and administrative decision-making, referred to above as 'the standard picture'. In the second, more creative step, the court invoked 'standards […] of […] unwritten law' as a means of complementing statute. This resembles Byles J's famous statement in *Cooper* that 'the justice of the common law will supply for the omission of the legislature'.[215] Since Byles J could not ground the requirement of a hearing in the Metropolis Management Act 1855, he resorted to the common law. Despite the stark contrast between common and civil law traditions, both English and German law in similar ways turned to unwritten standards when needed.[216] Invoking common law principle was generally much more prevalent in England

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[212] Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 217.

[213] Lilly Weidemann, 'Standards of Judicial Review of Administrative Action (1890–1910) in the German Empire' in Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 132, 161.

[214] Administrative High Court of Saxony, 24 October 1908 (Nr 342 I S) [*Jahrbücher des Königlich-Sächsischen Oberverwaltungsgerichts*, vol 12 (Roßberg 1909) 97]; the annotations of the two steps are mine.

[215] *Cooper v Wandsworth Board of Works* (1863) 143 ER 414, 420.

[216] Angela Ferrari-Zumbini, 'Standards of Judicial Review of Administrative Action (1890–1910) in the Austro-Hungarian Empire' in Giacinto Della Cananea and Stefano Mannoni (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 41

than bringing into play 'standards of unwritten law' in Germany. But this discrepancy was slightly reduced on account of the judgment in *Arlidge*.

In fact, parts of the reasoning of Viscount Haldane LC in *Arlidge* are in some ways similar to the quoted section of the judgment from Saxony.[217] The Lord Chancellor also proceeded in two steps. In the first step, he argued that unwritten principle on the procedure of a 'court of law' did not apply in like manner to statutory administrative decision-makers, such as the Local Government Board, whose procedure was chiefly determined by statute. Similarly to the judgment from Saxony, the procedure applicable to courts was held inapplicable to administrative authorities. A difference can be seen in the fact that the principles of a court procedure were conceived as chiefly unwritten in England, whereas they chiefly built on legislation, and only to a limited extent on unwritten principle, in Germany. In the second step, however, Viscount Haldane LC held that the Local Government Board must nonetheless 'act judicially' when deciding an appeal, which he took to entail that it must 'give to each of the parties the opportunity of adequately presenting the case made' and to decide without bias.[218] Although the procedure of the Local Government Board was largely determined by statute, it nonetheless had to observe select basic unwritten procedural rules in order to protect the interests of the parties. This closely resembled the second step of the Saxonian judgment, to the point that 'standards […] of […] unwritten law' complemented the chiefly statutory rules on the procedure of administrative authorities. As the House of Lords in *Arlidge* scaled down the operational relevance of common law reasoning in the context of statutory (administrative) decision-

established this in greater detail for the law of the Austro-Hungarian Empire, which was closely related to German law.

[217] Administrative High Court of Saxony, 24 October 1908 (Nr 342 I S) [*Jahrbücher des Königlich-Sächsischen Oberverwaltungsgerichts*, vol 12 (Roßberg 1909) 97].

[218] *R v Local Government Board ex p Arlidge* [1915] AC 120, 132.

makers under an obligation to 'act judicially', similarities in the ratio between judicial reasoning grounded on legislative and unwritten law became noticeable between England and Germany.

In France, unwritten law played a very limited role, at least insofar as it would have been invoked expressly in judicial reasoning on fair procedures.[219] In judgments pertaining to the participation of affected parties before decision-makers of the active administration, the Council of State confined itself to applying statutory provisions.[220] For the decision-making of administrative courts, I have argued above that non-positive conceptions of judicial proceedings existed to a limited extent, although rarely perceptible in judgments. One palpable instance of this was the reference to non-positive conceptions of 'judicial forms' (*les formes judiciaires*) in the *Cadot* case.[221] The existence of judicial reasoning going beyond legislation can be accounted for when considering that many rules and principles on the procedure of administrative courts had initially been developed by the Council of State in case law before they were laid down in statute in the Act of 24 May 1872.[222] To some degree, French jurists were familiar with non-positive ideas on the procedure of administrative courts. This was not the case for the active administration.

[219] On the scepticism towards judges in France, chapter 2 I 1 (p 36).

[220] II 2 (p 121).

[221] II 3 (p 124).

[222] II 3 (p 125).

3. The Main Argument

The main argument of the present chapter is that judicial review on the ground of an unlawful decision-making procedure was carefully crafted around notions of 'judicial' and 'administrative' powers in France and Germany, but less so, and in a different sense, in England. Although notions of 'judicial' and 'administrative' powers importantly shaped procedural review in England, the distinction was less foundational to it and generally caused confusion and complexity. In France and Germany, by contrast, differentiating between 'judicial' and 'administrative' powers was foundational for procedural review, and the distinction did not cause general confusion. The ensuing section substantiates this argument.

French and German law had a distinct set of procedural rules on 'the provision of a hearing', depending on whether an administrative court gave a 'judgment', or whether an administrative authority rendered an 'administrative act'. As was established in the previous chapter 2, there was a clear and principled boundary between (administrative) courts and decision-makers of the active administration. The present chapter has shown that a different set of procedural rules applied where an administrative authority rendered an 'administrative act', than where a court gave a 'judgment'. The discrepancy between the procedures of judicial and administrative decision-makers and decisions can be illustrated by the fact that some of the legal concepts on 'the provision of a hearing' in French and German law applied only to judicial proceedings, whilst others chiefly applied to administrative proceedings. Insofar as multi-purpose institutions were concerned, legislation delineated different departments (eg in the French Council of State) or manifestations (eg in the German administrative courts of first instance) of the institution, and specified whether statutory provisions on procedures applied to 'judgments' or

‘administrative acts’. When hearing review cases on the ground of failure to give a hearing required by law, German and French judges at the beginning of the judicial inquiry looked into whether the decision-maker was an administrative court or an administrative authority, and whether the decision under review was a ‘judgment’ or an ‘administrative act’.

Notions of ‘judicial’ and ‘administrative’ powers had a remarkable operational relevance in procedural review in England, too. English judges frequently invoked notions of ‘judicial’ and ‘administrative’ in their reasoning on what the common law principle of natural justice required in a specific case. Similarly to France and Germany, the procedural obligation of a decision-maker to hear affected parties was stricter in (what English judges perceived as being) the exercise of ‘judicial’, as opposed to ‘administrative’ powers. Nonetheless, the distinction was less foundational to procedural review, and it caused a lot of confusion. The terms ‘judicial’ and ‘administrative’ did not crystallise into a clearcut distinction which could have provided reliable guidance to English judges. The reason is that English law did not generally operate with an entrenched distinction between judicial and administrative powers and decision-makers. English judges in their reasoning on natural justice could not build on legislation which differentiated expressly and coherently between judicial and administrative institutions, decisions, and decision-making procedures.

Therefore, if English judges used notions of ‘judicial’ and ‘administrative’ powers, they had to draw the boundary as well as determining the legal significance of characterising a decision as either ‘judicial’ or ‘administrative’. English judges hearing natural justice cases thus faced a double task. The ‘flexible’ approach of the late 1800s and the more ‘taxonomic’ approach of *Arlidge* were two frameworks to resolve these two issues. On the ‘flexible’ approach, notions of ‘judicial’ and ‘administrative’ were employed loosely and very closely connected to the question of whether and how affected parties ought to be heard. The more

'taxonomic' approach of *Arlidge* in a way brought English law closer to French and German law in that their Lordships attempted to craft a doctrinal framework which differentiated more clearly between the 'judicial' or 'administrative' nature of institutions, decisions, and decision-making procedures. Yet this remained an arduous task. English law did not fit this binary logic.

4. The Origins of the Judicial-Administrative Divide in England

The wide-ranging problems of English judges to make sense of the distinction between 'judicial' and 'administrative' powers raise the question of why judges used the distinction in the first place. Where did the distinction come from? As intriguing the question may be, it is hard to resolve the matter conclusively. Two options seem conceivable. First, it is possible that the distinction was a legal transplant, an import from the continent.[223] Second, it is conceivable that the distinction was a purely domestic creation, and that it evolved independently from legal developments abroad. Although I could not find conclusive evidence on either option, my assumption is that the discussion of judicial and administrative powers was a domestic English development. Several circumstances make a legal transplant appear unlikely, whereas plausible conjectures can be made as to the origins of the distinction within English law.

English jurists of the late 1800s and early 1900s who were interested in French or German law mostly focused their attention to the Roman law-infused private law.[224] Albert Venn

[223] On legal transplants, see Thomas Duve, 'Entanglements in Legal History: Introductory Remarks' in Thomas Duve (ed), *Entanglements in Legal History: Conceptual Approaches* (Max Planck Institute for Legal History and Legal Theory 2014) 3

[224] See, for example, Frederic William Maitland, *Trust und Korporation* (Hölder 1904) 4; Joshua Getzler, 'Frederic William Maitland – Trust and Corporation' (2016) 35 University of Queensland Law Journal 171.

Dicey may have been interested in French administrative law to a certain extent, but most English judges were probably rather unfamiliar with the contemporary legal developments in French or German public law. If English jurists knew anything about 'administrative law', it was most likely the fact of its non-existence in England, as explained by Dicey. A study on administrative law in Britain and the United States from the 1960s found that many British lawyers in the era of the Second World War 'could say very little about administrative law except that they had been taught at university that there was no such thing'.[225]

However, if we suppose that an English jurists in the late 1800s had a perfect understanding of French and German administrative law, he would have noticed that the distinction between judicial and administrative powers had a strong statutory basis, as well as an institutional and constitutional foundation.[226] The most likely reaction of the hypothetical English jurist would have been a quick realisation that continental administrative law, and in particular the intricacies of the distinction between judicial and administrative powers, was foreign to English law. Transplanting the distinction to England would not seem a straightforward or convenient thing to do. But it ought to be noted that these considerations are only clue, not evidence. Assuming rationality on historical actors in hindsight is risky.[227]

[225] Gavin Drewry, 'Judicial Review: The Historical Background' in Michael Supperstone, James Goudie, and Paul Walker (eds), *Judicial Review* (5th edn, LexisNexis 2014) 41, 50.

[226] This was discussed in chapter 2.

[227] For reasons unknown to me (and us nowadays generally), it is possible that English judges may have thought it an excellent idea to transplant the distinction to England. Without solid historical evidence, the question reaches the limits of what we can know.

The ambiguity and variety of the English notions of 'judicial' and 'administrative', 'ministerial', and 'non-judicial' powers further militate against a legal transplant.[228] Had English judges in the 1800s imported notions of judicial and administrative powers after studying French or German contemporary legal developments, it seems likely they would have imported the notion of 'administrative' powers directly, rather than using a variety of other notions such as 'non-judicial' or 'ministerial'. Yet it was explained above that insofar as natural justice cases were concerned, the notions of 'administration' and 'administrative' powers only came up in *Arlidge* (1914).

Whilst several circumstances make a legal transplant appear unlikely, plausible conjectures can be made to the point that the distinction between 'judicial' and 'administrative' powers was a domestic English development. In fact, English judges had differentiated between courts and other decision-makers for centuries. Such questions were often raised with regard to a specific legal question. In *Bagg's Case* (1615), for instance CJ Coke famously made the point that the Court of King's Bench had authority 'not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial […]'.[229] As was explained in chapter 2, over the course of the 19th century questions cropped up repeatedly in the superior courts whether rules, which originally had been applicable only to courts, could also be applied to statutory and multi-purpose decision-makers, such as statutory tribunals.[230] Although these questions usually concerned a specific legal question (eg natural justice, perjury, the availability of the writ of certiorari), the discussions may have become increasingly independent of these precise questions and merged into more abstract

[228] This ambiguity was discussed above in IV 1 (p 149).

[229] *Bagg's Case* (1615) 11 Co Rep 93b, 98a. See also, *R v Cambridge University* (1722) 93 ER 698 (*Dr Bentley's Case*); *Re Hammersmith Rent-Charge* (1849) 154 ER 1136.

[230] This was explained in chapter 2 IV 2 (p 84).

notions of 'judicial' and 'administrative' powers. Against the backdrop of a rapidly changing institutional landscape, these notions then incrementally came to be used to other ends.[231]

Ultimately, the precise origins of the distinction remain uncertain. Certain is that notions of 'judicial' and 'administrative' powers kept English judges particularly busy in the late 1800s and early 1900s, and especially in natural justice cases. Yet the repeated attempts of English judges to craft a reliable doctrinal framework around notions of judicial and administrative powers were ultimately unsuccessful.[232]

[231] David Ibbetson 'The Challenges of Comparative Legal History' (2013) 1 Comparative Legal History 1, 9 points out the 'sheer capriciousness of legal change'.

[232] *Ridge v Baldwin* (1964) AC 40; Philip Joseph, 'False Dichotomies in Administrative Law: From There to Here' (2016) New Zealand Law Review 127, 131; Elizabeth Fisher, 'Administrative Tribunals: An Essay about the Legal Imagination of Administrative Law Scholars' in James Goudkamp, Mark Lunney, and Leighton McDonald (eds), *Taking Law Seriously* (Hart 2021) 259, 267.

VI. Conclusion

In this chapter, I have argued that judicial review on the ground of an unlawful decision-making procedure was carefully crafted around notions of 'judicial' and 'administrative' powers in France and Germany, but less so, and in a different sense, in England. English judges frequently used notions of 'judicial' and 'administrative' powers in their reasoning on decision-making procedures. In contrast to French and German law, however, these notions lacked a clear legislative, institutional and constitutional underpinning in England. The terms 'judicial' and 'administrative' did not crystallise into a clearcut distinction which could have provided English judges with reliable guidance on whether and how decision-makers needed to hear affected parties.

Chapter 4 – Review for Error of Law

I. Introduction

This chapter compares judicial review on the ground of an error of law, understood broadly as pertaining to the interpretation of a statutory or regulatory text and its application to a specific case.[1]

In the 'core case' of error of law review, a plaintiff challenges an administrative decision before a court on the ground that the primary decision-maker misinterpreted a statutory term and consequently misapplied the statute to the plaintiff's disadvantage. Consider the example that a statute (or a by-law) stipulates that houses were only allowed to have 'two floors' in a certain area. The plaintiff P built a house with two full floors and an attic under a pitched roof, used as a storage room. The planning authority A issues a closing order for the attic, arguing that the considerable height of the pitched roof made the attic an illegal third floor. P, by contrast, contends that the attic is not a 'floor' under the statute and therefore seeks judicial review of the closing order.

The ensuing chapter examines how French, German, and English courts approached such cases. Overall, chapter 4 makes two claims. The first claim substantiates the principal argument of the thesis for the ground of review under scrutiny: review for error of law was essentially crafted around specific notions of judicial and administrative powers in France and Germany, but less so in England. The second claim of chapter 4 is that French and German judges delivered a much more 'intense' control over how decision-makers

[1] Similarly, Philip Murray, 'Process, Substance and the History of Error of Law Review' in John Bell and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016) 87, 88.

interpreted and applied statute. In comparison, English judges were relatively 'deferential' to administrative decision-makers.[2] Given that the first claim on the operational relevance of notions of 'judicial' and 'administrative' powers has already been defended in similar ways for the institutional design of decision-makers (chapter 2) and for review on the ground of an unlawful decision-making procedure (chapter 3), the remainder of this introductory part focuses on outlining the second claim of chapter 4.

'Intensity of review' is understood broadly as pertaining to the question of whether judges when hearing judicial review cases took upon themselves the full authority to decide how a specific statute ought to be interpreted and applied in a given case, or whether they gave primary decision-makers a certain leeway to construe the law.[3] The backdrop is as follows. The three legal systems covered by this thesis shared the conviction that the courts ought to a certain degree control administrative decision-making in order to prevent administrative illegality and arbitrariness. Chapter 3 showed this for the provision of a hearing. This concerned *process*, the issue of *how* a decision is made. Review for error of law, however, is more closely related to the *substance* of a decision, in other words to *what* is being decided.[4] In overseeing how primary decision-makers construed and applied legal rules to specific cases, judges in some instances inevitably came near to the very heart, the

[2] 'Deference' and 'deferential' are used in this thesis in a broader political sense (details below, p 265–67), rather than referring to the 21st-century debates on 'marginal review'.

[3] 'Intensity of review' is related to what English administrative law scholarship of the 21st century calls the 'standard of review' (eg 'correctness' or '*Wednesbury* unreasonableness). In a historical and comparative perspective, it is appropriate to use the term 'intensity of review' in a broader sense. On this understanding, the 'intensity of review' can also result from doctrines confining the 'scope of review', eg by declaring that certain errors of law do not fall under the scope of application of certain processes. Thus construed, both the principle that only 'jurisdictional' errors were generally reviewable via the writ of certiorari, as well as the principle that certiorari was confined to 'judicial' (as opposed to 'ministerial' or 'administrative') acts constrained the 'intensity of review'. For the notions of 'intensity' and 'standard of review', see Hannah Wilberg, 'Deference on Relevance or Purpose? Wrestling with the Law/Discretion Divide' in Hannah Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart 2015) 263.

[4] For a similar conception of substance and process, see Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) 229.

substance, or the merits of the decision under review. This circumstance brought to the fore concerns of preserving a genuine province of administrative decision-making.

In late 19th century Germany, for example, certain scholars raised the concern that the recently created administrative courts could turn into a 'duplicate administration' if they took on too intense an oversight of public administration.[5] Related concerns about preserving a realm for the administration were also articulated in France, yet in a different constitutional and institutional context. The French Minister of Justice warned in 1828 that if the ordinary courts had a judicial oversight of public administration, 'the administration would cease to exist; […] The ordinary courts would administer and govern the State.'[6] In her study on the foundations of English administrative law, Edith Henderson observed for England that 'some kinds of decision must be left to the final determination of the administrative officials.'[7] If judges were to have an exhaustive authority to oversee decisions by administrative officials, they would essentially repeat the task of administrators. The coexistence of two different sorts of legal actors, administrators and judges, performing the same task would make little sense.[8]

[5] 'Doppelverwaltung'; Edmund Bernatzik, *Rechtsprechung und materielle Rechtskraft: Verwaltungsrechtliche Studien* (Wien 1886) 46; Edmund Bernatzik, 'Review of Friedrich Tezner, 'Zur Lehre von dem freien Ermessen der Verwaltungsbehörden als Grund der Unzuständigkeit der Verwaltungsgerichte' (1891) 18 Grünhuts Zeitschrift 148, 161; Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 141, 153, 169.

[6] Jean-Marie Portalis, 'Discours à la Chambre des députés,' 10 April 1828 ('Si les tribunaux pouvaient connaître du contentieux administratif, l'Administration n'existerait plus; [….] Les tribunaux administreraient et gouverneraient l'Etat.') Quoted by Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 29

[7] Edith Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard University Press 1963; reprint 2014) 4.

[8] Historically speaking, the existence of such system may be considered unlikely, but not impossible. Legal history does not always make sense. What seems severely inefficient in retrospect can nonetheless have made sense in a certain historical situation.

Without doubt, the contexts and purposes of Henderson's observation and of the warnings against the collapse of public administration in France and a 'duplicate administration' in Germany differed. Nonetheless, these three examples illustrate a shared concern for preserving an exclusive province of the public administration against the judiciary. At the same time, England, France, and Germany shared the conviction that courts ought to oversee to a certain degree how administrative decision-makers construed and applied statutory and regulatory texts. Balancing administrative autonomy and judicial control is thus one of the themes of the present chapter.[9]

Review for error of law constitutes one pivotal control mechanism amongst several doctrinal structures, arguments, and grounds of review that delineate the province of administrative decision-making from the judges' oversight of administrative decision-making. Other control mechanisms such as review of discretion or review of fact-finding are not covered in this chapter (and thesis). Insofar as fact-finding is concerned, this necessitates a brief explanation. Applying a statutory text to a case necessarily involves considering, interpreting, and legally assessing facts. Administrative law scholarship of the 21st century has shown that there are no sharp boundaries between questions of law and fact.[10] Conceptually, the distinction between law and fact is thus problematic. Looking at the matter from a historical and comparative perspective makes it even more complex, when considering that in the late 1800s and early 1900s the law-fact divide was relevant to

[9] Similarly, Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 297–98 suggested (in the context of review for lack of jurisdiction) that the history of judicial review in England can be conceived as a continuous balancing exercise between administrative autonomy and judicial control.

[10] English administrative lawyers are used to an intermediate category of 'applying the law to the facts'; Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) 332; Timothy Endicott, 'Questions of Law' (1998) 114 LQR 292; Mark Elliott and Jason Varuhas, *Administrative Law: Text and Materials* (5th edn, OUP 2017) 37; on a 'pragmatic approach […] to the dividing line between law and fact', see *Jones v First-tier Tribunal* [2013] UKSC 19 [2013] 2 AC 48.

different degrees in the three legal systems.[11] For example, Paul Craig pointed out that the law-fact divide was less significant to judicial review in England prior to *Anisminic v Foreign Compensation Commission* (1968).[12] To be clear, it is not the aim of this chapter to make a contribution to the contemporary law-fact debate in English law. The approach here is essentially pragmatic. The chapter focuses on review for 'error of law' understood in the broad sense above-mentioned. Yet in the absence of a clear-cut distinction between law and fact, I may touch upon facts where it is useful or necessary.

The ensuing parts of the chapter 4 explore how courts in France, Germany, and England reviewed administrative decisions on the ground of an error of law. Subsequently, a comparative analysis fleshes out similarities and differences between the three jurisdictions and seeks to account for the same. The focus of the comparison lies on substantiating the two main claims of chapter 4, namely that review for error of law was essentially crafted around notions of judicial and administrative powers in France and Germany, but less so in England, and that French and German judges delivered a more intense review than English judges.

One feature on the operational relevance of the judicial-administrative divide for error of law review ought to be mentioned right away. Whilst notions of 'judicial' and 'administrative' powers were often expressly invoked in the context of procedural review in chapter 3, this was less the case in review for error of law. Instead, the entire doctrinal frameworks in French and German law were heavily shaped by underlying conceptions of judicial and administrative powers. To put it differently, the judicial-administrative divide

[11] Concerning France, Raphael Alibert, *Le contrôle juridictionnel de l'administration au moyen du recours pour excès de pouvoir* (Payot 1926) 284–97 explains that law and fact are connected.

[12] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147; Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 324.

was mostly lurking beneath the surface rather than being expressly the subject of discussion and legal reasoning.

II. France: An Intense Review for 'violation de la loi'

The ensuing part analyses how the Council of State in France oversaw the interpretation and application of statutory and regulatory texts by administrative decision-makers. The first section expounds that review for error of law intensified notably in the late 1800s and early 1900s by a readjustment of the doctrinal framework. Subsequently, the second section argues that the key to the intensity of review lies in the institution of the Council of State and its ambiguous status within the French conception of separation of powers.

1. Intensifying Error of Law Review: From 'Rights' to 'Interests'

Until the end of the 19th century, an administrative decision made in violation of a statutory or regulatory text could only be challenged in the Council of State if the decision infringed a right of the plaintiff. The ground of review was referred to as 'violation of statute and vested rights'.[13] An 'error of law' alone was not sufficient; a decision could only be quashed if it infringed a right of the plaintiff. But the State Councillors interpreted the condition of a 'right' more and more broadly until they eventually dropped it altogether in the early 1900s.[14] Thereafter, it was sufficient if a decision touched upon 'interests' of the plaintiff. The ground of review came to be known as 'violation of statute', without any reference to

[13] *Violation de la loi et des droits acquis*; Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 532–33.

[14] Council of State, 11 December 1903 (*Lot* and *Molinier*); Council of State, 18 March 1904 (*Savary*); Council of State, 1 June 1906 (*Alcindor*); François Burdeau, *Histoire du Droit Administratif: de la Révolution au début des années 1970* (Presses universitaires de France 1995) 263; Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002) 239; Jacques Chevallier, *L'Élaboration historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (Pichon & Durand-Auzias 1970) 258; Maurice Hauriou, *La Jurisprudence Administrative de 1892 à 1929*, vol 2 (Sirey 1929) 348–57.

'rights'.[15] It became axiomatic that the Council of State had the authority to annul decisions which were based on any error of law, subject to an admissible claim being brought before it.[16] The State Councillors used a 'correctness' standard on questions of law. No deference was given to how primary administrative decision-makers interpreted and applied statutory or regulatory texts.

The main reason for leaving behind the requirement of 'infringed rights' were of a remedial and systematic nature. The Council of State aligned error of law with the other three established precepts of review in the *recours pour excès de pouvoir*. Where a decision was challenged on the ground that the decision-maker had acted without legal authority (*incompétence*), that the decision suffered from a formal or procedural error (*vice de forme*), or on the irrationality and improper purposes ground (*détournement de pouvoir*), it was sufficient that the decision touched upon 'interests' of the plaintiff.[17] Quashing a decision on one of these three grounds did not require an infringement of 'rights'.[18]

The reason for this discrepancy was that 'violation of statute and vested rights' in the earlier 19th century had not developed as one of the precepts of review under the *recours pour excès de pouvoir*, but as a separate process.[19] Whereas the Council of State since the 1830s

[15] *Violation de la loi*.

[16] Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 974.

[17] These grounds of review were introduced above in chapter 2 V 2 (p 96).

[18] François Burdeau, *Histoire du Droit Administratif: de la Révolution au début des années 1970* (Presses universitaires de France 1995) 263. The violation of a right was sometimes taken as the distinguishing criteria between the *recours pour excès de pouvoir* and the *recours de pleine juridiction*; see Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 957–58. That the *violation de la* loi as a ground of review in the *recours pour excès de pouvoir* required the infringement of a right thus went against the system.

[19] The Council of State referred to it generically as '*recours contentieux*' or '*recours par la voie contentieuse*'.

had cited the Act of 14–24 August 1790[20] as the foundation of the *recours pour excès de pouvoir*, review on the ground of a 'violation of statute and vested rights' was grounded in unwritten law.[21] Construing judicial review on the ground of an error of law as a separate remedy mattered mostly for procedural reasons. Most importantly, only the *recours pour excès de pouvoir* allowed parties to challenge administrative acts without mandatory legal representation and without incurring any court fees.[22] In the 1860s, however, the Council of State began to assimilate review for error of law with the *recours pour excès de pouvoir*, now citing the Act of 14–24 August 1790 as the legal foundation of review for 'violation of statute and vested rights', too. Error of law was thus transformed into one of the precepts of review under the *recours pour excès de pouvoir*. That review for error of law required the violation of a right was a residue of this different remedial origin. Abandoning this prerequisite in the early 1900s was thus the last step on the way to reconceptualising error of law as one of the grounds of review within the *recours pour excès de pouvoir*.[23]

To grasp the practical relevance of this development, it is useful to consider the French approach to review for error of law both before and after the State Councillors readjusted the doctrinal framework. In the 1880s, the Council of State still held that the violation of a 'right' of the plaintiff was a prerequisite to its annulling an administrative decision for error of law.[24] Édouard Laferrière defended this requirement in the second edition of his *Traité*

[20] Act of 14–24 August 1790 relating to the organisation of the judiciary [*loi des 14–24 août 1790 relative à l'organisation judiciaire*].

[21] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 406–11.

[22] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 409–10.

[23] Similarly, François Burdeau, *Histoire du Droit Administratif: de la Révolution au début des années 1970* (Presses universitaires de France 1995) 263.

[24] Council of State, 15 January 1875 (*Larralde*); Council of State, 4 August 1876 (*ville de Besançon*); Council of State, 20 July 1883 (*Du Lac*); Council of State, 27 July 1883 (*ville de Saint-Étienne*) Council of State, 17

(1896).[25] To get an impression of what counted as 'rights', it is useful to examine how Laferrière sorted the case law on 'violation of statute and vested rights' into five categories: property and similar rights; freedom of commercial and industrial enterprises; rights relating to offices, grades, and titles; the withdrawal of decisions that created rights; and the refusal to perform an act clearly prescribed by statute.[26] For the latter category, Laferrière gave the example that an administrative authority refused to give out a hunting permission on denial grounds other than the ones listed exhaustively in statute.[27] Where a primary decision did not infringe any established 'vested rights' of the plaintiff, the Council of State dismissed the application. In a case by the name of *Lefebvre* (1887), for example, the plaintiff challenged the decision by the Minister of War not to admit him to the military, arguing that one of the exams set for candidates relied on a misinterpretation of a regulation.[28] The exam paper contained three problems of arithmetic, rather than one, as was arguably foreseen in a regulation. The government commissioner Gauwain explained that the plaintiff merely had a right to sit the same exam as all the other candidates, but neither a right to be admitted to the military, nor a right to sit an exam with only one question on arithmetic.[29] Accordingly, since the decision of the Minister of War did not 'violate a right' of the plaintiff, the Council of State dismissed his application. Even if there

April 1885 (*consistoire de Nîmes*); cited by Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 533.

[25] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 532–33.

[26] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 538–47.

[27] Council of State, 13 March 1867 (*Bizet*).

[28] Council of State, 11 November 1887 (*Lefebvre*).

[29] Council of State, 11 November 1887 (*Lefebvre*).

had been a clear misinterpretation of the regulation (ie an error of law), the Council of State would not look into the Minister's refusal to admit the plaintiff to the military.[30]

The change from 'rights' to 'interests' came about in several judgments between 1903 and 1906. Instead of a single leading case or a fully argued judgment of principle, the Council of State carried out this shift by gradual, unobtrusive, movements. The change of doctrine was not expressly acknowledged or justified. The Council of State simply no longer mentioned the requirement of a 'right' but spoke of 'interests' instead. This inconspicuous mode of effectuating legal change was typical, as Laferrière noted: 'le Conseil d'État démontra le mouvement en marchant.'[31]

The cases bringing about the change mostly concerned appointments or promotions of public officeholders.[32] In these cases, a civil servant challenged the appointment or promotion of another person who allegedly did not meet the statutory conditions for the specific office. Where someone who did not fulfil the statutory requirements to hold a specific office was nonetheless appointed, the suspicion was that favoritism or corruption had played a role in the selection of the candidate. Under the previous doctrine ('violation of statute and vested rights'), the challenges by civil servants who had the necessary qualifications to hold the office, but were not selected for it, were inadmissible since there was no 'right' of civil servants to be appointed to higher positions. Under the new doctrine ('violation of statute'), it sufficed that the nomination of another person touched upon the

[30] Council of State, 11 November 1887 (*Lefebvre*). In addition, the State Councillors thought the Minister had not misinterpreted or misapplied the regulation.

[31] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 410 ('the Council of State displays [/effectuates] movement [ie legal change] by marching ahead'); Laferrière comments on the alignment of error of law as one of the grounds of review with the *recours pour excès de pouvoir*.

[32] François Burdeau, *Histoire du Droit Administratif: de la Révolution au début des années 1970* (Presses universitaires de France 1995) 263; Maurice Hauriou, *La Jurisprudence Administrative de 1892 à 1929*, vol 2 (Sirey 1929) 348–58; Hauriou at this point thought the condition of 'vested rights' had only been broadened so as to include 'eventual rights'.

'interests' of civil servants qualified for that office. In the judgments of *Lot* and *Molinier* (both 1903), the Council of State accepted such challenges by civil servants as admissible, but rejected them on the merits, whereas a similar challenge in *Savary* (1904) was wholly successful.[33] The judgment in *Alcindor* (1906) confirmed the change of doctrine.[34]

The judgment in *Lot* concerned the nomination of the director of the French National Archives. It was provided by a regulation that the 'employees' of the National Archive had to be selected 'from among archivists-paleographers'.[35] Assuming that the director was not an 'employee' under the regulation, the administration appointed Mr Dejean, who was not an 'archivist-paleographer'.[36] Mr Lot, a civil servant who was an 'archivist-paleographer', challenged the appointment. Mr Lot argued that the condition applied to the director too, and that the administration had thus misinterpreted and misapplied the regulation to his disadvantage. He claimed that he himself was eligible to be appointed director, as were all other 'archivists-paleographers', but that Mr Dejean was not. Under the old doctrine, the Council of State had no authority to look into the appointment, since a civil servant did not have a 'vested right' to be considered for the position. But the State Councillors no longer required an infringed 'right'. The 'personal interest' of Mr Lot in his capacity as archeologist-paleographer sufficed to provide him with standing.[37] The claim was thus

[33] Council of State, 11 December 1903 (*Lot*); Council of State, 11 December 1903 (*Molinier*); Council of State, 18 March 1904 (*Savary*); quoted and discussed in Maurice Hauriou, *La Jurisprudence Administrative de 1892 à 1929*, vol 2 (Sirey 1929) 348–58.

[34] Council of State, 1 June 1906 (*Alcindor*); cited by François Burdeau, *Histoire du Droit Administratif: de la Révolution au début des années 1970* (Presses universitaires de France 1995) 263.

[35] 'les titulaires d'emploi' … 'les archivistes-paléographes'.

[36] Maurice Hauriou, *La Jurisprudence Administrative de 1892 à 1929*, vol 2 (Sirey 1929) 354.

[37] The doctrinal change from 'violation de la loi et des droits acquis' to 'violation de la loi' (without a requirement of infringed 'vested rights') had consequences not only for the intensity of error of law review, but also for the law of standing. Where a decision merely touched upon a plaintiff's 'interests' rather than 'rights', a challenge of that decision in the *recours pour excès de pouvoir* was not only 'not well-founded' (on the merits), but could also be held 'inadmissible' (due to a lack of standing). Putting the matter differently,

admissible. On the merits, however, the Council of State decided that the director was not an 'employee' in the sense of the regulation after all. Mr Lot's claim was thus ultimately rejected.[38] Nonetheless, the Council of State took upon itself the general authority to oversee whether administrative decisions suffered from an error of law, regardless of whether the decision infringed a 'vested right' or whether it merely 'touched upon interests'.

In leaving behind the requirement of infringing 'vested rights', the Council of State in the early 1900s adopted a remarkably 'intense' standard of review for error of law. In the event of a dispute, the courts regarded themselves as competent to rule on the meaning and application of a statute. As mentioned earlier, the shift from 'interests' to 'rights' and the ensuing development towards a more intense review had primarily remedial and systematic reasons. But it must be seen in the context of two larger developments. First, the Council of State generally broadened and intensified its oversight of public administration during this period. Review for error of law is only one amongst many doctrinal developments in the late 19th and early 20th centuries pointing in this direction.[39] Second, French legal historians found that the Council of State in judicial review around 1900 made a shift from a subjective paradigm, primarily focused on safeguarding individual rights and interests, towards a 'legal objectivism'.[40] This aligns with the development that the subjective element ('interests' rather than 'rights') in error of law review lost in importance. To be

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the intensity of review depended on (and resulted from) various tools in the judicial toolbox that constrained (or facilitated) judicial review on the ground of an error of law.

[38] Council of State, 11 December 1903 (*Lot*).

[39] François Burdeau, *Histoire du Droit Administratif: de la Révolution au début des années 1970* (Presses universitaires de France 1995) 273–74; other developments concerned the *détournement de pouvoir* (similar to the English irrationality and purpose/relevancy grounds) and the confinement of administrative acts generally or partly exempt from judicial oversight (*actes de gouvernement* and *actes d'administration pure*).

[40] *Objectivisme juridique*.

clear, the Council of State did not have the authority to review administrative decisions of its own initiative. A plaintiff still needed to bring an admissible challenge before the Council of State, complaining that an illegal administrative act touched upon his interests.[41] But once this step was taken, the Council of State assessed the 'legality' of an administrative act in a more 'objective' sense than thitherto.[42]

2. The Intermediary Status of the Council of State

The key to explaining the intense review for error of law lies in the institution of the Council of State and its status within the French conception of separation of powers. The Council of State after the reform in 1872 had three departments for 'purely administrative matters' and one 'adjudication department'.[43] The latter acted as superior administrative court. But the adjudication department was considered a kind of intermediary power between the executive and the judiciary. Edouard Laferrière explained that separation of powers did not imply 'an absolute and mathematical separation […,] there exist between the two [powers] intermediate zones that are often considerably large'.[44] The supervisory jurisdiction of the Council of State over administrative decision-making was considered such an 'intermediary power, which is at the same time both executive and judicial'. On Laferrière's account, a decision-maker who controls administrative decisions 'acts both as a judge, since

[41] Henry Berthélemy, *Traité élémentaire de Droit Administratif* (7e edn, Rousseau 1913) 974.

[42] Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002) 239 and 252.

[43] *Section du contentieux*.

[44] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 1 (2nd edn 1896) 11–12 ('une séparation absolue, mathématique […] il y a entre eux des zones limitrophes souvent très étendues').

he resolves a dispute, and at the same time acts as superior administrator, since he rectifies an error or an illegal act by the administration.'[45] It was this intermediary status of the Council of State which made the intense review possible. According to French scholars back at the time, it would have been impossible for a purely judicial authority (such as the ordinary courts, eg the Court of Cassation) to adopt a correctness standard of review.[46] Judges of the ordinary courts would have faced the criticism of encroaching on the executive and acting in violation of the separation of powers.

A related consideration is that the State Councillors had experience both as administrators and as judges. They commonly sat on the 'adjudication department' and on one of the 'purely administrative departments' of the Council of State.[47] Further, the State Councillors of the adjudication department were in 'constant communication' with the purely administrative departments. As the French academic Maurice Hauriou put it, the State Councillors were 'immersed in an administrative atmosphere'. [48] Therefore, they had less reason to defer to administrative authorities on the ground of specialist administrative expertise. In fact, the intense review for error of law was not considered as problematic. Neither academics back at the time nor legal historians nowadays discuss it much.[49] Given

[45] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 1 (2nd edn 1896) 12 ('Ce pouvoir intermédiaire, qui tient à la fois de l'exécutif et du judiciaire […]', 'L'autorité qui sera ainsi appelée à contrôler la décision administrative fera à la fois office de juge, puisqu'elle tranchera un différend, et office d'administrateur supérieur, puisqu'elle redressera une erreur ou une illégalité de l'administration.')

[46] Eg Léon Duguit, *Les Transformations du Droit Public* (Colin 1913) 180; Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 1 (2nd edn 1896) 10–11.

[47] Jacques Chevallier, *L'Élaboration historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (Pichon & Durand-Auzias 1970) 209.

[48] Maurice Hauriou, *Répertoire du Droit Administratif* (Béquet 1879) 12 para 49 ('les membres des sections du contentieux […] sont donc en communication constante avec les membres des sections administratives outre qu'eux-mêmes peuvent avoir fait partie de ces sections; ils sont plongés dans une atmosphère administrative […]'); quoted by Jacques Chevallier, *L'Élaboration historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (Pichon & Durand-Auzias 1970) 209.

[49] Subject to more discussion was the Council of State taking on an intense review of factual errors, see Council of State, 4 April 1914 (*Gomel*); Raphael Alibert, *Le contrôle juridictionnel de l'administration au moyen du recours pour excès de pouvoir* (Payot 1926) 284–97; Maurice Hauriou, *La Jurisprudence*

the intensity of review, one French academic suggested that review for 'violation of 'statute' in fact amounted to a 'violation of the case law of the Council of State'.[50] On this account, the yardstick for assessing whether there was an error of law was not the statutory text itself, which is necessarily open to a variety of interpretations, but the interpretation the Council of State had given, or would give, this statutory text. Importantly, this was a neutral scholarly observation, not a criticism or a value judgment. In fact, the same academic commended the adjudication department of the Council of State for representing 'the best implementation of the principle of separation of powers'.[51]

Given this intense review, it may be asked whether the Council of State in fact exercised what English law would consider a full-blown appeal rather than a limited supervisory jurisdiction. Yet judicial oversight by the Council of State was construed as a purely 'legal' matter. There were limits to it. For example, it was established that the Council of State would not intervene where administrative authorities had 'discretion'. Where the State Councillors considered a decision merely 'inappropriate' from a policy perspective, rather than 'illegal', they had no authority to quash the decision.[52] Further limitations to review for error of law can be found in other doctrinal tools. Where a plaintiff lacked standing, or where a decision fell under the long list of generally non-justiciable decisions, so-called 'government acts'[53], the Council of State had no jurisdiction to check whether an

Administrative de 1892 à 1929, vol 2 (Sirey 1929) 372–92; Grégoire Bigot, *Ce Droit qu'on dit Administratif: Études d'Histoire du Droit Public* (La mémoire du droit 2015) 57; Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002) 265.

[50] Raphael Alibert, *Le contrôle juridictionnel de l'administration au moyen du recours pour excès de pouvoir* (Payot 1926) 276 ('[…] la violation de la loi […] équivaut […] à la méconnaissance de l'interprétation du Conseil d'Etat et, par suite, à une violation de la jurisprudence du Conseil d'Etat.')

[51] Raphael Alibert, *Le contrôle juridictionnel de l'administration au moyen du recours pour excès de pouvoir* (Payot 1926) 330 ('La juridiction administrative est la meilleure application du principe de la séparation des pouvoirs.')

[52] The distinction between *légalité* and *opportunité*.

[53] *Actes de gouvernement*.

administrative body had correctly interpreted and applied a statutory text. Thus, the French legal historian Grégoire Bigot maintains that the extension of the *recours pour excès de pouvoir* did not entirely remove the margins of appreciation of primary decision-makers; administrative judges did not and could not completely substitute administrative decision-making.[54] From an English perspective, however, administrative autonomy was constrained significantly by a remarkably intense judicial control.

[54] Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002) 267.

III. Germany: Law, Discretion, and the State

In Germany, review for error of law intensified fundamentally in the late 1800s and early 1900s, with a legal change more radical than that in France. Given that the German approach to review for error of law was very different from that of French and English law, it is useful to begin by laying out the general doctrinal framework as well as its constitutional foundations. The first section outlines that error of law review in Germany largely relied on distinguishing between 'questions of law' and 'questions of discretion'.[55] In the second and third sections, I illustrate that this doctrinal framework was grounded in a specific notion of 'the State' and in conceptions of 'judicial' and 'administrative' powers. The fourth section examines how review for error of law worked in practice and how it intensified during the early 1900s.

1. The Dichotomy between Applying the Law and Exercising Discretion

In German public law thinking of the late 1800s and early 1900s, 'law' (*Recht*) and 'discretion' (*Ermessen*) were conceived as opposites. Certain administrative decisions were understood as being entirely 'predetermined' by statute, whereas the administration in other matters had a 'discretion' to decide one way or another.[56] Where administrative decision-makers were bound by statute to decide a matter in a specific way, the decision was judicially reviewable on a 'correctness' standard. The law was entirely for the courts; no deference was given to how primary decision-makers interpreted and applied it. Where

[55] *Rechtsfragen* and *Ermessensfragen*.

[56] *Gebundene Entscheidungen* and *Ermessensentscheidungen*; similarly, Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (Duncker und Humblot 1895) 100–1 differentiated between non-discretionary decisions (*Entscheidungen*) and discretionary administrative decisions (*Verfügungen*).

public administration had a 'discretion', by contrast, the decision was reviewable only to a very limited degree, or even entirely exempt from judicial review.[57] The reason was that administrative discretion was not considered as an exercise in applying the law, but as located entirely outside the law. Discretion was the area not regulated, or at any rate not fully determined, by statute. Where a certain matter was entirely unregulated, where a statute expressly gave administrative authorities several options on how to act or decide, and where statutory vagueness or gaps were to be filled conclusively by the administration, decision-makers could act according to their 'free discretion'.

The basic doctrinal framework to error of law review in Germany can thus be summarised as follows. A 'legal error' by the administration in 'statutorily predetermined decisions' was *per definitionem* subject to intense judicial review. By contrast, where the administration had a 'discretion', it was logically not possible to commit a 'legal error' given that 'discretion' was not an exercise in interpreting and applying the law.[58]

The dichotomy between 'law' and 'discretion' built on a specific notion of 'the State'. The State was not conceived as being constituted by law, but as existing prior to and independently of the law. The law only came into play subsequently to set boundaries and to limit the powers of the State, which were largely identified with the monarchic executive.[59] Accordingly, statute was not primarily considered to delegate authority to the administration. Instead, statute was a mere 'boundary' to the pre-legally conceived

[57] Exceptions and nuances to this principle will be addressed in due course, eg in the administrative courts of first instance.

[58] A distinct category of 'discretionary errors' came into play to prevent obvious abuses of administrative powers, but the intensity of review in 'discretionary decisions' was extremely limited. These 'discretionary errors' lie beyond the scope of this thesis, but they broadly resembled the English purpose/relevancy grounds and reasonableness, eg a 'motive control' (*Motivkontrolle*) and precursors of proportionality (*Verhältnismäßigkeit*); Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 191–92 and 222–23.

[59] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 92–93.

executive powers.[60] On this understanding, 'administrative discretion' constituted the remaining province where public administration could act and decide according to their own political preferences, i.e. where the law did not constrain them to decide in a certain way. Since judicial review was largely construed as a 'legal' control mechanism, 'discretionary questions' were by-and-large exempt from judicial oversight. The primary task of administrative courts was to impose (a predominantly statutory) legality on primary decision-makers.

The dichotomy between 'law' and 'discretion' was reflected in much of the legislation establishing separate administrative courts and delineating the scope of their review. Statute commonly exempted 'discretionary decisions' from judicial oversight. In the South-Western German State of Württemberg, for example, the Act on Judicial Review of 1878 stipulated that the Administrative High Court decided on 'appeals against decisions of administrative authorities, when someone […] claims that the relevant public law decision was not justified in law and that the decision infringed his rights or burdened him with an undue obligation'.[61] The jurisdiction of the Administrative High Court was thus very broad. But the Act also stipulated that '[t]his appeal is excluded where and insofar as the administrative body has the authority […] to decide at its discretion.'[62] Discretionary

[60] Statutes were (and are to this day) referred to as the 'barriers' (or 'confinements') of the administration (*Schranken*).

[61] [Württemberg] Act on Judicial Review of 16 December 1876 [Württembergisches Gesetz über die Verwaltungsrechtspflege vom 16. Dezember 1876] art 13: 'Außerdem entscheidet der Verwaltungsgerichtshof vorbehaltlich der hienach bezeichneten Ausnahmen über Beschwerden gegen Entscheidungen und Verfügungen der Verwaltungsbehörden, wenn Jemand, sei es eine einzelne Person, ein Verein, oder eine Korporation, behauptet, daß die ergangene auf Gründe des öffentlichen Rechts gestützte Entscheidung oder Verfügung rechtlich nicht begründet, und daß er hiedurch in einem ihm zustehenden Recht verletzt oder mit einer ihm nicht obliegenden Verbindlichkeit belastet sei.'

[62] [Württemberg] Act on Judicial Review of 16 December 1876, art 13: 'Ausgeschlossen ist diese Beschwerde, wenn und soweit die Verwaltungsbehörden […] nach ihrem Ermessen zu verfügen ermächtigt sind.' Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 91.

decisions were thus expressly exempt from judicial oversight. By the time the Kingdom of Saxony introduced separate administrative courts in 1900, it was taken as self-evident that 'discretion' was exempt from judicial oversight.[63] The point was no longer expressly made in statute, but it nonetheless followed from the relevant provision. The Act on Judicial Review of 1900 stipulated that administrative courts in Saxony had authority to annul decisions by the administration 'where the law *has not been applied or incorrectly applied* and the challenged decision is based hereon […]'.[64] Since 'discretion' was not an exercise in applying the law, it was implicit in the provision that the jurisdiction of administrative courts did not extend to 'discretionary' decisions.

This statutory limitation of judicial review to questions of law, and the ensuing exemption of administrative discretion from judicial oversight, applied to the Administrative High Courts in all major German states.[65] Additionally, it applied to some, but not all, administrative courts of first instance. Regarding the lower instance courts, the legal provisions varied between the different German States. In Prussia, in Bavaria, and (until 1884) in Baden, administrative courts of first instance had authority to review certain 'discretionary' decisions. This was the result of legislation which listed by subject-matter the kinds of decisions which could be brought before administrative courts of first instance; some of these matters were 'discretionary' ones.[66] The discrepancy between the scope of

[63] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 103.

[64] [Saxony] Act of 19 July 1900 on Judicial Review [Gesetz über die Verwaltungsrechtspflege vom 19. Juli 1900] s 76 ('[…] dass das bestehende Recht nicht oder nicht richtig angewendet worden sei und die angefochtene Entscheidung hierauf beruhe[…]') (accentuations are mine); quoted by Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 103; in addition, administrative courts had jurisdiction to annul administrative decisions 'where an essential procedural provision has been neglected in the making of an administrative decision.'

[65] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 106.

[66] Conversely, there were also matters where administrative courts had no jurisdiction to oversee 'legally bound' decisions, which thus remained entirely for the active administration; Ulla Held-Daab, *Das freie*

review in certain administrative courts of first instance and the Administrative High Courts can be accounted for nicely when considering their different institutional nature. As explained in chapter 2, the administrative courts of first (and where existing second) instance were set up within the hierarchy of the active administration. They acted as administrative courts in certain matters and as administrative authorities in others. Only the Administrative High Courts were institutionally separated from the active administration; only the judges of the Administrative High Courts were exclusively giving judgments, rather than also acting administratively. This neater separation from the administration apparently made a control of administrative discretion undesirable.[67]

Since this thesis focuses on judicial review in the Administrative High Courts, their lower instance counterparts are not examined in full detail.[68] The divergent scope of review in the lower instance administrative courts was only mentioned as a means of contrast. For our purposes, the important commonality between the Administrative High Courts remains the dichotomous approach of distinguishing between 'applying the law' (and 'statutorily predetermined decisions') and 'exercising a discretion' (and 'discretionary decisions').

2. The Rechtsstaat: Visions of Administrative Courts in the 1860s

The doctrinal framework outlined in the previous section was to an important degree the result of discussions among German public law scholars in the 1860s as to whether and

Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre (Duncker und Humblot 1996) 106.

[67] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 110.

[68] This was explained in chapter 1 IV 4 (p 26).

how separate administrative courts ought to be established, and what their function ought to be. Where and how to strike the right balance between judicial control and administrative autonomy, and what kind of institution ought to be responsible for it, was a highly contested issue. The ideas put forward by three scholars in the 1860s had a particularly strong influence on the development of error of law review in the late 1800s and early 1900s.

Lorenz von Stein, one of the eminent public scholars of the period, related the debate on judicial review to the notion of the *Rechtsstaat*, or the 'State of law', in a very loose sense the German equivalent to the English Rule of Law.[69] Given that the State and its executive powers were conceived as pre-legal in Germany, they needed to be tamed and subdued to the law. Only thus would the State become a *Rechtsstaat*. On von Stein's account, the *Rechtsstaat* required that the executive should be legally bound by statute and that remedies were available to bring illegal executive action and decision-making before the courts.[70] In the absence of statutory rules, however, public administration could determine the 'obligations of the individual […] entirely in their own discretion.'[71]

Von Stein in fact argued against separate administrative courts, deeming the coexistence of the ordinary courts and an administrative appeal procedure before administrative

[69] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 74; on *Rechtsstaat* and Rule of law, see Nicholas Barber, 'The Rechtsstaat and the Rule of Law' (2003) 53 University of Toronto Law Journal 443; RC van Caenegem, 'The Rechtsstaat in Historical Perspective' in RC van Caenegem, *Legal History: A European Perspective* (Hambledon 1991) 185; Julian Rivers, 'Rechtsstaatsprinzip and Rule of Law revisited' in Rainer Grote (ed), *Die Ordnung der Freiheit* (Mohr Siebeck 2007) 891; Bernardo Sordi, 'Révolution, Rechtsstaat and the Rule of Law: Historical Reflections on the Emergence and Development of Administrative Law' in Susan Rose-Ackerman, Peter L Lindseth, and Blake Emerson (eds), *Comparative Administrative Law* (2nd edn, Elgar 2017) 23.

[70] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 72. This was discussed above in ch 2 III 1 (p 58.

[71] Lorenz von Stein, 'Rechtsstaat und Verwaltungsrechtspflege' (1879) 6 Grünhuts Zeitschrift 27, 67, and 297 ('Verpflichtung des Einzelnen […] ganz nach ihrem Ermessen bestimmen'); quoted by Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 72.

authorities sufficient.[72] On this account, the jurisdiction of ordinary courts to rectify administrative decisions ought to be very limited, namely to instances where public administration clearly violated the wording of a statute, in other words to very obvious errors of law. Measures against the 'spirit' or the objective of a statute, by contrast, were only to be subject to challenge in the administrative appeal procedure before administrative authorities.[73] Von Stein's concern was the safeguarding of administrative autonomy. The courts ought not replace the interpretation an administrative body had given a statutory text by a judicial interpretation of the same statute. Although this narrow version of an error of law review confined to obvious violations of the statutory text did not have a lasting impact, it shows that the balancing of judicial control and administrative autonomy was identified as problematic even before the first separate administrative courts were introduced in Germany. Certain ideas of von Stein ideas became redundant with the introduction of separate administrative courts, but grounding the debate on judicial oversight of administrative action on the notion of the *Rechtsstaat* had a lasting impact.[74]

The judge and academic Otto Bähr, in his 1864 monograph *Der Rechtsstaat*, agreed with von Stein that the executive was bound by positive law and that remedies were necessary to bring illegal State action before independent courts. But Bähr did not trust the ordinary courts to deliver this judicial control effectively, which may be connected to his experiencing a major constitutional conflict in the State of Kurhessen in 1850.[75] Bähr called

[72] *Rekursverfahren*.

[73] Lorenz von Stein, 'Rechtsstaat und Verwaltungsrechtspflege' (1879) 6 Grünhuts Zeitschrift 67, 69–70; Lorenz von Stein, *Verwaltungslehre*, vol 1 (2nd edn, Cotta 1869) 371, 382; cited by Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 91.

[74] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 74.

[75] Above, chapter 2 III 1 (p 57).

for separate 'public law courts'.[76] Regarding the scope of their oversight, Bähr maintained that determining the content of a statute was always a question of law rather than one of 'discretion' or 'political appropriateness', even where the statutory text was vague. This laid the ground for a much more intense judicial oversight than envisaged on Stein's account. But Bähr in turn limited the reach of judicial review by distinguishing between 'interpreting statutes' and 'applying the law to the facts of a case'.[77] The latter, he argued, was for the public administration insofar as politically sensitive statutory wording was concerned, eg the 'public good' or 'a danger for morality'. Bähr took the view that all statutory texts referring to the 'public good' ought to be interpreted and applied by the public administration without any judicial oversight.[78] As will be seen below, Bähr anticipated the development review for error of law would take in the early 1900s insofar as highly evaluative statutory terms (such as 'the public good') were excluded from an otherwise intense judicial oversight.

Rudolf von Gneist suggested the most extensive reach of judicial review. He argued for extending the jurisdiction of administrative courts beyond purely legal questions to questions of fact and evaluative questions such as 'unequal' or 'inappropriate' decision-making. On his account, correctly applying statute was not merely a question of law, but commonly a matter of correctly assessing the facts and applying the statute 'appropriately' and 'equally' to all. Since the ordinary courts had no expertise regarding administrative fact-finding and evaluative issues concerning the appropriate application of statutes, Gneist argued for separate administrative courts with independent judges within the administrative

[76] Otto Bähr, *Der Rechtsstaat: eine publicistische Skizze* (Wigand 1864).

[77] *Gesetzesauslegung* and *Subsumtion*.

[78] Otto Bähr, *Der Rechtsstaat: eine publicistische Skizze* (Wigand 1864) 60; Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 78.

hierarchy.[79] Gneist suggested that 'administrative discretion' ought not be exempt from judicial oversight, but that, on the contrary, the control of discretionary powers ought to be one of the main tasks of administrative courts.[80] This proved very influential on the Prussian legislation which declared the first-instance administrative courts competent for certain discretionary matters.[81]

Von Stein, Bähr, and von Gneist thus put forward competing conceptions on how best to ensure that public administration correctly applied statute and how errors of law could be brought before the courts. Differences were manifest in their ideas on which institution ought to control administration and on the scope of review. Whereas the visions of von Stein, Bähr, and von Gneist were incompatible in many respects, three things were common to them. First, the notion of the *Rechtsstaat* took centre stage in the discussion on how to ensure the legality of administrative action. Second, 'administrative discretion' was conceptualised as flowing directly from the pre-legally conceived State powers; whether 'discretion' ought to be subject to judicial review or exempt from it, was one of the key points of the debate. Third, the scholars devised institutional and doctrinal frameworks from scratch with the clear aim of appropriately balancing judicial control and administrative autonomy. In the 1860s, judicial review in Germany seemed malleable and subject to rationalist scholarly design ex nihilo.[82] As will be shown below, this provides an interesting contrast to England.

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[79] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 85.

[80] Rudolf von Gneist, *Der Rechtsstaat und die Verwaltungsgerichte in Deutschland* (2nd edn, Julius Springer 1879) 272.

[81] Above, II 1 (p 204).

[82] On the strong position of German law professors generally, see RC van Caenegem, *Judges, Legislators, and Professors: Chapters in European Legal History* (CUP 1987).

3. Judicial and Administrative Decision-Making

Whilst the *Rechtsstaat* was the key constitutional principle underlying error of law review, the German approach was also shaped by specific conceptions of 'judicial' and 'administrative' powers. 'Discretion' was considered as being a peculiarity of public administration. Only administrative decision-making was treated as a problem for the *Rechtsstaat*. Judges, by contrast, were thought to have no discretion.[83] In the 1860s, judicial decision-making was generally conceived as being constituted and entirely determined by statute. The advocates of separate administrative courts in particular were inclined to portray these institutions as politically neutral and thus tended to depict the application of statutory provisions by judges as a deductive, 'logical', or even 'mathematical' activity.[84] This was an important argument in justifying the creation of administrative courts against the largely conservative governments of the German States in the late 19th century.[85] Opponents of separate administrative courts or scholars who argued for a narrowly confined judicial oversight, by contrast, warned that administrative courts would essentially repeat the task of public administration as a sort of 'duplicate administration'.[86]

[83] Eg Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (Duncker und Humblot 1895) 100; Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 69.

[84] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 122.

[85] Held Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 100, 117, and 169.

[86] *Doppelverwaltung*; Edmund Bernatzik, *Rechtsprechung und materielle Rechtskraft: Verwaltungsrechtliche Studien* (Wien 1886) 46; Bernatzik, 'Review of Friedrich Tezner, 'Zur Lehre von dem freien Ermessen der Verwaltungsbehörden als Grund der Unzuständigkeit der Verwaltungsgerichte' (1891) 18 Grünhuts Zeitschrift 148, 161.

In private law, by contrast, the conception of judicial decision-making as a purely logical activity whose outcome was entirely predetermined by statute had been slowly revised since the early 19th century. Towards the end of the century, under the impression of vague clauses on 'common decency' and 'good faith' in the *Bürgerliches Gesetzbuch*, the new German Civil Code that was enacted in 1896 and came into force in 1900, the topic of 'judicial discretion' came to the fore.[87] Against this backdrop, public law scholars came to acknowledge that administrative courts sometimes did have discretion in deciding a judicial review case. Nonetheless, 'judicial discretion' continued to be considered a negligible exception to the general rule that statute fully determined judicial decision-making. It became common in the late 19th and early 20th centuries to distinguish between the 'merely apparent', 'confined', and 'judicial' discretion on the one hand, and the 'free', 'genuine' and 'administrative' discretion on the other.[88] 'Discretion' continued to be regarded as typical for the exercise of administrative powers.

This was to change only with the positivist work of Hans Kelsen and Adolf Julius Merkl in the 1910s and 1920s. Their writings brought about entirely new conceptions of the State and of discretion. 'The State' was no longer seen as a pre-legal entity, but as constituted by law, and even as identical with the legal order. 'Discretion' was no longer seen as the peculiarity of the executive, but as existing in the judiciary, and in the legislator, too.[89] But

[87] Bürgerliches Gesetzbuch, ss 138 and 242 ('gute Sitten'; 'Treu und Glaube'); Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 168.

[88] 'Bloß augenscheinliches', 'gebundenes', 'richterliches Ermessen' versus 'freies', 'tatsächliches', 'administratives Ermessen'; Paul Laband, *Staatsrecht des deutschen Reiches*, vol 2 (5th edn, Mohr 1911) 178–79, 197; Max von Seydel, *Bayerisches Staatsrecht*, vol 2 (2nd edn, Riedel 1896) 441–42; Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (Duncker und Humblot 1895) 84–85 and 164–165 ; Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 128–132, 225–227.

[89] The main idea being Merkl's 'das doppelte Rechtsantlitz' (the twofold nature of the law): the legislator makes law, but it also applies higher ranging constitutional provisions in order to enact statutes. The constitution stipulates how the legislator makes law and it sets certain boundaries regarding the content a statute can legally have. Otherwise, the constitution leaves the legislator a discretion to enact statutes. The judiciary 'makes law' (ie creates new legal obligations) by applying the constitution and primary and

these positivist approaches were largely neglected by German legal scholarship until the latter half of the 20th century.[90]

4. Review for Error of Law in Practice

For the period covered by this thesis, I explained that 'legally predetermined decisions' were subject to an intense judicial control, whereas 'discretionary decisions' were largely exempt from judicial oversight. Hence, where an administrative decision was challenged on the ground of an error of law, the main question the judges had to resolve was whether the decision fell in one or the other category. The general development in the late 19th and early 20th centuries was that administrative courts became more reluctant to acknowledge 'administrative discretion', thus intensifying their control over how administrative authorities construed statute.[91]

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secondary legislation, which predetermine some (or most) of the content a judgment can legally have. But the non-predetermined rest is to be filled by the discretion of the judiciary. The executive (both government and public administration) applies constitutional law, primary and secondary legislation, and judicial decisions in order to 'make law' (ie creating new legal obligations via administrative acts, *Verwaltungsakte*). But the non-predetermined domain is to be filled by the discretion of the executive. 'Applying the law' (*Rechtsanwendung*) and 'making law' (*Rechtsetzung*) are thus two different perspectives on the same process of creating more and more concrete legal provisions. 'Discretion' exists at each of these levels of applying/making law. See Adolf Julius Merkl, 'Das doppelte Rechtsantlitz' (1918) Juristische Blätter 425, 444, and 463; Adolf Julius Merkl, 'Prolegomena einer Theorie des rechtlichen Stufenbaues' in Alfred Verdross (ed), *Kelsen Festschrift* (Springer 1931) 252; Thomas Olechowski, 'Legal Hierarchies in the Works of Hans Kelsen and Adolf Julius Merkl' in Ulrike Müßig (ed), *Reconsidering Constitutional Formation II: Decisive Constitutional Normativity: From Old Liberties to New Precedence* (Springer 2019) 519, 523–24.

[90] It is one of Held-Daab's main points that these positivist accounts have been (unduly) neglected until the 1990s; contrary to that, arguing that German scholars have widely discussed these works since the 1960s, Hans Heinrich Rupp, 'Review of Held-Daab, Das freie Ermessen' (1996) 51 Juristenzeitung 1173.

[91] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 231; Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 92.

Particularly the Administrative High Courts in Bavaria and Württemberg initially understood open-textured statutory terms as leaving the public administration a 'discretion' to interpret and apply these statutes without any judicial control.[92] The common reasoning in the courts was that vague statutory provisions were not sufficiently specific to 'exclude' administrative discretion, which (as explained) was conceived as the original state of the pre-legally conceived State powers. It was argued that where a statute left large gaps, it was for the public administration to fill these gaps, not for the administrative courts.[93]

An example for such vagueness is the licensing of pubs. According to statute, administrative authorities could reject an application for a license on three grounds; where the plaintiff was 'unreliable', where the premises were 'unsuitable', or where there was no 'demand' for another pub in a certain area.[94] This brought up the question of whether administrative courts had judicial oversight over how the administrative authorities interpreted and applied these terms. According to the Bavarian Administrative High Court, whilst the 'reliability' of the plaintiff was a vague term, its interpretation nonetheless was a question of law and as such to be determined by the 'judicial discretion' of the administrative judges.[95] Regarding the two remaining denial grounds, by contrast, the court held that public administration ought to interpret and apply these terms at their 'free

[92] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 141; Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 92.

[93] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 142.

[94] Trade, Commerce, and Industry Regulation Act 1869 [Gewerbeordnung für das Deutsche Reich vom 21. Juni 1869] s 33.

[95] Administrative High Court of Bavaria, 11 May 1880 [Königlich Bayerisches Staatsministerium des Innern (eds), *Sammlung von Entscheidungen des Königlich-Bayerischen Verwaltungsgerichtshofes, vol 1: 1880* (Straub 1881) 291, 294 no 69]. The Administrative High Court distinguished between a 'merely apparent judicial discretion' and a 'genuine free administrative discretion'.

discretion'. This implied an exemption from judicial oversight.[96] The court maintained that since the legislator had not given more detail on how to assess the 'demand' for a pub in a certain area and the 'suitability' of the premises, these evaluative assessments must take into account the 'public interest', which the administrative authorities was to do 'at their free discretion'.[97]

Why the 'reliability' of a plaintiff was for the court to decide, whereas the 'demand' for a pub and the 'suitability' of the premises were not, is not self-evident.[98] All three statutory terms were open-textured. Interpreting them required similar expertise, fact-finding, and knowledge of how these terms were construed and applied in previous cases. The distinction between a 'merely apparent judicial discretion' and a 'genuine, free, and administrative discretion' allowed the courts a significant degree of flexibility as to whether or not they ought to review a decision, depending on whether judicial intervention seemed justified in the specific case at hand. Given the initial distrust against the recently created administrative courts, the Administrative High Court in Bavaria was very generous in the

[96] Administrative High Court of Bavaria, 23 September 1889 [Königlich Bayerisches Staatsministerium des Innern (eds), *Sammlung von Entscheidungen des Königlich-Bayerischen Verwaltungsgerichtshofes, vol 11: 1889* (Straub 1890) 553, 555 no 124]; see also, Administrative High Court of Bavaria, 13 June 1906 [Königlich Bayerisches Staatsministerium des Innern (eds), *Sammlung von Entscheidungen des Königlich-Bayerischen Verwaltungsgerichtshofes, vol 27: 1906* (Straub 1907] 125, 127, no 35]; Administrative High Court of Bavaria, 16 March 1880 [Königlich Bayerisches Staatsministerium des Innern (eds), *Sammlung von Entscheidungen des Königlich-Bayerischen Verwaltungsgerichtshofes, vol 1: 1880* (Straub 1881) 185, 186 no 44]; cited by Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 142.

[97] Administrative High Court of Bavaria, 10 February 1880 [Königlich Bayerisches Staatsministerium des Innern (eds), *Sammlung von Entscheidungen des Königlich-Bayerischen Verwaltungsgerichtshofes, vol 1: 1880* (Straub 1881) 140, 143 no 32]; quoted by Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 143.

[98] Similarly, Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 143–46.

1880s in recognising 'administrative discretion'.[99] In modern terms, the judges were relatively deferential to administrative authorities.

The Prussian Administrative High Court, which had enjoyed a better standing from its creation in 1875, was more assertive in interpreting open-textured statutes from the very beginning.[100] But around 1900, the Southern German Administrative High Courts, too, had established themselves sufficiently to extend their jurisdiction considerably. Discretion of the public administration resulting from vague statutory language was accepted less and less readily by the courts.[101] Towards 1910, only highly evaluative statutory terms such as 'the public interest', 'necessity', 'usefulness' and 'propriety' were agreed upon to constitute 'discretionary concepts',[102] which entailed that they were interpreted and applied by the public administration without judicial oversight.[103] Every other vague statutory term was taken to be a 'legal concept'[104] whose meaning was for the administrative courts to determine.[105] The German courts thus took on a much more intense review in the early 1900s.

Two decisions by the Administrative High Court of Saxony dating from 1901 are particularly remarkable in this regard. Administrative authorities had forbidden public

[99] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 141.

[100] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 182–83.

[101] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 182–83.

[102] *Ermessensbegriffe*.

[103] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 181–82.

[104] *Rechtsbegriff*.

[105] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 181–83.

performances of two plays, Leo Tolstoy's *The Power of Darkness* and Gerhart Hauptmann's *The Weavers*.[106] Both orders were based on a local by-law stipulating that plays could be produced in public only if they did not 'cause a moral or religious outrage'.[107] According to the responsible administrative authority, these plays did cause such outrage. The Administrative High Court took the opposite view. The judges argued that the by-law did not leave the administration a 'free discretion'. The administrative authority was 'constrained in its decisions by valid legal provisions, thus having no room for manoeuvre'. The judges held that whether a play caused 'outrage' was 'not a question of fact or discretion, but purely a question of law'.[108]

The Administrative High Court interpreted the statutory provision and applied the same to the cases at hand. In abstract terms, the court reasoned that where a play caused merely 'distaste and reluctance' it could not be forbidden under the by-law: 'moral and religious outrage' was a high threshold.[109] Decisive were the expected effects a play would have on the public, and whether a play would cause 'a danger to public decency'.[110] Applying this

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[106] Administrative High Court of Saxony, 16 March 1901 (Nr 17 I S) [*Jahrbücher des Königlich-Sächsischen Oberverwaltungsgerichts,* vol 1 (Roßberg 1901) 26] (The Power of Darkness); Administrative High Court of Saxony, 6 November 1901 (Nr 156 I) [*Jahrbücher des Königlich-Sächsischen Oberverwaltungsgerichts,* vol 2 (Roßberg 1902) 28] (Die Weber); on the political context of the performances of *Die Weber*, see Detlef Merten, 'Geschichte der Verwaltungsgerichtsbarkeit in Preußen' Karl-Peter Sommermann and Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019) 179, 250.

[107] [Leipzig] Regulation concerning the Policing of Music Performances etc of 1894 s 12 [Regulativ, die polizeiliche Aufsichtführung über Musikaufführungen usw vom 10. März 1894]: 'was in sittlicher oder religiöser Beziehung keinen Anstoß erregt'.

[108] Administrative High Court of Saxony, 16 March 1901 (Nr 17 I S) [*Jahrbücher des Königlich-Sächsischen Oberverwaltungsgerichts,* vol 1 (Roßberg 1901) 26, 31–32] (The Power of Darkness) ('Denn der […] Begriff des 'freien Ermessens' ist jedenfalls dann nicht anwendbar, wenn die Verwaltungsbehörden, wie im vorliegenden Falle, durch bestehende rechtsgültige Bestimmungen in ihren Entschließungen gebunden sind und insoweit nicht mehr freien Spielraum haben[…]'; '[…] nicht eine That- oder Ermessensfrage, sondern eine reine Rechtsfrage […]').

[109] Administrative High Court of Saxony, 16 March 1901 (Nr 17 I S) [*Jahrbücher des Königlich-Sächsischen Oberverwaltungsgerichts,* vol 1 (Roßberg 1901) 26, 32–33] (The Power of Darkness).

[110] Administrative High Court of Saxony, 16 March 1901 (Nr 17 I S) [*Jahrbücher des Königlich-Sächsischen Oberverwaltungsgerichts,* vol 1 (Roßberg 1901) 26] (The Power of Darkness).

to the cases, the court explained that although *The Power of Darkness* displayed deeply immoral actions and behaviours, these were condemned and criticised in the play rather than encouraged or celebrated.[111] Regarding Hauptmann's play on the uprising by Silesian weavers in 1844, the court held that since it was easily recognisable as an historical play, it did not cause 'moral outrage' or incite hatred in the contemporary public. The fact that *The Weavers* had been produced in other cities without any negative effects or discernible risks to the 'public security' further militated against its causing 'outrage'.[112] Ultimately, the by-law did not authorise banning public performances of the two plays.

The two judgments from Saxony exemplify how the German administrative courts in the late 19th and early 20th centuries intensified their judicial control of public administration by gradually confining 'administrative discretion'. The aim was to subjugate administrative infringements on freedom and property to the judicial oversight of administrative courts even where the statutory basis of administrative action was vague or open-textured.[113] The general development was that administrative courts (and also scholarship) no longer acknowledged 'administrative discretion' regarding the conditions a statutory norm posited for administrative action (except for 'the public good' or 'the public interest'), but only in the legal consequences. The distinction between the statutory *pre-conditions* for taking action (*Tatbestand*) and the *legal consequences* flowing thereof (*Rechtsfolge*) was very common in German legal culture, and it still is nowadays.[114] In administrative law, many

[111] Administrative High Court of Saxony, 16 March 1901 (Nr 17 I S) [*Jahrbücher des Königlich-Sächsischen Oberverwaltungsgerichts,* vol 1 (Roßberg 1901) 26, 35–6] (The Power of Darkness).

[112] Administrative High Court of Saxony, 6 November 1901 (Nr 156 I) [*Jahrbücher des Königlich-Sächsischen Oberverwaltungsgerichts,* vol 2 (Roßberg 1902) 28, 35] (Die Weber) ('Beeinträchtigungen der öffentlichen Sicherheit').

[113] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 182–83.

[114] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 183–84.

statutes take the form 'If X1, X2, and X3 exist, the public administration may [or shall] do Y [or Y2 or Y3]'.[115] The Saxonian by-law above-mentioned, for example, stipulated that if a play causes 'moral or religious outrage', the public administration shall ban public stagings of that play. The general line of development was that 'administrative discretion' was constrained to the legal consequences of a statute.[116] Whether the conditions of a statute were met was controlled more and more closely by the courts. Where these statutory conditions were indeed given, the administration had a wide 'discretion' to determine the precise legal consequences.[117] 'Discretion' was thus construed as a freedom of choice between several potential measures all complying with the demands of legality.[118]

Three considerations explain this development towards a more intense review on the ground of an error of law. First, the standing and the legitimacy of Administrative High Courts in the broader political system was often precarious during the 1860s/70s, particularly in the Southern German States. As a consequence, the judges initially made rather cautious use of their statutory powers, but they extended the scope of review once the existence of separate administrative courts seemed secured.[119] Second, conceptions of judicial and administrative powers were slightly reshaped around 1900, particularly insofar

[115] For England, see Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 309.

[116] Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 94–95.

[117] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 185.

[118] Friedrich Tezner, *Zur Lehre von dem freien Ermessen der Verwaltungsbehörden als Grund der Unzuständigkeit der Verwaltungsgerichte* (Manz 1888) 12 and 71; cited by Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 184.

[119] Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 141; Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 217–19.

as ‘judicial discretion’ was acknowledged (even if its importance was still downplayed). Where ‘discretion’ was no longer entirely the peculiarity of the administration, judges had less reason to confine themselves to reviewing decisions which were based on clear violations of statute. Third, the constitutional context of error of law review had changed in the decades between the 1860s and the 1910s. Whilst statute was initially considered as being a mere ‘boundary’ to the pre-legally conceived executive powers, scholars developed the doctrine that all exercises of administrative powers needed some form of statutory basis and legitimation.[120] This was one of the further steps in subduing the State and its executive to the law, thus turning it into a genuine *Rechtsstaat*.

5. Summary

Review for error of law in Germany was characterised by the dichotomy between ‘law’ and ‘discretion’. This approach was based on a conception of the State and its executive powers as pre-legal entities, of administrative decision-making as ‘discretionary’, and of judicial decision-making as statutorily pre-determined. The administration was thought to have wide-ranging discretionary powers, unless statute regulated a certain matter in clear language, thus drawing ‘boundaries’ to the (originally boundless) ‘discretion’. The Administrative High Courts were deferential to administrative interpretations and applications of statute in the 1870s/80s, but adopted a much more intense review around 1900, now construing almost all statutory terms as being ‘legal’ concepts. Whilst the

[120] In constitutional terms, this was the development from *Vorrang des Gesetzes* (‘primacy of statute’) to *Vorbehalt des Gesetzes* (roughly, ‘legitimation of statute’); *Vorrang des Gesetzes* meant that administrative acts could not go against statute (where a statute existed); according to the *Vorbehalt des Gesetzes*, any administrative act needed a statutory basis as a source of legal authority; see Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996) 63, 118–21, 200, 233; Gernot Sydow, *Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts: eine Quellenstudie zu Baden, Württemberg und Bayern mit einem Anhang archivalischer und parlamentarischer Quellen* (CF Müller 2000) 91.

underlying conceptions of the State and of judicial and administrative powers changed between the 1860s and the 1910s, the overall doctrinal framework remained largely unchanged. When the judges took on a more intense review in the early 1900s, they merely applied the law-discretion divide differently. In a way, the doctrinal framework outlived its foundations.[121]

[121] This is one of the main arguments of Ulla Held-Daab, *Das freie Ermessen von den vorkonstitutionellen Wurzeln bis zur positivistischen Auflösung der Ermessenslehre* (Duncker und Humblot 1996).

IV. England: Remedial Variety and Deference

The following part examines how English courts oversaw the interpretation and application of statutory and regulatory texts by administrative decision-makers (broadly conceived).[122] I suggest that review for error of law in England, when viewed from a comparative perspective, was characterised by three features. First, decisions could be challenged on the ground of an error of law via a variety of processes. Second, English judges delivered a less intense review than French and German judges did. There was no general principle in English law that any error of law needed rectification by the courts. Third, in stark contrast to France and Germany, review for error of law in England was not generally crafted around a specific conception of judicial and administrative powers.

The first section addresses the remedial complexity of error of law review (the first feature). Given the variety of processes, assessing the intensity of review (the second feature) is a difficult endeavour. The path taken in this chapter is to focus on two important doctrinal limitations to error of law review, each of which constrained the intensity of review in certain, but not all processes: the distinction between 'jurisdictional' and 'non-jurisdictional' errors and the distinction between 'judicial', as opposed to 'ministerial' and 'administrative' acts. Neither of the two limitations applied to the equitable remedies of injunctions and declarations, which thus provide an interesting contrast and arguably display a slightly more intense judicial oversight. Nonetheless, in comparison to their French and German counterparts, English judges were overall relatively deferential towards how primary decision-makers interpreted and applied statutory and regulatory texts.[123] The

[122] The absence of a centralised and hierarchically organised 'public administration' in England was discussed in chapter 2 IV 1 a (p 69).

[123] 'Deference' and 'deferential' are used in this thesis in a broader political sense (details below, p 265–67), rather than referring to the 21st-century debates on 'marginal review'.

third feature characterising English law, ie that error of law review was not generally crafted around a specific conception of judicial and administrative powers, follows from the English part in its entirety. *Something that is not the case* is harder to illustrate than *something that is*. Therefore, the relative absence of the judicial-administrative distinction in English error of law review is more conveniently discussed in detail in the comparative part below.

1. Remedial Variety and Complexity

Given that the various process and remedies discussed in chapter 2 were crucially important to review on the ground of an error of law, it is useful to recapitulate them here.

England did not (yet) have a unified process by the name of an 'application'[124] or a 'claim for judicial review'.[125] Administrative decisions could be challenged on the ground of an error of law before the English courts via a variety of processes. These can be assembled into three groups. First, the prerogative writs of certiorari, mandamus, and prohibition were direct challenges of decisions made in the exercise of some form of public powers.[126] Decisions could be quashed (certiorari), a decision-maker could be compelled to do a certain thing (mandamus) or prohibited from taking a certain action (prohibition). Second, decision-makers could be sued for damages via private law actions, such as trespass. In these collateral challenges, judges were often required to examine incidentally whether decision-makers had acted unlawfully as a condition to give judgment on whether officials

[124] Senior Courts Act 1981, s 31.

[125] Civil Procedure Rules 1998, part 54, rule 1.

[126] Chapter 2 IV 1 b (p 75).

incurred civil liability. Third, decisions could be challenged via injunctions and declarations. Injunctions could be mandatory or prohibitory.[127] A declaratory judgment, by contrast, merely stated the law on a certain contentious point, without granting a specific form of relief.[128]

According to John Bell, it took English law until the Tribunals, Courts, and Enforcement Act 2007 'to get a fully developed and coherent idea of administrative justice that might be seen as comparable to what emerged in France by the 1880s'.[129] Similarly Conor McCormick found that concerning the prerogative writs, declarations, and injunctions, the law reports from the late 1800s and early 1900s 'do not display broad consistency in many respects'.[130] It is thus advisable to be cautious with generalisations about 'review for error of law' in England. Much depended on the specific process.[131] The conditions under which judges intervened with administrative decision-making differed widely between the processes. This is particularly important when considering that the different processes and remedies could not be combined entirely freely.[132]

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[127] Conor McCormick, 'The Historical Foundations of Judicial Review in the United Kingdom' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 193, 207; SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 329 points out that until the late 19th century all injunctions were worded in a prohibitory form, even if the effect was mandatory.

[128] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 367.

[129] John Bell, 'The Role of Doctrinal Writing in Creating Administrative Law: France and England Compared' (2008) 15 Glossae. European Journal of Legal History 141, 143.

[130] Conor McCormick, 'The Historical Foundations of Judicial Review in the United Kingdom' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 193, 213–14.

[131] Philip Murray, 'Process, Substance and the History of Error of Law Review' in John Bell and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016) 87.

[132] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 335, 362–64 on the relationship between the writ of prohibition and injunctions. See also, Law Commission, 'Report on Remedies in Administrative Law' (Law Comm No 73, 1976) 15.

The remedial complexity constitutes one of the characteristic features of review on the ground of an error of law in England. For the remainder of the English part, it means that assessing the intensity of review makes it necessary to go into the details of the conditions under which applications for certain remedies were successful. That said, it is neither possible nor necessary within the confines of this thesis to discuss the conditions for judicial intervention on the ground of an error of law exhaustively.[133] The aim here is to analyse the most important structures to error of law review which stand out in a comparative perspective.

Two conditions for judicial intervention, which applied to certain, but not all remedies, are of particular interest, given that they significantly curtailed review for error of law. The distinction between 'jurisdictional' and 'non-jurisdictional' errors confined review for error of law via the prerogative writs and in tort actions. Characterising some acts as 'judicial', as opposed to 'ministerial' or 'administrative', confined the writs of certiorari and prohibition. The ensuing sections consider these doctrinal limitations to review for error of law in turn. The equitable remedies of injunctions and declarations are addressed thereafter.

2. Jurisdictional and Non-Jurisdictional Errors

The main doctrinal tool confining review for error of law in England was the distinction between errors of law within jurisdiction (non-jurisdictional errors) and such errors which made decision-makers go beyond their jurisdiction (jurisdictional errors). As a general principle, albeit one with exceptions and limitations to be discussed in due course, only

[133] See only Thomas Tapping, *The Law and Practice of the High Prerogative Writ of Mandamus, As It Obtains in England and Ireland* (Benning 1848) with 250 pages on the instances in which mandamus was available; Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 575.

jurisdictional errors were generally reviewable.[134] Non-jurisdictional errors, by contrast, were reviewable only in limited circumstances.[135] The distinction between jurisdictional and non-jurisdictional errors originated in the 17th century in actions for trespass and other civil wrongs against judges and officers of inferior courts, especially Commissioners of Sewers. Only where an error of law was 'jurisdictional' were the judges or officers subjected to civil liability.[136] Courts felt that it would be overly strict and normatively unjustified to hold officials liable for errors of law within jurisdiction, particularly where the defendants in tort actions were charged with the execution of a contested warrant they had not made themselves.[137] The distinction between jurisdictional and non-jurisdictional error was later applied to the prerogative writs of certiorari, mandamus and prohibition. In the remainder of this section, I will focus on the writ of certiorari given that the distinction was most developed under this process in the period in question.[138] But it is important to remember that classifying certain errors as 'non-jurisdictional' confined judicial review via the writs of mandamus and prohibition, and in actions for damages, too.[139]

The backdrop underlying the distinction between jurisdictional and non-jurisdictional errors was the limited authority of statutory decision-makers. Parliament delegated powers

[134] Similarly, SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 55.

[135] Non-jurisdictional errors of law that appeared on the face of the record could be quashed via the prerogative writ of certiorari, but this did not have much practical relevance in the late 1800s and early 1900s given the sparse detail on records, a consequence of legislation in the mid–19th century; see Philip Murray, 'Escaping the Wilderness: R v Bolton and Judicial Review for Error of Law' (2016) 2 Cambridge Law Journal 333, 356–58.

[136] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 65.

[137] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 302.

[138] Similarly, Philip Murray, 'Process, Substance and the History of Error of Law Review' in John Bell and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016) 88, 90.

[139] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 302; Joshua Scholefield and Gerard Hill, *Appeals from Justices* (Butterworth 1902) 189 point out that the principle is the same in applications for mandamus, certiorari, or prohibition.

on primary decision-makers to fulfil certain functions, such as overseeing public health, issuing licenses, levying poor law rates, etc. But such statutory powers had boundaries. Commonly, the powers of statutory decision-makers were limited as to persons, place, and subject-matter. Accordingly, the legal historian Stuart Anderson defined 'jurisdiction' broadly as 'legal authority within a denoted sphere, a competence dependent on person, place, subject-matter […].'[140] Where statute delegated powers on an authority to search 'boats' for 'stolen goods' and seize such goods and boats, for example, the decision-maker would be going beyond its jurisdiction if it seized carriages.[141] The general idea was that a statutory decision-maker should stick to the task the legislator had delegated to it rather than venturing into matters lying beyond its jurisdiction. For error of law, this meant that only such errors were reviewable which made the decision-maker go beyond his jurisdiction. Where a decision-maker asserted that it had authority to search a carriage, arguing a carriage counted as a 'boat' under the statute in question, the courts would intervene. Controlling 'carriages' was not the task the legislator had set this decision-maker. Where a decision-maker misconstrued the meaning of a statutory term and misapplied a statute, but stayed within its jurisdiction, by contrast, the courts had no authority (or at least no general authority) to intervene.[142]

[140] Stuart Anderson, 'Judicial Review' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 486, 488: 'legal authority within a denoted sphere, a competence dependent on person, place, subject-matter, and, to an extent, process.' That a disregard of procedural rules could be considered a jurisdictional error is not relevant here; Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 314–17.

[141] A fictional variation of *Brittain v Kinnaird* (1819) 1 B & B 432, where a specialised court had jurisdiction to search boats for stolen goods; the plaintiff brought an action in trespass against magistrates for detaining a vessel, arguing that a vessel did not constitute 'a boat' under the statute; Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 305–6.

[142] Review for error of law on the face of the record is discussed in due course.

In practice, statutory conditions pertaining to place or persons were largely unproblematic.[143] The geographical scope of authority of a decision-maker was commonly clearly defined, for example by the boundaries between two parishes. Where a parish levied rates for poor relief outside the scope of its geographical authority, they acted outside their jurisdiction. For limitations pertaining to subject-matter, by contrast, it proved extremely hard to draw the boundaries between improper exercises of statutory powers within jurisdiction and errors that made a decision-maker go beyond his jurisdiction.[144]

For the judicial practice of the 19th century, Paul Craig has shown that at least two different conceptions of 'jurisdiction' co-existed.[145] The assumption underlying both was that if there are to be errors within jurisdiction, it must be irrelevant to the question of jurisdiction whether the decision on the merits went one way or another.[146] The 'collateral/jurisdictional fact doctrine' conceived of jurisdiction as being concerned with a 'collateral' point or fact in the sense of a part of the decision distinct from the merits.[147] Lord Coleridge aptly explained this in *Bunbury v Fuller* (1853):

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[143] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 299–300 and 314–15.

[144] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 315.

[145] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 298. See also, Frederic William Maitland, 'The Shallows and Silences of Real Life' in *The Collected Papers of Frederic William Maitland*, vol 1 (HAL Fisher ed, CUP 1911) 467, 478 'We puzzle foreigners by our lax use of the word "jurisdiction" and it is remarkable enough. Whatever the justice has had to do has soon become the exercise of a jurisdiction; whether he was refusing a licence or sentencing a thief, this was an exercise of jurisdiction, an application of the law to a particular case.' Cited by Louis L Jaffe and Edith G Henderson 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 LQR 345, 360–61.

[146] *R v Central Criminal Court JJ* (1866) 17 QBD 598, 602: 'Where a court has jurisdiction to entertain an application, it does not lose its jurisdiction by coming to a wrong conclusion, whether it was wrong in law or in fact.'

[147] Despite the name, the doctrine applied to law and fact, Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 298; for a judicial statement to the same point, see *R v Shoreditch Assessment Committee, ex p Morgan* [1910] 2 KB 859, 880: '[I]t is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact'.

> Now it is a general rule, that *no court of limited jurisdiction* can *give itself jurisdiction* by a wrong decision on a point *collateral* to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be *final* on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and, however necessary in many cases it may be for it to make a *preliminary inquiry*, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the superior court.[148]

On this account, any decision on the 'merits' was within jurisdiction, regardless of whether (in the view of the court) it had been decided correctly or incorrectly. Matters 'collateral' to the merits were 'preliminary' in the sense that they determined whether or not a decision-maker had jurisdiction to look into a certain matter. These collateral or preliminary matters had to be reviewable, so that no decision-maker could 'give itself jurisdiction', eg by taking a 'carriage' for a 'boat'.

The competing 'commencement doctrine' adopted a temporal perspective, assuming that decision-makers made an initial decision on whether they had jurisdiction. Accordingly, all errors occurring at a later stage were within jurisdiction. The practical consequence was a more narrowly confined judicial review than on the collateral fact doctrine.[149] This narrow conception of jurisdiction, which was defended by Gordon in several articles from the 1930s–60s,[150] and coined the 'pure theory' of jurisdiction by De Smith,[151] had evolved in

[148] *Bunbury v Fuller* (1853) 156 ER 47, 60 (accentuations are mine).

[149] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 305.

[150] Philip Murray, 'Escaping the Wilderness: R v Bolton and Judicial Review for Error of Law' (2016) 2 Cambridge Law Journal 333, 360; DM Gordon, 'The relation of facts to jurisdiction' (1929) 45 LQR 459; 'Observance of Law as a Condition of Jurisdiction' (1931) 47 LQR 386; 'Quashing on Certiorari for Error in Law' (1951) 67 LQR 452; 'Conditional or Contingent Jurisdiction of Tribunals' (1960) 1 UBCL Rev 185; 'Jurisdictional Fact: an Answer' (1966) 82 LQR 515;'What did the Anisminic Case Decide?' (1966) 82 LQR 515.

[151] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 67–68; Philip Murray, 'Escaping the Wilderness: R v Bolton and Judicial Review for Error of Law' (2016) 2 Cambridge Law Journal 333, 360.

the early 19th century.[152] It was expressed succinctly by Lord Denman CJ in the case of *R v Bolton* (1841): 'jurisdiction does not depend on the truth or falsehood of the charge [laid before a decision-maker], but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry'.[153] Jurisdiction was thus said to be assessed at the start of an inquiry, to the effect that any errors occurring at a later stage were within jurisdiction.[154]

The tension between these two doctrines was usually resolved by interpreting the legislative instrument in question.[155] The legislator was thought sometimes to delegate powers on decision-makers 'including [the jurisdiction to decide on] the existence of the preliminary facts on which the further exercise of their jurisdiction depends'.[156] In other instances, the legislator was considered to delegate powers *excluding* the jurisdiction to decide on jurisdiction.[157] Craig has shown that invoking legislative intent could justify the distinction between the two doctrines ex post, but it did not give judges any ex ante tools to decide into which of the two groups a case fell.[158] There appears to be no general pattern, such as one of the approaches being preferred by certain judges, on one subject-matter (eg poor law), or a in a certain decade.[159] Judges were thus relatively free to decide whether or not a

[152] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 66, makes the point that there was in the early 19th century a tendency to interpret the concept of 'jurisdiction' more narrowly than hitherto, thus no longer to treating 'nearly all of on inferior court's findings as touching its jurisdiction'.

[153] *R v Bolton* (1841) 113 ER 1054.

[154] Philip Murray, 'Process, Substance and the History of Error of Law Review' in John Bell and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016) 87, 99.

[155] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 307.

[156] *R v Commissioners for Special Purposes of Income Tax* (1888) 21 QBD 313 (Lord Esher MR); quoted by Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 308.

[157] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 308.

[158] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 310.

[159] Similarly, Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 308.

decision ought to be reviewed, which in the case of certiorari meant quashing the decision.[160]

Ultimately, the courts adopted a pragmatic approach. Whether an error was found to be jurisdictional/reviewable or non-jurisdictional/unreviewable depended on different contexts. Three aspects seem to have been particularly relevant. First, it depended on the consequences of judicially reviewing a decision. For the writ of certiorari, this meant considering what the situation would be if the court quashed the decision in question. (In tort proceedings, by contrast, characterising a certain error as 'jurisdictional' potentially meant subjecting an official to civil liability.) Second, statutory context mattered, particularly whether there was a statutory appeal against the challenged decision or an ouster clause. Where a statutory appeal was available, the effect of declaring an error non-jurisdictional/unreviewable had less of an impact, given that there was an alternative means of challenge. Ouster clauses, by contrast, were usually construed as concerning non-jurisdictional errors only, to the effect that jurisdictional errors could still be quashed, even if there was a no-certiorari clause.[161] Third, it was relevant whether the judges had good reasons to be deferential to primary decision-makers, for example where a decision required local or special administrative expertise.[162]

[160] Similarly, SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 75–76.

[161] Stuart Anderson, 'Judicial Review' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 486, 488; *ex p Bradlaugh* (1878) 3 QBD 509.

[162] Eg *Turner v Blamire* (1853) 61 ER 506; *A-G v Great Eastern Railway Co* (1870–71) LR 6 Ch App 572; similarly, Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 325–26.

3. The Origins of Jurisdictional and Non-Jurisdictional Errors

The previous section discussed the limitation of review for error of law (chiefly via the writ of certiorari) to 'jurisdictional' errors and what influenced the assessment of whether a certain error was classified as jurisdictional. This raises the question of why this requirement existed in the first place. Why is it that only jurisdictional errors could be quashed via the writ of certiorari? This question is particularly important when recalling the general principle in French and German law that any error of law justified judicial intervention.

Philip Murray has put forward a convincing account as to the origins of the distinction between jurisdictional and non-jurisdictional errors for the writ of certiorari.[163] This account goes back to medieval times, when the writ was deployed as a general 'tool for internal administrative management', the equivalent of 'sending for the file'.[164] Certiorari issued mostly in the Court of King's Bench, it required other courts of record to bring up their records for inspection in King's Bench. When the writ in the 17th century evolved into a remedy for judicial review, it targeted errors that appeared on the face of the record.[165] The writ was primarily used against decisions by Justices of the Peace, but it was then extended to other statutory decision-makers, such as the Commissioners of Sewers.[166] Since the records often contained only limited information, external evidence in the form of

[163] Philip Murray, 'Process, Substance and the History of Error of Law Review' in John Bell and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016) 87; Philip Murray, 'Escaping the Wilderness: R v Bolton and Judicial Review for Error of Law' (2016) 2 Cambridge Law Journal 333.

[164] Philip Murray, 'Process, Substance and the History of Error of Law Review' in John Bell and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016) 87, 90.

[165] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 582.

[166] Philip Murray, 'Process, Substance and the History of Error of Law Review' in John Bell and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016) 87, 92.

affidavits was introduced to reveal that a decision-maker had committed an error of law. The Court of King's Bench developed the procedural rule that affidavit evidence could only be introduced where a decision-maker committed a 'jurisdictional' error. The distinction between jurisdictional and non-jurisdictional errors thus initially served the procedural purpose of limiting the availability of affidavit evidence. In the 19th century, however, the distinction lost this procedural basis.[167] At the same time, applications for certiorari on the ground of an error of law on the face of the record lost their practical relevance due to legislative changes which diminished the detail of information available on the records. After the Summary Jurisdiction Act 1848, 'speaking records' were a thing of the past, leaving review for error of law on the face of the record, in Murray's words, 'practically defunct'.[168] Characterising an error of law as 'jurisdictional' thus became 'the sole gateway to judicial review'.[169]

On this account, the distinction between jurisdictional and non-jurisdictional errors was a residue of the earlier history of the writ of certiorari. That jurisdiction became the gateway for judicial review was, in a way, accidental. Viewing the matter from a different perspective, one could say that the judges used the distinction between jurisdictional and non-jurisdictional error as a doctrinal tool which helped them to strike what they conceived as the right balance between administrative autonomy and judicial control. The fact that the distinction left the judges a substantial degree of flexibility as to whether or not a decision ought to be quashed was not necessarily a disadvantage. Quite the contrary, from the

[167] Philip Murray, 'Process, Substance and the History of Error of Law Review' in John Bell and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016) 87, 88–89.

[168] Philip Murray, 'Escaping the Wilderness: R v Bolton and Judicial Review for Error of Law' (2016) 2 Cambridge Law Journal 333, 356–58; similarly, Stuart Anderson, 'Judicial Review' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 486, 491 and 505.

[169] Philip Murray, 'Process, Substance and the History of Error of Law Review' in John Bell and others (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016) 87, 110.

judges' perspective, it may have been one of the benefits of this doctrinal tool that it could be tailored to the circumstances and needs of a wide variety of cases, and also the variety of bodies subject to judicial review.[170]

Whilst I largely confined the analysis to the writ of certiorari, it ought to be remembered that the distinction between erroneous exercises of statutory powers within jurisdiction and such errors that made the decision-maker go beyond his jurisdiction, also pertained, in broadly similar ways, to the prerogative writs of mandamus and prohibition,[171] and to actions in tort. The effect was that in these proceedings, only such errors that went to the jurisdiction of the decision-maker justified judicial intervention. This stood in stark contrast to French and German law; it will be expanded upon this below in the comparative part of the present chapter.

4. Judicial, Ministerial, and Administrative Acts

Besides the distinction between jurisdictional and non-jurisdictional errors, the differentiation between 'judicial' and 'ministerial' or 'administrative' acts further limited review for error of law. The prerogative writs of certiorari and prohibition were commonly thought to be available only where a decision-maker exercised 'judicial' functions.[172]

[170] The variety of bodies subject to judicial review was discussed in chapter 2 IV 1 a (p 69).

[171] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 292 mentions divergent views to the point that prohibition may also issue to non-jurisdictional errors, but this mostly pertained to ecclesiastical courts which were under particularly close scrutiny of the common law; for inferior tribunals, prohibition issued only where an error was jurisdictional or on the face of the record.

[172] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 281, points out that, more precisely, prohibition appears to issue to a body that performed functions of a judicial character even if 'all that remains for it to do is to carry out a ministerial act – e.g., execution of its own judgment'; Joshua Scholefield and Gerard Hill, *Appeals from Justices* (Butterworth 1902) 225, 234.

Where a contested act or a function was 'ministerial' or 'administrative', by contrast, a decision based on a misinterpretation or misapplication of a statutory text could not be quashed via certiorari.

This doctrinal limitation is relevant to the two overall arguments of the present chapter. First, the fact that English judges expressly invoked notions of 'judicial' and 'administrative' may at first sight seem to contradict my claim that review for error of law was carefully crafted around notions of 'judicial' and 'administrative' powers in France and Germany, but less so in England. Yet on closer analysis, the English judicial reasoning on 'judicial' as opposed to 'ministerial' and 'administrative' acts supports this overall argument rather than contradicting it. The English labels were employed very loosely and far from consistently. They were not rooted in an entrenched constitutional or institutional distinction between judicial and administrative powers. Further, the limitation of the writ of certiorari and the writ of prohibition to 'judicial' acts had less overarching significance for error of law review than the notions of 'judicial' and 'administrative' powers in France and Germany. This point will be discussed in greater detail in the comparative part below.

Second, the limitation of the writ of certiorari to 'judicial' acts restrained the intensity of review for error of law, thus buttressing the second main claim of the present chapter. This is substantiated in the ensuing section. To illustrate the point, it is useful to examine the consequences of characterising an act as 'judicial', the historical origins of this limitation, and how this requirement was gradually readjusted in the late 1800s and early 1900s.

Confining the writ of certiorari to 'judicial' acts and functions was much discussed in the context of licensing decisions. Coleridge J, for example, held in 1852 that 'the grant of a licence to sell beer by retail is not judicial; and […] therefore it is not an act upon the

validity of which this Court can decide upon certiorari.'[173] The effect was that even where licensing authorities misconstrued or misapplied a statute, their decisions could not be quashed via the writ of certiorari. In this sense, the limitation of certiorari to 'judicial' acts constrained the intensity of review.[174]

Confining the writ of certiorari to 'judicial' acts was a remainder of the writ's earlier limitation to issue only to 'courts of records'.[175] The latter made sense at a time when certiorari primarily targeted errors of law on the face of the record.[176] Justices of the Peace and Commissioners of Sewers were classified as 'courts of record', but certiorari was not available to oversee decisions made by administrative bodies that were not thus classified.[177] Yet the condition of a 'court of record' was construed more and more liberally by the courts,[178] and over the years 'tacitly dropped and gradually forgotten'.[179] But the related requirement for an act to be 'judicial' lived on and in some cases in the late 19th century denied certiorari.[180]

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[173] *R v The Overseers of the Township of Salford* (1852) 118 ER 259, 261; similarly, *R v The Churchwardens and Overseers of the Poor of Hatfield Peverel* (1849) 117 ER 117, 125 (sending a pauper into an asylum is 'not of such a judicial nature as to be removable by certiorari'); *R v The Aberdare Canal Company* (1850) 117 ER 328 (commissioners giving their assent to a canal company building a bridge is a judicial act, certiorari lies).

[174] I discussed the broad notion of 'intensity of review' employed in this chapter above in I (p 185).

[175] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 583; Chantal Stebbings, *Legal foundations of tribunals in nineteenth-century England* (CUP 2007) 254–55.

[176] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 586.

[177] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 583.

[178] Eg *Groenvelt v Burwell* (1700) 1 Ld Raym 454, 467 (Holt CJ), 'where there is a jurisdiction erected de novo with power to fine and imprison, it is a Court of Record; for Courts of Record only can fine'; similarly, *R v River Thames Watermen and Lightermen Company* [1897] 1 QB 659 (Wright J) 'the order in question in this case was not a judicial order, and therefore […] a writ of certiorari to remove it does not lie.'

[179] Amnon Rubinstein, *Jurisdiction and Illegality: A Study in Public Law* (Clarendon 1965) 70; quoted by Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 587.

[180] Eg *R v London County Council: Re Empire Theatre* (1894) LTR 638, 640 (Lord Wright) 'the writ of certiorari is applicable to judicial proceedings of courts, but the [London] county council is not a court, and

In the case of *R v Sharman* (1898), where opponents to the granting of a license challenged the same via an application for a writ of certiorari, Wright J confirmed that 'the decision of the justices to grant the licence is not a judicial order which can be brought up by that process [certiorari], but is a conclusion formed in the exercise of their administrative functions as the licensing authority'.[181] But some judges in licensing cases in the 1890s questioned whether it made sense to limit the writ of certiorari to 'judicial' acts.[182] Finally, the case of *R v Woodhouse* (1906)[183] no longer followed *R v Sharman*. Instead of leaving behind the requirement of 'judicial' acts or functions, however, Vaughan Williams LJ reclassified licensing as 'a judicial act', with the consequence that 'a certiorari will lie'.[184]

One crucial problem was that the labels of 'judicial', 'ministerial', and 'administrative' were not used consistently; they had several meanings.[185] The licensing decisions of the 1890s and early 1900s illustrate that the term 'judicial' was used with different meanings to address a variety of legal questions. For example, the courts employed the notion of 'judicial' in discussing whether statutory rules on costs for Courts of Summary Jurisdiction applied to licensing justices, too.[186] Further, the notion of 'judicial' in certain instances built

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its proceedings are not judicial'; quoted by Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 590.

[181] *R v Sharman, ex p Denton* [1898] 1 QB 578, 580.

[182] R v Bowman [1898] 1 QB 663, 667 (Wills J) '[…] I should have wished to hear the subject more fully discussed before I arrived at the same conclusion. My impression certainly was that the remedy by certiorari had not hitherto been confined within such narrow limits as that case [R v Sharman] suggests.'; R v Nicholson [1899] 2 QB 455, 473–74 (Vaughan Williams LJ) expressed more explicit doubts about the principle 'that an order to be brought up must be that of persons exercising judicial, or what have been called quasi-judicial, functions. In my opinion, there are other cases in which it will be found that the remedy by certiorari is available […].'

[183] *Leeds Corp v Ryder* [1906] 2 KB 501 (= *R v Woodhouse*).

[184] *Leeds Corp v Ryder* [1906] 2 KB 501, 514 (= *R v Woodhouse*).

[185] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 29.

[186] *Boulter v Kent Justices* [1897] AC 556; Summary Jurisdiction Act 1879 (42 & 43 Vict c 49) s 31; in *R v Woodhouse*, Vaughan Williams LJ held that *Sharman* was based on a misinterpretation of *Boulter v Kent Justices*, arguing that the latter case concerned costs, rather than the question of whether certiorari lies to the

on the perceived institutional nature of the decision-maker, whereas in other instances they concerned the perceived nature of the decision.[187] De Smith has noted that the courts did not feel particularly bound to adhere to one of the senses of 'judicial', 'ministerial', or 'administrative'. Where a definition of 'judicial' formulated by the courts for a particular purpose appeared ill-suited to another purpose, the courts 'have shown no hesitation in disregarding it and adopting another definition.'[188]

> [Whilst the] scope of judicial review may be determined by the manner in which the courts classify statutory functions, […] in many cases the truth of the matter is that the mode of classifying statutory functions is determined by the scope of review that the courts deem to be desirable and practicable.[189]

The trend in the late 1800s and early 1900s was to broaden the scope of application of the writs of certiorari and prohibition.[190] The reach of the writs of certiorari and prohibition was no longer determined by the character of the authority making the decision, but by the nature of the decision.[191] In the House of Lords judgment in *Board of Education v Rice* (1911), the writ of certiorari was used for the first time to quash a decision by a central

decisions of licensing justices; Stuart Anderson, 'Judicial Review' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 486, 501.

[187] Where the courts (in *Boulter v Kent Justices* [1897] AC 556) had to decide whether licensing justices were a 'Court of Summary Jurisdiction', it made sense to focus on the nature of the decision-maker; Vaughan William's judgment in *R v Woodhouse*, 512–13, by contrast, focused on the nature of the (licensing) decision: 'in practice a certiorari has issued in cases in which it is impossible to say there was a Court'.

[188] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 29.

[189] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 50–51.

[190] Conor McCormick, 'The Historical Foundations of Judicial Review in the United Kingdom' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 193, 204; Sergio Galeotti, *The Judicial Control of Public Authorities in England and in Italy: A Comparative Study* (Stevens 1954) 36.

[191] Conor McCormick, 'The Historical Foundations of Judicial Review in the United Kingdom' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 193, 204.

government department.[192] Thus, certain decisions based on an error of law which previously eluded judicial oversight via the writ of certiorari were brought under its reach.

Yet it is important to remember that the requirement of an act being 'judicial' applied only to the writs of certiorari and prohibition. Mandamus, by contrast, issued to compel the performance of any public duty, be they 'judicial', 'ministerial', or 'administrative'.[193] In fact, when certiorari was denied in licensing decisions, mandamus could issue, nonetheless. In the case of *R v Bowman* (1898) for example, the judges of the Queen's Bench Division considered a licensing decision 'illegal' but did not quash the same via certiorari due to the fact that they considered licensing as 'not judicial'.[194] Yet they issued a writ of mandamus, compelling the licensing justices to 'hear and determine' the case according to the law. Hearing the matter anew, however, was less effective a form of relief than quashing it via certiorari.[195] Ultimately, the confinement of the writ of certiorari to 'judicial' acts constrained the intensity of review for error of law, but not to the extent it might appear at first sight, given that other processes, such as mandamus, were available.[196] This displays

[192] *Board of Education v Rice* [1911] AC 179; Stuart Anderson, 'Judicial Review' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 486, 503–4; whether the writ of prohibition lies to the Local Government Board was still doubtful in *R (on the Prosecution of Penarth Local Board of Health) v Local Government Board* (1882) 10 QBD 309, 321 and 327.

[193] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 36 and 438; Joshua Scholefield and Gerard Hill, *Appeals from Justices* (Butterworth 1902) 179, 183–84.

[194] *R v Bowman* [1898] 1 QB 663.

[195] Stuart Anderson, 'Judicial Review' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 486, 501; Conor McCormick, 'The Historical Foundations of Judicial Review in the United Kingdom' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 193, 204; Joshua Scholefield and Gerard Hill, *Appeals from Justices* (Butterworth 1902) 183–84, point out that mandamus issued 'to hear and determine' where a decision-maker had discretion, whereas mandamus issued to do a specific act where a decision-maker had no discretion.

[196] Stuart Anderson, 'Judicial Review' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 486, 501 further makes the point that statutory appeals were commonly available against decisions from licensing justices.

once more the remedial complexity, which I described as one of the features characterising review for error of law in England.

5. Injunctions and Declarations

Thus far, I have discussed two doctrinal tools which limited error of law review via the common law remedies, namely characterising certain errors as 'jurisdictional' (the prerogative writs and tort actions) and characterising certain acts or functions as 'judicial' (the writs of certiorari and prohibition). In the above discussion on remedial variety and complexity, I pointed out that actions for injunctions and declarations were used to judicially review decisions on the ground that the primary decision-maker had misconstrued or misapplied a statute, too. As equitable remedies, many of the procedural niceties of the prerogative writs and tort actions did not apply to them.[197] In the words of De Smith, the equitable remedies were:

> '[…] more flexible and adaptable instruments of judicial control than the common-law remedies […,] less burdened by the deadening weight of precedent […,] comparatively free from the abstruse technicalities and hair-splitting distinctions that inhibit the further development of certiorari and prohibition.'[198]

The distinction between jurisdictional and non-jurisdictional errors, for example, did not come up in actions for injunctions. This provides an interesting contrast with the prerogative writs, particularly when considering that in certain situations a similar form of relief could be sought via the prerogative writs and injunctions.[199]

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[197] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 404–5.

[198] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 323.

[199] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 335.

The equitable remedies support the two main claims of the present chapter. This is easily explained for the first claim: injunctions and declarations were not fashioned on any specific notions of 'judicial' and 'administrative powers', they were available against both public and private persons alike. The significance of the equitable remedies for the second claim on 'intensity of review' is more difficult to assess. It appears that judges on injunctions and declarations were slightly less deferential than in applications for the prerogative writs and in tort actions. This is substantiated in the following.

The key to the discrepancy between equitable and common law remedies lies in their development in distinct courts over centuries. Equitable remedies were dispensed by the courts of equity, particularly the Court of Chancery.[200] Common law remedies, by contrast, were dispensed by the common law courts, the Court of King's/Queen's Bench, the Court of Common Pleas, and the Court of Exchequer. The Judicature Acts of 1873/75 reorganised the English judiciary and merged equity and common law courts.[201] The new High Court of Justice had several divisions, which broadly resembled the old equity and common law courts, for example the Chancery Division and the Queen's Bench Division.[202] Equitable and common law remedies continued to exist and to be discernible as such, but any division of the High Court and the Court of Appeal had the authority to issue equitable remedies.[203]

[200] The Court of Exchequer also dispensed equity from the 16th century to 1841, see William Cornish and others, *Law and Society in England 1750–1950* (2nd edn, Hart 2019) 40–44; SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 330.

[201] John Baker, *An Introduction to English Legal History* (5th edn, OUP 2019) 58–59; Patrick Polden, 'The Judicature Acts' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 757.

[202] The Judicature Acts created a 'Supreme Court of Judicature' consisting of the Court of Appeal and the High Court of Justice with its several divisions; initially five (Queen's Bench, Common Pleas, Exchequer, Chancery, and the Probate, Divorce and Admiralty Division), but Common Pleas and Exchequer were absorbed into Queen's Bench Division in 1880.

[203] Conor McCormick, 'The Historical Foundations of Judicial Review in the United Kingdom' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 193, 208.

In the words of Patrick Polden, the main purpose of the Judicature Acts was 'a fusion of courts, not a fusion of law'.[204] Thus, the substantial differences between equity and common law persisted. Accordingly, the reorganisation of the judiciary had no significant direct impact on the conditions under which the courts reviewed decisions on the ground of an error of law via injunctions and declarations.[205]

During the period between the 1860s and the 1910s, injunctions were practically more relevant than declarations. Despite several legislatives initiatives in the mid-to-late 19th century to promote the declaration, there was a pervasive reluctance in the courts to issue purely declaratory judgments up until *Dyson v Attorney General* (1911).[206] This 'turning point' enabled plaintiffs to seek declaratory judgments in the absence of another form of judicial review.[207] The declaration would thus become one of the most important judicial review processes in the 20th century.[208] But it gained this importance only at the end of the period covered by this thesis.

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[204] Patrick Polden, 'The Judicature Acts' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 757, 770

[205] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 330.

[206] *Dyson v Attorney General* [1911] 1 KB 410. The Court of Chancery Procedure Act 1852 (15 & 15 Vict c 86) s 50 enacted that it would be lawful for the courts to make binding declarations without granting consequential relief. But the courts interpreted this narrowly, so as to make declaratory judgments available only where the plaintiff would have been entitled to other relief but had chosen not to ask for it. Order 25 Rule 5, made in 1883 by the Rule Committee empowered under the Judicature Acts to make rules on the proceedings of the High Court stipulated expressly that declarations were available even where another form of relief could not be claimed. But the used purely declaratory judgments very cautiously up until *Dyson*. See SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 370–73; Conor McCormick, 'The Historical Foundations of Judicial Review in the United Kingdom' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 193, 212.

[207] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 371; Stuart Anderson, 'Judicial Review' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 486, 504–5.

[208] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 373.

The focus in the following therefore lies upon injunctions, which played an important part in judicial review throughout the late 1800s and early 1900s.[209] Injunctions could be prohibitory or mandatory, thus restraining an authority from taking unlawful action or compelling it to perform a public duty.[210] There was obvious overlap between the injunction and the prerogative writs of prohibition and mandamus, but the relationship between these remedies remained unclear in many ways.[211] Given that the injunction as an equitable remedy was 'pre-eminently a discretionary remedy', it is not easy to deduce general principles regarding the circumstances under which an injunction issued.[212] This uncertainty as to the reach of injunctions is palpable in review on the ground of an error of law, too. However, it appears that the courts in actions for injunctions were slightly less deferential towards how primary decision-makers interpreted and applied legal rules than in the common law processes. In actions for injunctions, courts occasionally took on the full authority to decide how a statute ought to be applied in the specific case at hand.

As mentioned, the key doctrinal tools constraining the intensity of review in common law remedies scarcely came up in judicial reasoning in actions for injunctions. That the distinction between 'jurisdictional' and 'non-jurisdictional' errors was not discussed in injunctions can be explained with the divergent historical origins of the injunction in the courts of equity. A similar doctrinal tool might be seen in 'ultra vires', a concept first used by the Court of Chancery in the mid-19th century to deal with statutory bodies and railway

[209] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 610; SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 323.

[210] Conor McCormick, 'The Historical Foundations of Judicial Review in the United Kingdom' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 193, 207; SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 319.

[211] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 335; Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 610.

[212] SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 331 and more broadly on the circumstances under which an injunction issued, ibid, ch 10.

companies exceeding their statutory powers.[213] Broadly speaking, 'ultra vires' and 'jurisdictional error' thus concerned similar ideas. But the historical origins and the precise contours differed significantly. Importantly, 'ultra vires' in injunction cases appears mostly as a simple conclusion, not part of the judicial reasoning on whether misinterpreting or misapplying the law justified judicial intervention. When a decision-maker had acted 'ultra vires', he had gone beyond his jurisdiction and judicial intervention was therefore justified. In many injunction cases, judges did not reason expressly on how to balance judicial control and administrative autonomy. Arguably, there was no equitable equivalent to the 'preliminary/collateral facts' doctrine and the 'commencement' theory, which did a lot of this balancing work in applications for the prerogative writs and tort actions. Instead, the courts in injunction cases often took on a comprehensive authority to construe statutory or regulatory terms and to decide how these applied in a given case. This made good sense where the courts expressly oversaw the limits of jurisdiction of municipal corporations. For example, the House of Lords decided that the statutory powers of the London County Council to operate tramways did not extend to omnibuses.[214] Similarly, the Chancery Division decided that the Manchester Corporation lacked jurisdiction to engage in a general parcel delivery business.[215]

However, other injunction cases display a similarly intense review for error of law despite the fact that these cases did not (or at least did not obviously) concern decision-makers acting in excess of jurisdiction. The Chancery Division in *Boyce v Paddington* (1903) took

[213] Eg in *Lord Auckland v Westminster District Board of Works* (1871–72) LR 7 Ch App 597, 604; *London County Council v A-G* [1902] AC 165; *Clowes v Staffordshire Potteries Waterworks Company* (1872-73) LR 8 Ch App 125; SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 57 notes that although the term 'ultra vires' was first used in these cases, the main features of the doctrine had been taking shape for a long time in the context of common-law corporations.

[214] *London County Council v A-G* [1902] AC 165; similarly, *A-G v Mersey Railway Company* [1907] AC 415 (HL).

[215] *A-G v Manchester Corporation* [1906] 1 Ch 643.

on the authority to decide whether a 'hoarding' built on a churchyard was an illegal 'building'.[216] The plaintiff brought an action for an injunction restraining the local authority from constructing a hoarding on a churchyard which was statutorily determined to be an 'open space' for perpetual use by the public 'for exercise and recreation' and 'in open condition free from buildings'. The plaintiff argued that a 'hoarding' was a building under the statute, and thus illegal. The judge disagreed and dismissed the action for an injunction.[217] Although ultimately deciding in favour of the local authority, the court here effectively reviewed the local authority's decision on a correctness standard in a case that was not (or at least not obviously) concerned with 'excess of jurisdiction'. The local authority uncontroversially had jurisdiction over the churchyard. The question was merely whether it was legal for it to build a hoarding on it. This depended on whether a 'hoarding' was a 'building' under the statute. On the 'collateral fact doctrine' and the 'commencement theory' employed for the prerogative writs and tort actions, any error on this decision would arguably have been within jurisdiction and thus unreviewable.

Given the abovementioned vagueness of the concept of 'jurisdiction', it is not easy to pinpoint cases which uncontroversially concerned errors (merely) within jurisdiction. But there are further injunction cases which did not (or at least did not obviously) concern decision-makers acting in excess of jurisdiction.[218] Nonetheless, the courts in these cases took on the full authority to interpret legislation and to decide how it ought to be applied in

[216] *Boyce v Paddington Corporation* [1903] 1 Ch 109.

[217] *Boyce v Paddington Corporation* [1903] 1 Ch 109, 115–117 (Buckley J).

[218] *A-G v The Mayor of Southampton* (1858) 1 Giff 363 (the corporation of Southampton moved a cattle fair on grounds that were reserved under statute 'for the purposes of public recreation', arguing that a fair was a 'place of recreation'); *Lord Auckland v Westminster District Board of Works* (1871–72) LR 7 Ch App 597 (on the meaning of the statutory term 'vacant ground' under the Metropolis Management Amendment Act 1862, concerning the question of whether compensation was due if a new general line of buildings limited the part of the land that could be built); *Clowes v Staffordshire Potteries Waterworks Company* (1872–73) LR 8 Ch App 125 (on whether a water company had a statutory right to foul the water of a stream); *Quinton v Bristol Corporation* (1873–74) LR 17 Eq 524 (on whether the corporation had statutory powers to take entire properties rather than only the parts strictly necessary for the purpose of widening the streets).

the specific case at hand. No deference was shown towards how primary decision-makers interpreted and applied legal rules.

It appears that a less intense standard of review was common in actions for injunctions only where the decision under review required technical administrative expertise vested in the primary decision-maker, for example in water and land management. Where statute delegated broad discretionary powers to Inclosure Commissioners, railway companies, or the Conservators of the Thames, the Court of Chancery delivered a less intense oversight, which resembled the more deferential judicial predisposition in the prerogative writs and tort actions.[219]

Nonetheless, judicial review for error of law in certain injunction cases appears more intense than in the common law remedies. As was mentioned above, such discrepancy can be accounted for when considering the different historical origin of the injunction as an equitable remedy dispensed in the courts of equity.

Further, in actions for injunctions, the balancing of judicial control and administrative autonomy could be done at other stages of the judicial inquiry. Individuals themselves could apply for an injunction only under very narrow standing requirements.[220] Practically

[219] *Turner v Blamire* (1853) 61 ER 506 (refusal to restrain the Inclosure Commissioners from confirming an award as to the inclosures of certain land); *Stockton & Darlington Railway Company v Brown* (1860) 11 ER 724 (the Act of Parliament constituted the company as 'the sole judges as to whether they will or will not take those lands', insofar as they acted bona fide); *A-G v Thames Conservators* (1862) 71 ER 1 (refusal to interfere with the discretionary powers of the Conservators of the Thames to erect piers as they deem advantageous to the public); *A-G v Great Eastern Railway Co* (1870–71) LR 6 Ch App 572 (refusal to interfere with discretion vested in the Conservators of the River Cam to take measures necessary to maintain the river navigable).

[220] Namely where the interference with a public right also interfered with a private right of the plaintiff, or where the interference with a public right entailed a special damage to the plaintiff; *Boyce v Paddington Corporation* [1903] 1 Ch 109; Conor McCormick, 'The Historical Foundations of Judicial Review in the United Kingdom' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 193, 208; SA De Smith, *Judicial Review of Administrative Action* (1st edn, Stevens 1959) 346–50.

more relevant, an injunction could be sought via the Attorney General.[221] In such 'relator actions', individuals requested the Attorney General to sue the perpetrator of a public wrong in his name. The Attorney General was thus a 'filtering mechanism', with wide discretion as to whether or not he would initiate proceedings for an injunction before the courts.[222] An action for an injunction thus had to pass one of two bottlenecks in order to make an alleged error of law reviewable: the standing requirements or the relator actions proceedings. The Attorney General generally initiated proceedings where a case passed a certain threshold of public injury, with the result that once a case came before the courts, an error of law usually justified judicial intervention.

6. Summary

I have argued that review for error of law in England was characterised by three features.

First, a 'general' approach to 'error of law review' existed only in a limited sense; much depended on the specific process and the conditions under which a certain remedy issued.

Second, however, I have argued that in comparison to French and German judges, English judges were relatively deferential towards how primary decision-makers interpreted and applied statutory and regulatory texts. I am not suggesting that English judges were generally or consistently deferential. The precise degree of deference shown by English

[221] The Attorney General could also act on his own initiative (*ex proprio motu*), but this had less practical relevance; Conor McCormick, 'The Historical Foundations of Judicial Review in the United Kingdom' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 193, 209.

[222] Conor McCormick, 'The Historical Foundations of Judicial Review in the United Kingdom' in Stefano Mannoni and Giacinto della Cananea (eds), *Administrative Justice Fin de Siècle: Early Judicial Standards of Administrative Conduct in Europe, 1890–1910* (OUP 2021) 193, 209. If the Attorney General did initiate proceedings, it was nonetheless for the courts to decide the case, see *A-G v Birmingham Tame and Rea District Drainage Board* [1910] 1 Ch 48, 61.

judges depended on a variety of contexts, such as the rights or interests at stake, and the precise remedy sought. But in comparison to French and German judges, English judges had a relatively deferential predisposition. This is particularly clear in the prerogative writs and tort actions, but it applied (with some limitations) to actions for injunctions, too. English law lacked a general principle that any error of law justified judicial intervention. Thus, English law valued administrative autonomy more than French and German law did.

Third, error of law review in England did not generally build on specific conceptions of judicial and administrative powers. The distinction between jurisdictional and non-jurisdictional errors, key to error of law review via the prerogative writs and tort actions, was applied across a wide variety of decision-makers, to inferior courts and administrative bodies alike.[223] Only the writs of certiorari and prohibition were confined to 'judicial acts', but this limitation had less overarching significance to error of law review given the availability of other processes, such as the writ mandamus, tort actions, and actions for injunctions.

[223] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 317.

V. Comparison

The ensuing part of this chapter compares error of law review between the three legal systems. The first section examines legal change between the 1860s and 1910s. Second, I return to the hypothetical 'core case' of review for error of law and compare how the courts in each legal system would have approached and resolved such a case. The third section examines the complexity and flexibility of the different doctrinal frameworks. In the fourth and fifth section, I substantiate the two main arguments of chapter 4. The sixth section puts the comparative analysis into a longer historical perspective.

1. Legal Change Between the 1860s and the 1910s

In comparing the three jurisdictions in the late 1800s and early 1900s, it is important to note that error of law review in France and Germany changed noticeably between the 1860s and the 1910s, whereas English law remained relatively static.

In France, we saw that errors of law were initially reviewable only insofar as the decision in question violated 'rights' of the plaintiff. Yet the Council of State around 1900 replaced the requirement of 'infringed rights' by the broader condition for a decision to touch upon the plaintiff's 'interests'. In readjusting the doctrinal framework, the Council of State intensified review for error of law.

In Germany, the legal change was even greater. Whilst the Administrative High Courts were initially quite deferential towards how administrative decision-makers interpreted and applied statutory and regulatory terms, they took on a much more intense review around 1900. Effectuating this legal change towards a more intense review took a different route in Germany than in France. Instead of readjusting the doctrinal framework, the existing

framework of distinguishing between 'law' and 'discretion' was merely applied differently. Whilst the German Administrative High Courts were initially very generous in recognising open-textured statutory terms as 'discretionary concepts', whose interpretation and application was a matter of 'administrative discretion', they subsequently characterised most statutory terms as 'legal concepts', which were entirely for the courts to construe.

In comparison, English law was relatively static. There were minor changes regarding the requirement of 'judicial acts' in applications for the writ of certiorari or concerning the availability of purely declaratory judgments. But neither the overall framework nor the intensity of review changed fundamentally. Review for error of law in England in the 1910s was not so different from how it had been in the 1860s.

In a longer historical perspective, the late 1800s and early 1900s were arguably more important to the development of judicial review (and administrative law more broadly) in France and Germany than in England. This may be due to the fundamental institutional and constitutional change in France and Germany, that I discussed in chapter 2. Consider the new political regimes under the Third Republic in France (1870–1940) and the German Empire (1871–1918), the judicialisation of the Council of State under *justice déléguée* after 1872 and the creation of separate administrative courts in Germany from 1863 onwards.[224] Insofar as judicial review was concerned, the late 1800s and early 1900s in England were not a period of great constitutional change. The reorganisation of the judiciary under the Judicature Acts 1873/75 did not bring about fundamental legal change for judicial review. Most noticeable was the fact that the Court of Queen's Bench became the Queen's Bench Division, and that the common law divisions of the High Court could dispense equitable remedies. Neither the extension of franchise via the Second Reform Act of 1867 nor the

[224] Chapter 2 II (p 34) and III (p 52).

Parliament Act of 1911 had a direct impact on judicial review. Viewing the history of the English constitution and judicial review in a longer historical perspective, the 17th and 18th centuries and the latter half of the 20th century have brought about more fundamental ruptures.[225]

2. The Core Case

With the discordant legal change in mind, let us consider how the three legal systems dealt with the hypothetical 'core case' of review for error of law outlined in the introduction to chapter 4. In this 'core case', a plaintiff seeks judicial review of an administrative decision on the ground that the primary decision-maker misinterpreted a statutory term and consequently misapplied statute to the plaintiff's disadvantage. My example was that a statute (or a by-law) stipulates that houses are only allowed to have 'two floors' in a certain area. The plaintiff P builds a house with two full floors and an attic under a pitched roof, which serves as a storage room. The planning authority A issues a closing order for the attic, arguing that given the height of the pitched roof the attic is in fact a third floor, and thus illegal. P, by contrast, argues that the attic does not constitute a 'floor' under the statute and therefore seeks judicial review of the closing order. How did the courts approach such a case?

In France after 1900, the adjudication department of the Council of State courts had comprehensive authority to decide questions of law where an admissible case was brought

[225] Robert Stevens, *The English Judges: Their Role in the Changing Constitution* (Hart 2005); Jeffrey Jowell, 'Restraining the State: Politics, Principle and Judicial Review' (1997) 50 Current Legal Problems 189; Edith Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard University Press 2014).

before it. The State Councillors had the authority to decide on the meaning of the statutory term 'two floors' and on whether an attic, such as the one in question, constituted an illegal third floor. Whilst the State Councillors would take note of what the planning authority A decided, and of A's reasoning, the primary decision did not have any prescriptive value or authority as far as they were concerned. Where the State Councillors thought that the planning authority had misinterpreted and misapplied the statute, they would quash the decision regardless of what the planning authority thought right. The State Councillors showed no deference towards the primary decision-maker, the question of how to construe the statutory provision being entirely for them.

In Germany after 1900, Administrative High Courts would hold the statutory term 'two floors' to be a 'legal concept', as opposed to a 'discretionary concept'. How to interpret and to apply the provision was thus a 'question of law' which was entirely for the court. As in France, the judges in the Administrative High Court would show no deference towards the primary decision-maker.

In England, the matter was more complex. If P applied for a writ of certiorari, seeking to have the closing order quashed, the judges hearing the case would consider two main questions in order to determine whether they could decide on the meaning of the statutory provision on 'two floors'.[226] First, although the writ of certiorari in the period in question was no longer confined to decisions of 'courts of records', it was only available against

[226] For example, a local authority made a closing order under Housing and Town Planning Act 1909 (9 Edw 7 c 40) s 17. After a statutory appeal before the Local Government Board, the party could apply to the Local Government Board to state a special case under s 39 sub-s 1 (a) for the opinion of the High Court, or (if the Board declines) apply to the High Court for an order, requiring the Board to state such a case. The party could also seek certiorari against the decision of the Local Government Board; the latter option being a similar procedural route to the one taken in *R v Local Government Board, ex p Arlidge* [1915] AC 120 (Viscount Haldane LC discussing the interplay between appeal on a case stated and the writ of certiorari, 126–27; Lord Parmoor holding that certiorari should issue, 142; Lord Moulton leaving the question open, 149).

'judicial acts'.[227] The question as to whether the closing order is of a 'judicial' nature is not an easy one, particularly in light of the concept's flexibility. Whilst the nature of the decision-maker was no longer the only decisive feature in the period in question, it was still relevant. Had a Justice of the Peace issued the closing order, the High Court would probably characterise the act as 'judicial'. Where a local Board of Works had issued the closing order, the court would look into whether the decision-maker had discretion and into the gravity of the consequences of the order for the plaintiff. If the court decided the closing order was indeed 'judicial', and that certiorari was available, it would next consider whether the planning authority A had exceeded its jurisdiction.

The general principle in error of law review via the prerogative writs and tort actions was that only errors that made the decision-maker go beyond his jurisdiction were reviewable.[228] The complexity of the distinction between jurisdictional and non-jurisdictional errors, the competing doctrines, and the resulting flexibility of the law were discussed at length above. The flexibility of the English approach makes it much harder to predict how judges would have decided a hypothetical case. However, whether or not the attic represents an illegal third 'floor' under the statute in question appears to be precisely the task the legislator delegated to the planning authority to decide, in other words, a merits question. Thus construed, the courts would say that it was for the planning authority P to decide on the meaning of the statutory term 'two floors', and to apply the statute accordingly.[229] English judges would thus give an important degree of deference to the

[227] For more detail, IV 4 (p 233).

[228] The limitations and exceptions to this principle were discussed above, IV 2 (p 224).

[229] As long as the primary decision-maker acted reasonably and did not let irrelevant considerations compromise his decision-making.

primary decision-maker, in that they only reviewed errors that made the decision-maker go beyond its jurisdiction.

It will be recalled that there were several means of seeking redress in England. Instead of applying for a writ of certiorari (to quash the closing order) or an action in trespass (if the closing order had already been executed), the plaintiff P could potentially apply for an injunction to the effect of prohibiting the planning authority A from executing the closing order (ie preventing them from tearing down the attic of P's house). Further, P could have sought a declaration that the attic was perfectly legal, or a combination of an injunction and a declaration.[230] Given the extensive discretion the court had in the context of equitable remedies, predicting the outcome of such hypothetical cases is even harder than in the case of the writ of certiorari. For injunctions and declarations, judicial review was neither confined to 'judicial acts' nor to 'jurisdictional errors'. The court would examine the precise circumstances of the case and the statutory context, but the resulting outcome is hard to predict in such a schematic case as the hypothetical one examined.

The different approaches to the hypothetical core case bring to the fore two issues to be discussed in turn in the following two sections: the complexity of the English doctrinal framework (section 3) and the relatively deferential predisposition of English judges (section 4).

[230] As discussed above (IV 5, p 241), a purely declaratory judgment was available only after *Dyson v Attorney General* [1911] 1 KB 410.

3. Complexity and Flexibility of the Doctrinal Frameworks

The French approach of the early 1900s was rather simple. Construing statutory terms was for administrative courts. The State Councillors used a 'correctness' standard on questions of law. Where an admissible case was brought before it, the Council of State had a comprehensive authority to review the decision on the ground of an error of law. The German approach of the early 1900s was almost as simple. The meaning of statutory terms which set conditions for exercises of statutory powers was generally for the courts to determine, except for a few highly evaluative terms, generally agreed upon, which related to 'the public good' or 'the public interest'.[231] The judges in the German Administrative High Courts generally showed no deference towards administrative interpretations of statute, unless a statutory term represented one of the recognised exceptions. Both French and German law had been conceptually more complicated prior to 1900. In France, this was due to the fact that there was no consensus as to what counted as infringed 'rights'. In Germany, this was due to uncertainties in how the judges applied the law-discretion divide, as was exemplified in the German section dealing with licensing.[232] But these uncertainties were removed when the Council of State left behind the requirement of 'infringed rights' and when German courts took upon themselves the authority to decide on the meaning of all statutory terms, save for the few exceptions. Legal complexity and uncertainty were in both instances reduced by extending the reach of judicial review.

In comparison, review for error of law in England was and remained complex, even if we leave aside the remedial diversity for a moment and focus just on the writ of certiorari. That

[231] These exceptions were discussed above, III 4 (p 215).

[232] III 4 (p 213).

administrative decisions could only be quashed via the writ of certiorari where the act was 'judicial' and where the error was 'jurisdictional' made it hard to predict the outcome of the hypothetical 'core case' since neither of the limitations was easily applied in practice. It was shown above in the English part how hard it was to draw principled boundaries between judicial and non-judicial acts as well as between jurisdictional and non-jurisdictional errors. During the period covered by this thesis, this did not change. Both conditions continued to confine judicial review in England until the 1960s, when they were eventually left behind after the judgments in *Ridge v Baldwin* (1964) and *Anisminic v Foreign Compensation Commission* (1968).[233]

Yet the fact that the French and German doctrinal frameworks were conceptually simpler did not necessarily mean that the judges on the continent had less flexibility than their English counterparts. In fact, judges hearing judicial review cases in all three jurisdictions had a wide-ranging room for manoeuvre to adapt the doctrinal frameworks so as to decide what they thought was the right outcome of a case. The balancing between administrative autonomy and judicial control was largely in the hands of judges in all three jurisdictions.

In England, the flexibility of the doctrinal framework resulted largely from its complexity, particularly with regard to the distinction between jurisdictional and non-jurisdictional errors, the distinction between judicial and administrative acts, and the far-reaching discretion in injunctions and declarations. Reading French judgments, one could have the impression that the State Councillors in error of law cases had no room for manoeuvre

[233] In *Ridge v Baldwin* (1964) AC 40, Lord Reid expressed fundamental doubts on the judicial-administrative divide in the context of natural justice. The principle that only 'jurisdictional' errors were reviewable was left behind after *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, more precisely after Lord Diplock's interpretation of *Anisminic* in *Racal* [1981] AC 374 (HL) and *O'Reilly v Mackman* [1983] 2 AC 237; see Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) 335.

whatsoever. However, this is largely due to the style of French judgments.[234] In reality, the Council of State had significant freedom to adapt the law to the case at hand and to develop it further. Most of the major changes in judicial review in France in the period were due to the judgments of the State Councillors rather than to changes in legislation. As we saw, the Council of State simply jettisoned the requirement of 'infringed rights' and replaced it by 'touching-upon-interests' without openly acknowledging, let alone justifying, the change of doctrine. Laferrière's remark that the Council of State 'effectuates legal change by walking ahead' encapsulated this capacity of the State Councillors to modify the law over time.[235]

With the strict 'correctness' standard of review after 1900, it may seem that the French doctrinal framework allowed for no flexibility whatsoever. Yet the State Councillors in fact retained a certain room for manoeuvre. Where judicial intervention seemed undesirable or unnecessary to the State Councillors, they could hold that the primary decision-maker had not misconstrued or misapplied the law. Where the State Councillors thought there were several possibilities of how to apply the law in a specific case, with each of these options fulfilling the requirements of legality, the State Councillors would say that the administration had 'discretion'.[236] Further, the State Councillors had other tools in their judicial toolbox that could be employed to serve the purpose *of not reviewing* a decision for error of law, even if these tools did not specifically target error of law review. The law on standing, for example, was elastic enough to give the judges an important degree of

[234] Hein Kötz, 'Über den Stil höchstrichterlicher Entscheidungen' (1973) 37 Rabels Zeitschrift für ausländisches und internationales Privatrecht 245.

[235] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 410 ('Le Conseil d'État démontra le mouvement en marchant.')

[236] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 423; Jacques Chevallier, *L'Élaboration historique du Principe de Séparation de la Juridiction Administrative et de l'Administration Active* (Pichon & Durand-Auzias 1970) 283.

flexibility as to whether or not they accepted a case as admissible.[237] Additionally, a long but loosely defined list of generally non-justiciable decisions (the so-called *actes de gouvernement*) allowed for some flexibility *not* to intervene.[238]

In Germany, the flexibility of error of law review resulted from the elasticity of the law-discretion divide. It is remarkable how fundamentally the intensity of review for error of law increased in the late 1800s and early 1900s, despite the fact that the doctrinal framework remained by-and-large the same. Reading German judgments from the 1870s and the 1910s, the judges in the Administrative High Courts continued to use the same vocabulary and the same tools to delineate the boundary between administrative autonomy and judicial control. Yet the boundary in 1910 was leaning much more strongly towards judicial control than it had in 1870. Where an open-textured statutory term was likely to be classified as 'discretionary' in 1870 and thus conclusively for the public administration to interpret and apply, the same term was likely to be considered a 'legal' one in 1910, thus subject to intense judicial control on a correctness standard. This extension of the reach of judicial review was not the result of legislative initiatives; it was a product of judicial decision-making.

Ultimately, judicial flexibility thus shaped error of law review in all three jurisdictions examined. Whilst legislation, scholarship, and the broader legal culture may have shaped the view of the judges as to where the line between administrative autonomy and judicial control ought to be drawn, it was ultimately the judges in the English superior courts, the French State Councillors, and the judges of the German Administrative High Courts who

[237] Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 436.

[238] *Actes de gouvernement*; see Édouard Laferrière, *Traité de la Juridiction Administrative et des Recours Contentieux*, vol 2 (2nd edn, Berger-Levrault 1896) 32–66.

drew the line. Nonetheless, it could be argued that once review for error of law intensified in France and Germany in the early 1900s, the respective doctrinal frameworks were in comparison slightly more rigid than the English framework. In England, the judges had flexibility due to the fact the doctrinal framework was, and remained, complex.

4. Intensity of Review

The different approaches to the 'core case' illustrated that English judges were broadly speaking more deferential to primary decision-makers than their continental counterparts. In France and Germany (after 1900), the general principle was that questions of law were entirely for administrative courts to decide, provided that a plaintiff brought an admissible case before them.[239] In England, there was no general principle that any error of law by a primary decision-maker justified quashing or otherwise judicially reviewing that decision.[240] English judges left primary decision-makers a wider freedom how they interpreted and applied statute. This observation stands, even when taking into account the slightly more hands-on approach in actions for injunctions. Naturally, the degree of deference shown by English judges depended on context, such as the interests or (property) rights at stake in a specific case. I am not suggesting that English judges were constantly

[239] Limitations and exceptions to this general principle were discussed above in II and III of this chapter.

[240] Similarly, on the different intensities of review between France and England in the mid-20th century, CJ Hamson, *Executive Discretion and Judicial Control: An Aspect of the French Conseil d'Etat* (Stevens 1954) 10–16.

and consistently 'deferential', but that they were relatively deferential in error of law review when compared to French and German judges.[241]

That said, it is important to note that whilst English judges were more deferential to primary decision-makers, remedies were available to them that were intruding more on administrative autonomy, namely the writ of mandamus, (particularly mandatory) injunctions, and (to a lesser extent) the writ of prohibition.[242] English courts could prohibit decision-makers from taking certain actions (prohibition and prohibitory injunction) or even compel decision-makers to take certain actions or to decide cases in a specific way (mandamus and mandatory injunction). As was discussed in chapter 2, the Administrative High Courts in Germany and the French Council of State, by contrast, were largely confined to quashing unlawful administrative decisions.[243] The continental courts had no general means of compelling an administrative authority to decide a matter in a certain way or to take a specific course of action (other than paying damages[244] or, in France, complying with government contracts).[245] When an administrative decision was quashed, the matter went back to the primary decision-maker who decided anew. Thus, although the French and German courts exercised an intense review for error of law, less intrusive remedies were available to them.

[241] In other areas, eg review of discretion, English judges at times delivered a remarkably intense review (when compared to French and German law), eg *Rooke v Withers* (1597) 5 Co Rep 99, 77 ER 209; Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) chs 13 and 14.

[242] AP Le Sueur, 'Justifying Judicial Caution: Jurisdiction, Justiciability, and Policy' in Brigid Hadfield (ed), *Judicial Review: A Thematic Approach* (Gill & Macmillan 1995) 232 classifies the English remedies on a scale of 'intrusiveness'.

[243] As discussed in chapter 2 V 2 (p 95).

[244] In Germany, the ordinary (private) law courts had jurisdiction to decide on the delictual liability of officials and public authorities; as discussed in chapter 1 IV 4 (p 28).

[245] As discussed in chapters 1 IV 4 (p 28) and 2 V 2 (p 96).

However, English judges were not merely more deferential as regards the more intrusive remedies, such as the writ of mandamus, but throughout. It remains the case that English judges were relatively deferential towards how primary decision-makers construed and applied statutory and regulatory texts, particularly in comparison to the more intense judicial control on the continent. Where a plaintiff sought the quashing of an administrative decision, the English courts on an application for the writ of certiorari delivered a less intense review than the French State Councillors on the *recours pour excès de pouvoir* and the German Administrative High Court judges on the *Anfechtungsklage*.

In the following, it is my aim to account for this discrepancy. The intensity of review within one jurisdiction is not amenable to a monocausal explanation; a variety of circumstances and contexts were relevant to it. Four themes will be discussed in greater length: first, the presence or absence of specialist administrative courts, judges, processes, remedies, and more broadly of a recognised 'administrative law'; second and third, the constitutional backdrop, namely the Rule of Law and 'deference' as a general feature of the English constitution; and fourth, the ensuing narrow conception of the judicial role in England.

a) The Specialist/Generalist Nature of Judicial Review

For France, it will be recalled that the key to the intense review for error of law was the 'intermediary' status of the Council of State within the French conception of separation of powers. Constitutionally, the State Councillors were able to deliver a much more intense control of public administration without encroaching on administrative autonomy than would have been possible for the ordinary courts (such as the Court of Cassation). In practical terms, the State Councillors had less reason to defer to administrative authorities given their combined experience and expertise as judges and administrators. In Germany,

separate administrative courts had been created precisely for the task of ensuring the lawfulness of administrative action. The legislation establishing administrative courts gave them a strong mandate to control exercises of administrative powers. The judges in the German Administrative High Courts did not deal with criminal or private law cases, they were experts on administrative law.[246]

In England, by contrast, there were no specialised 'administrative courts'. The English superior courts were generalist in the sense that the judges dealt with cases from all areas of the law. Overseeing how administrative decision-makers exercised their statutory powers was rather something the judges 'also' had to do, in addition to private and criminal law cases. In chapter 2, I have argued that judicial review in England was not construed as judicial oversight of 'administrative' powers or decision-makers in a technical sense. In fact, the very concept of 'public administration' did not yet have common currency in England in the period covered.[247] Instead, judicial review in England was characterised by a variety of processes and remedies.[248] Yet by contrast to the French *recours pour excès de pouvoir* and the German *Anfechtungsklage*, none of the processes available in England was tailored to the aim of judicially reviewing administrative bodies. It will be recalled that tort actions, injunctions, and declarations were available across the spectrum of private and public law. Although the prerogative writs can in a certain sense be considered as public law processes, certiorari and prohibition originally targeted inferior and ecclesiastical courts rather than 'public administration'.[249]

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[246] Martin Pagenkopf, *150 Jahre Verwaltungsgerichtsbarkeit in Deutschland* (Boorberg 2014) 16.

[247] As discussed in chapter 2 IV 1 (p 69).

[248] As discussed in chapter 2 IV 2 (p 79).

[249] Jason Varuhas, 'Taxonomy and Public Law' in Mark Elliott, Jason Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart 2018) 39, 44.

One of the pervasive features of judicial review in England was that judges had to adapt legal tools which originally had been developed with other aims in mind, to make these tools fit for the purpose of overseeing a wide variety of administrative decision-makers (broadly conceived).[250] This can be seen in the distinction between 'jurisdictional' and 'non-jurisdictional' errors as well as in the requirement of 'judicial', as opposed to 'ministerial' and 'administrative' acts. It was shown above that in the context of certiorari, the former distinction initially served the purpose of limiting the availability of affidavit evidence, whilst the latter was a remainder of the previous requirement of a 'court of record' from the time when certiorari primarily targeted errors on the face of the record.[251] Viewed from a comparative perspective, it can be argued that the absence of specialised 'administrative courts' and of a specialised remedy tailored to review administrative action instilled some caution in the English judges as to how much they ought to interfere with statutory decision-makers.[252]

Further, there is some evidence suggesting that (some) English judges considered many of the regulatory frameworks, which we nowadays call 'administrative law', not to be 'law' at all.[253] Lord Campbell maintained in the House of Lords that the disputes arising out of the railway legislation had 'nothing at all to do with law'. He warned against 'turn[ing] the Judges of the courts of common law into railway directors.'[254] The perception that the regulatory schemes which brought judicial review cases before the courts were not

[250] Jason Varuhas, 'Taxonomy and Public Law' in Mark Elliott, Jason Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart 2018) 39, 43; SA De Smith, 'The Prerogative Writs' (1951) 11 Cambridge Law Journal 40, 48.

[251] IV 3 (p 231) and 4 (p 233).

[252] Sergio Galeotti, *The Judicial Control of Public Authorities in England and in Italy: A Comparative Study* (Stevens 1954) 243 made a similar point in his 1954 comparison of judicial review in England and Italy.

[253] Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (CUP 2007) 44 and 54.

[254] Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (CUP 2007) 54.

considered as 'law', but as something different, may have led the judges to be cautious, hesitant, or even unwilling, to interfere too much with primary decision-makers. In France and Germany, administrative law was established and acknowledged as a field of law since the early-to-mid 19th century when chairs for 'administrative law' had been created at universities.[255] Journals and textbook literature flourished in the latter part of the century. It would have been highly unlikely for continental lawyers to consider the many regulatory schemes, their implementation, and the disputes arising from the same, as anything but 'law'. Besides the absence of 'administrative courts' and special administrative law processes, the fact that no area of the law was acknowledged as 'administrative law' in England could thus additionally have prompted the English judges to adopt a more cautious approach to review for error of law.

So far, I have argued that specialist administrative courts with expert administrative judges who deployed a specific administrative law remedy (in a legal system that acknowledged a distinct branch of 'administrative law'), ie the circumstances in France and Germany, facilitated a more intense review for error of law. The absence of these circumstances in England, conversely, did not facilitate such an intense review. Yet it is important to recall that I am not suggesting the deferential English approach was 'deficient' in any way. As was explained in chapter 1, this thesis does not presume a 'correct' (or 'best') approach or intensity to review for error of law.[256] Instead, the aim of this chapter is to explain the different approaches of each jurisdiction against the backdrop of constitutional and institutional contexts, particularly insofar as they concern conceptions of judicial and

[255] Chairs of administrative law were first established in 1819 (Paris) and 1842 (Tübingen). See John Bell, 'The Role of Doctrinal Writing in Creating Administrative Law: France and England Compared' (2008) 15 Glossae. European Journal of Legal History 141, 145; Michael Stolleis, 'Entwicklungsstufen der Verwaltungsrechtswissenschaft' in Eberhard Schmidt-Aßmann, Wolfgang Hoffmann-Riem, Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts, vol 1: Methoden, Maßstäbe, Aufgaben, Organisation* (2nd edn, Beck 2012) 65, 81.

[256] Chapter 1 IV 2 (p 20).

administrative powers. On this approach, the less intense review simply seemed normatively justified to English judges, whereas a more intense review seemed appropriate to French and German (administrative) judges.

b) The Rule of Law

With regard to the constitutional foundations of judicial review, I have argued that the French conception of separation of powers and the German notion of the *Rechtsstaat* facilitated an intense review for error of law by the State Councillors and the judges in the German Administrative High Courts. In England, by contrast, there was no constitutional principle that would have encouraged English judges to review every error of law.

On Dicey's influential account, the core principles of the English constitution were the Sovereignty of Parliament and the Rule of Law. Neither of these principles required judges to rectify any error of law. Although the judiciary was crucial to Dicey's account of the Rule of Law, he had little to say on how precisely judges ought to approach giving judgments.[257] Dicey proposed three facets of the Rule of Law: first, no man can be punished except for a 'breach of law established in the ordinary legal manner before the ordinary Courts of the land'; second, every man is 'subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'; and third, the general constitutional principles are 'the result of judicial decisions determining the rights of private persons determined in particular cases before the Courts', rather than flowing directly from a

[257] Similarly, Catherine Marshall, *Political Deference in a Democratic Age: British Politics and the Constitution from the Eighteenth Century to Brexit* (Palgrave 2021) 103: 'There is very little from Dicey on […] local government […] or even, crucially, on the judiciary.'

written constitution.[258] The courts were crucial to each of these three facets. Yet there was not much in Dicey's account on how and with what intensity the courts ought to control exercises of public power. In a way, this is hardly surprising, considering Dicey's insistence that England had no 'administrative law'. Additionally, Dicey's reservations against using an abstract notion of 'the State' prevented him from addressing the issue squarely.[259] As Dicey repeatedly stressed, only in England was it possible to sue an official personally in tort just like any other person, not in France (where it was possible instead to sue the State).[260] The disregard for the numerous regulatory schemes and the broad variety of statutory decision-makers of the late 1800s and early 1900s explain why *The Law of the Constitution* had nothing to say on the question as to where to draw the line between administrative autonomy and judicial control, or in other words, how intense judicial review of administrative action ought to be.

c) Deference as a Facet of the English Constitution

Another element of the English constitution, arguably implicit in Dicey's *Law of the Constitution*, proves more fruitful when it comes to explaining the lower intensity of review

[258] Albert Venn Dicey, *The Law of the Constitution* (John Allison ed, OUP 2019) 97, 100, and 115.

[259] John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000) 80 makes the related point that without a 'clear conception of the state administration', Dicey had no reason to distinguish between private and public disputes.

[260] Albert Venn Dicey, *The Law of the Constitution* (John Allison ed, OUP 2019) 100–1, 398–400 and 408–9. The delictual liability of officials and the State changed fundamentally in the early 1900s in France in cases such as Council of State, 21 June 1895 (*Cames*), 10 February 1905 (*Tomaso Greco*), and 17 February 1905 (*Auxerre*). In the 1910s the Council of State established the 'principe de juxtaposition des responsibilités', according to which plaintiffs could sue both the official and the State; Grégoire Bigot, *Introduction Historique au Droit Administratif depuis 1789* (Presses universitaires de France 2002) 288–93; François Burdeau, *Histoire du Droit Administratif: de la Révolution au début des années 1970* (Presses universitaires de France 1995) 294–97.

by English judges.[261] Catherine Marshall has argued that 'deference', defined as 'self-restraint for the common good and to avoid open conflict', characterised the British and particularly the English constitution since the 18th century.[262] Walter Bagehot put the concept of deference at the heart of how the English system worked. In the first book edition of *The English Constitution* (1867), Bagehot explained:

> [O]ur constitution is not based on equality, or on an avowed and graduated adjustment to intelligence and property; but *upon certain ancient feelings of deference and a strange approximative mode of representing sense and mind*, neither of which must be roughly handled, for if spoiled they can never be remade, and they are the only supports possible of a polity such as ours, in a people such as ours.[263]

Bagehot's work is not purely legal, but sociological in that it identified an English 'deferential national character' (Marshall).[264] Similar to Dicey, Bagehot drew on France in order to explain English institutions.[265] Bagehot asserted that 'Politics must "grow"; they cannot suddenly be made.'[266] On this account, the political and institutional instability in France in 1848/52 and 1870/71 was linked to the *tabula rasa* mode of politics that aimed to design suitable institutions *ex nihilo*, 'based on reason and theory' (Marshall).[267] The strength of the English system, by contrast, was that the common law evolved gradually

[261] Catherine Marshall, *Political Deference in a Democratic Age: British Politics and the Constitution from the Eighteenth Century to Brexit* (Palgrave 2021) 103 and 106 argues that 'voluntary deference was the "something" at the core of Dicey's system […]'.

[262] Catherine Marshall, *Political Deference in a Democratic Age: British Politics and the Constitution from the Eighteenth Century to Brexit* (Palgrave 2021) 1–2.

[263] Walter Bagehot, *The English Constitution* (Paul Smith ed, CUP 2001) 192.

[264] Catherine Marshall, *Political Deference in a Democratic Age: British Politics and the Constitution from the Eighteenth Century to Brexit* (Palgrave 2021) 78.

[265] Catherine Marshall, *Political Deference in a Democratic Age: British Politics and the Constitution from the Eighteenth Century to Brexit* (Palgrave 2021) 71.

[266] Catherine Marshall, *Political Deference in a Democratic Age: British Politics and the Constitution from the Eighteenth Century to Brexit* (Palgrave 2021) 75.

[267] Catherine Marshall, *Political Deference in a Democratic Age: British Politics and the Constitution from the Eighteenth Century to Brexit* (Palgrave 2021) 75.

over time with the nation. Deference was crucial to the English system, based on slow, gradual, and organic developments rather than rationalist design from scratch.[268]

Bagehot's outline of French and English politics and constitutions can be criticised from different angles, not the least because his tendency to simplify made his account prone to inaccuracy – not unlike Dicey's.[269] Nonetheless, it is significant that Bagehot placed 'deference' at the very centre of the English constitution, as a sort of pervasive glue of the social fabric that bound together the nation and its institutions. While the primary focus for Bagehot was the deference of the people towards government, it was also important to the interaction between different institutions of government. Marshall makes this point expressly for judges.[270] In France and Germany, by contrast, 'deference' was unheard of. There were no equivalent concepts of French or German language with a comparable constitutional relevance. Arguably, a more adversarial model of politics prevailed, which meant that the legal authority vested in a court could be exercised to the fullest, and indeed was often exercised so. From a comparative perspective, it can thus be argued that 'deference' as a broader principle of the English constitution did not leave the English judges untouched; quite the contrary, their relatively deferential predisposition in error of law review was a key facet of it.[271]

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[268] Catherine Marshall, *Political Deference in a Democratic Age: British Politics and the Constitution from the Eighteenth Century to Brexit* (Palgrave 2021) 75–76. See also John Allison, *The English Historical Constitution: Continuity, Change and European Effects* (CUP 2007) 102, which does not explicitly discuss 'deference' as a broader constitutional principle, but is compatible Marshall's description: 'Limited clarity or consistency […] may be troubling from analytical and normative perspectives or in comparison with the clarity or consistency achieved or expected through a written constitutional enactment of principle, accords with the historical [English] constitution.'

[269] Catherine Marshall, *Political Deference in a Democratic Age: British Politics and the Constitution from the Eighteenth Century to Brexit* (Palgrave 2021) 80 and 95 characterises Bagehot as 'a great simplifier'.

[270] Catherine Marshall, *Political Deference in a Democratic Age: British Politics and the Constitution from the Eighteenth Century to Brexit* (Palgrave 2021) 104.

[271] It is interesting to note in this regard that the downfall of deference as a broader political and constitutional concept in the 1970s occurred approximately during the same period in which the role of the judiciary grew and the 'long sleep of public law' (Sedley) came to an end. Similarly, Catherine Marshall, *Political Deference*

d) A Narrow Conception of the Judicial Role: Supervisory Jurisdiction

All the considerations so far add up to the point that a more restrained understanding of the judicial role prevailed in England.[272] It was explained above that in Germany, judicial decision-making was largely considered as being deductive and 'logical'.[273] Judges were thought to have no 'discretion'. Although this was nuanced slightly towards the end of the 19th and the early 20th century, the conception that 'discretion' was peculiar to the administration, not to judges, remained prevalent. This may have been an incentive for imposing on administrative authorities what judges considered the (one) 'correct' interpretation and application of the law. In England, by contrast, the more personal style of judgments made it obvious that judges actually had a wide-ranging discretion. The fact that each judge gave his own judgment and justified his conclusion under his name illustrated visibly that there were several ways of construing statutory and regulatory texts. Against the backdrop of this (common law) specific style of judgments in England, it appears less convincing to portray judicial decision-making as an entirely deductive or logical activity with only one correct possible outcome.[274] The awareness that there were several options for construing and applying statutory and regulatory texts favoured a more deferential approach to review for error of law. Where the primary decision-maker had

in a Democratic Age: British Politics and the Constitution from the Eighteenth Century to Brexit (Palgrave 2021) 9.

[272] Similarly, Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) 62. The deferential predisposition of English judges in the early 20th century was not necessarily confined to administrative law, see Robert Stevens, *The English Judges: Their Role in the Changing Constitution* (Hart 2005) 24–25.

[273] III 3 (p 210).

[274] The perspective here is historical, not philosophical. I try to explain the lived experience of English judges who must have been aware that their colleagues sometimes construed a statute differently, thus deciding a case differently.

construed and applied a statute differently from how judges would have done it, this did not necessarily entail that the primary decision-maker had committed an 'error' in need of 'correction'.

The different conceptions of the role of judges in error of law review can be seen in the contrasting vocabulary of 'supervisory jurisdiction' in England and the 'legal control' (*Rechtskontrolle*[275]) exercised by Administrative High Courts in Germany. The latter meant that the German administrative judges 'controlled' in a strict sense of the word whether administrative authorities had correctly construed and applied the law. The English superior courts had no such wide-ranging authority on judicial review, but merely a 'supervisory' jurisdiction. The Donoughmore Report of 1932 described the same as follows:

> The scope of the High Court's *supervision* is well established by law. If a properly constituted inferior tribunal has exercised the jurisdiction entrusted to it in good faith, […] and not arbitrarily or illegally, *the High Court cannot interfere*. When *exercising its supervisory powers* the High Court is not sitting as a Court of Appeal from the Tribunal, but it has power *to prevent the usurpation or mistaken assumption by the Tribunal of a jurisdiction beyond that given to it by law*, and to ensure that its decisions are judicial in character by compelling it […] to confine itself to decision of the points which are in issue before it.[276]

When explaining and justifying the limited reach of review for error of law in England, judges occasionally pointed out that an application for a prerogative writ (and similarly for injunctions, declarations, or tort actions) was not an appeal.[277] Statutory appeals were the instance where English courts oversaw the lawfulness of administrative decision-making (broadly conceived) on an often wider reach, but the precise scope of the appeal depended

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[275] Otto Mayer, *Deutsches Verwaltungsrecht*, vol 1 (Duncker und Humblot 1895) 168, 189, 200, 201, 210; similarly, the French notion of *le contrôle juridictionnel*, eg Raphael Alibert, *Le contrôle juridictionnel de l'administration au moyen du recours pour excès de pouvoir* (Payot 1926).

[276] The Committee on Ministers' Powers Report (HM Stationery Office 1932) ('Donoughmore Report') 99.

[277] Eg *R v Nicholson* [1899] 2 QB 455, 461 (Darling J): 'The writ of mandamus is not to be a means of appeal wherever the magistrates come to a wrong conclusion as to whether notices are good or not. Short of deciding that, I cannot see how we can allow the writ to go in the present case.' Similarly, *Board of Education v Rice* [1911] AC 179, 182 (Lord Loreburn): 'Tho Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.'

on the statute in question.[278] Where there was an appeal on 'points of law', for example, an error did not have to be 'jurisdictional' to make an appeal successful. On judicial review via the prerogative writs, tort actions, and injunctions and declarations, by contrast, the courts had a mere 'supervisory' jurisdiction in the sense outlined by the Donoughmore report. This points to an important difference. In France and Germany, administrative courts derived their authority from statute. On judicial review, they oversaw administrative bodies that similarly exercised statutory authority. In England, by contrast, the superior courts on judicial review derived their authority from the common law, but they (largely) oversaw statutory decision-makers.[279] Given the different sources of legal authority, a more deferential approach to error of law appears to make good sense, particularly in a system with a sovereign Parliament.

5. Judicial and Administrative Powers

The previous section substantiated one of the two principal claims of chapter 4. I have argued that French and German judges delivered a more intense review on the ground of an error of law than English judges in judicial review, and I subsequently tried to account for this discrepancy. To that end, the previous section touched upon how the three jurisdictions conceptualised judicial and administrative powers. The ensuing section, by contrast, addresses the judicial-administrative divide more generally. How much explanatory force does the distinction between judicial and administrative powers have for

[278] Stuart Anderson, 'Judicial Review' in William Cornish and others (eds), *The Oxford History of the Laws of England, vol XI, 1820–1914: The Legal System* (OUP 2010) 486, 492–98 underlines the importance of statutory appeals in the late 1800s and early 1900s, particularly appeal on a case stated.

[279] English courts on judicial review could also oversee non-statutory powers, for example the custom-derived authority of corporations to making by-laws, but by 1900 most by-laws were grounded in statute, see Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) ch 13.

error of law review? The argument developed in the ensuing section constitutes the second principal claim of chapter 4. It postulates that error of law review was carefully crafted around specific notions of judicial and administrative powers in France and Germany, but less so in England. This claim has institutional, constitutional, remedial, and doctrinal dimensions.

Institutionally, judicial review for error of law in France and Germany was conceptualised as 'courts' overseeing 'public administration'. In England, that was not the case. To the contrary, it was shown in the English section that the writs of certiorari and prohibition had in earlier centuries primarily served to oversee inferior and ecclesiastical courts, remnants of which could be seen in the limitation of certiorari to 'judicial acts'. Yet in the period covered by this thesis, the English superior courts on judicial review oversaw all sorts of decision-makers. I have argued in chapter 2 that there was no neat distinction between 'courts' and 'administrative bodies' in England. The wide variety of statutory decision-makers were neither designed nor conceived to form an abstract whole, a 'public administration'. In the cases cited in the present chapter, the English superior courts oversaw Justices of the Peace, licensing justices, Courts of Summary Jurisdiction, local Boards of Works, parishes, municipal corporations, the London County Council, the conservators of the Thames and of the River Cam, the Board of Education, Inclosure Commissioners, Commissioners of Income Tax, canal companies, water companies, and railway companies. These institutions can be classified as 'broadly administrative' in the sense that they administered regulatory schemes. Yet by their institutional nature, they cannot be classified as purely 'administrative' as opposed to 'judicial' bodies, as was the case for primary decision-makers in France and Germany.

This institutional dimension was closely related to the *processes and remedies* available to review administrative action. The French *recours pour excès de pouvoir* and the German

Anfechtungsklage were designed to control the lawfulness of administrative action. In England, no process was designed specifically for this purpose. The prerogative writs targeted decision-makers exercising public powers in a broad sense, including inferior and ecclesiastical courts. The remedies of injunctions, declarations, and tort actions were available across the spectrum of private and public law. Regrouping the English remedies as 'judicial review of administrative action' thus requires some abstraction. In retrospect, this can be done with good reasons. Yet back in the late 1800s and early 1900s, the judges hearing 'judicial review' cases on the ground of an error of law did not consider themselves as dealing with something fundamentally different from what they did in (what we would now consider) private law cases, eg on whether clubs or companies had construed and applied their rules correctly.[280]

Doctrinally, the frameworks for error of law review in France and Germany were simple because they were tailored to the problem of drawing the boundary between administrative autonomy and judicial control, in other words to answer the question of what is for the administration to decide, and what is for the judges to decide. The French answer was that wherever an administrative body had misconstrued or misapplied statute to the disadvantage of a plaintiff who brought an admissible challenge, the Council of State had authority to quash the decision. In Germany, the dichotomy between 'law' and 'discretion' targeted the delimitation of the authority of (primary) administrative decision-makers and administrative courts. English judges, it was shown, had a variety of doctrinal tools available to the balancing of administrative autonomy and judicial control, yet none of these tools built on a distinction between judicial and administrative powers in the same way the

[280] Eg *Hopkinson v Marquis of Exeter* (1867–68) LR 5 Eq 63 (a member of the Conservative Club seeking an injunction against his expulsion); Jason Varuhas, 'Taxonomy and Public Law' in Mark Elliott, Jason Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart 2018) 39, 42–44.

French and German doctrines did. The confinement of the writ of certiorari to 'judicial', as opposed to 'ministerial' or 'administrative' acts did not have the same overarching significance to error of law review, and it mostly caused confusion, as we saw in the context of licensing decisions. The key doctrinal tool English judges used to set the limits of error of law review in the prerogative writs and tort actions was the distinction between errors within jurisdiction and errors that constituted an excess of jurisdiction. Whilst the nature of the decision-maker may have had a certain relevance for how the distinction was drawn in practice, the tool itself was applied to inferior courts and administrative bodies (such as a board of works) alike.[281] As for the equitable remedies, injunctions and declarations issued in private and public law cases alike, and how the courts used their wide discretion did not reveal any doctrinal frameworks building on notions of administrative and judicial powers.

Ultimately, the *constitutional foundations* of error of law review differed widely between the three countries. The French and German constitutions distinguished between judicial and administrative (or more broadly, executive) powers and decision-makers, and assigned certain roles and functions to both. It is most obvious in the German approach that review for error of law was tailored to specific constitutional needs, namely turning the State into a *Rechtsstaat* by subjecting it to the law. In France, the strict conception of separation of powers meant that the ordinary courts could not interfere with the exercise of administrative powers, but the 'intermediary' status of the Council of State allowed the State Councillors to do just that. While the French academic Maurice Hauriou claimed in response to Dicey that France had a '*règne de la loi'* (Rule of Law) too, the term '*l'état de droit*', translated from the German *Rechtsstaat*, would become the more common term by the mid-20th century.[282] Back in the period covered by this thesis, however, the separation of powers

[281] Paul Craig, *English Administrative Law from 1550: Continuity and Change* (OUP 2024) 317.

[282] Maurice Hauriou, *La Jurisprudence Administrative de 1892 à 1929*, vol 2 (Sirey 1929) 407; Mark Walters, *AV Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (CUP 2020) 232. See also

was the key constitutional principle underlying judicial review in France. In England, the separation between judicial and administrative powers was not a core constitutional principle.[283] Dicey's account of the Rule of Law envisaged an important role for 'the ordinary courts' as guardians of the common law. Yet, as I have argued in the previous section, Dicey's insistence that there was no 'administrative law' meant that he could not address the issue of how courts ought to oversee exercises of public powers. 'Deference' as an element of the English constitution did not build on any conceptions of judicial and administrative powers; it was pervasive in that it affected the relationships between all institutions, and also between the people and its institutions. It is noteworthy that Bagehot rejected the French conception of separation of powers and divided English institutions into 'dignified' and 'efficient' parts instead.[284] Distinguishing between judicial and administrative powers was simply not a fundamental feature of the English constitution.

6. A longue durée Perspective

In a longer historical perspective, it can be argued that subjecting government (and public administration) to the law was one of the key developments in France and Germany in the late 19th and early 20th centuries, whereas the same had already been established in England in the 17th and 18th centuries. In the above sections on Germany, I recounted the lively debate among scholars in the 1860s on how best to ensure the legality of administrative

RC van Caenegem, 'The Rechtsstaat in Historical Perspective' in RC van Caenegem, *Legal History: A European Perspective* (Hambledon 1991) 185, 186.

[283] John Allison, *The English Historical Constitution: Continuity, Change and European Effects* (CUP 2007) ch 4. This was discussed in chapter 2 V 3 (p 98).

[284] Catherine Marshall, *Political Deference in a Democratic Age: British Politics and the Constitution from the Eighteenth Century to Brexit* (Palgrave 2021) 69 and 79.

action, and how to design appropriate institutions, remedies, and doctrines to bring unlawful government action before the courts.[285] This was one of the main constitutional challenges of the time. In English constitutional discourse during the period between the 1860s and the 1910s, by contrast, the judiciary and its role in overseeing government was relatively absent. Other constitutional matters were more pressing, for example the enlargement of franchise (Reform Acts 1867 and 1884) and the Parliamentary Reform Act 1911. An English debate on 'administrative law' and on the court's role in overseeing government began in the late 1920s and early 1930s with Lord Hewart's *The New Despotism* (1929), FJ Port's *Administrative Law* (1929) and the Donoughmore Report (1932).[286]

However, that government was generally subject to the law had been settled in England since the 17th century.[287] This cannot be covered in detail within the confines of this thesis, but it is useful to point out an example. In the famous case of *Entick v Carrington* (1765), the defendants broke into the plaintiff's house, destroyed his property, and took away his papers.[288] They acted on the order of the Secretary of State, the Earl of Halifax, who had issued a warrant to search the house for seditious papers against the Crown and Parliament. The judges held that 'there is no law in this country to justify the defendants in what they have done'.[289] On one modern reading, the case 'looked at the scope of executive power and determined that the executive was subject to the ordinary law of the land unless

[285] Above, chapter 4 III 2 (p 205).

[286] Lord Gordon Hewart of Bury, *The New Despotism* (Ernest Benn 1929); FJ Port, *Administrative Law* (Longmans 1929); The Committee on Ministers' Powers Report (HM Stationery Office, 1932) ('Donoughmore Report'); Joanna Bell, *The Anatomy of Administrative Law* (Hart 2020) ch 2.

[287] Eg *Prohibitions del Roy* [1607] 77 ER 1342, 12 Co Rep 64; *Case of Proclamation*s (1611) 77 ER 1352, 12 Co Rep 74; Bill of Rights of 1689. Naturally, limitations to this principle applied where the King or the Queen (and the Crown) were concerned, but these lie beyond the scope of this thesis.

[288] *Entick v Carrington* (1765) 19 Howell's State Trials 1029, 95 ER 807.

[289] *Entick v Carrington* (1765) 19 Howell's State Trials 1029, 95 ER 807, 817.

expressly exempted'.[290] The case was one in trespass brought personally against the officials acting on the orders of the Earl of Halifax. Substantially, however, Lord Camden decided that a public body was 'only empowered to act within the law and could not […] claim power merely because it was desirable to have that power […]' (Gordon).[291]

Consider how this contrasted with German constitutional thinking on 'the State' and its executive powers as pre-legal entities, a conception which prevailed until the late 19th century and which informed the institutional, remedial, and doctrinal frameworks of judicial review of administrative action. Lorenz von Stein, Otto Bähr, and Rudolf von Gneist in the 1860s each suggested a framework of their own, but their common aim was to subdue the State and its executive powers to the law. In England, by contrast, government had been considered as constituted and bound by the law for centuries.[292] But as Dicey's account of the Rule of Law made very clear, holding officials accountable was not considered as a separate field of the law, but as applying the same legal rules and principles that governed disputes between private persons. With increasing state regulation and central government taking a more active role in administering the country in the late 19th and earlier 20th centuries, the traditional legal means for resolving administrative law disputes were arguably no longer fit for purpose.[293] The debate on how and to what extent the courts ought to control the exercise of administrative powers would keep English lawyers busy throughout much of the 20th century.[294] Whilst this would ultimately lead to

[290] Richard Gordon, 'Entick v Carrington [1765] Revisited: All the King's Horses' in Satvinder Juss and Maurice Sunkin (eds) *Landmark Cases in Public Law* (Hart 2018) 1, 9.

[291] Richard Gordon, 'Entick v Carrington [1765] Revisited: All the King's Horses' in Satvinder Juss and Maurice Sunkin (eds) *Landmark Cases in Public Law* (Hart 2018) 1, 10.

[292] Neil MacCormick, 'Der Rechtsstaat und die Rule of Law' (1984) 39 Juristenzeitung 65, 66.

[293] The more active role of central government was discussed above in chapter 2 IV 2 (p 79).

[294] For a summary of the broader developments of administrative law in the 20th century, see Joanna Bell, *The Anatomy of Administrative Law* (Hart 2020) ch 2.

the creation of a unified procedure under the name ‘application for judicial review’, this procedure was not crafted around specific notions of ‘judicial’ and ‘administrative’ powers in the continental sense.

VI. Conclusion

The present chapter has substantiated the principal argument of this thesis for review on the ground of an error of law. I have argued that the institutional, remedial, and doctrinal frameworks for error of law review in France and Germany were grounded in how the two legal systems conceptualised judicial and administrative powers. In England, by contrast, the distinction was relatively absent. Where it did come up, it mostly caused confusion, such as in the discussions on whether the writ of certiorari ought to be available against licensing decisions. Error of law review in England was characterised by a variety of processes and remedies, a lower intensity of review, and the relative absence of the judicial-administrative divide. In order to draw the boundaries between administrative autonomy and judicial control, English judges adapted legal tools which had originally had another purpose, such as the distinction between jurisdictional and non-jurisdictional errors.

A final note on similarity and difference. Concerning review for error of law, French and German law seem much more closely related to one another than to English law. Yet it is important to note that, to an important degree, this similarity between the two continental jurisdictions came about precisely in the late 1800s and early 1900s. In the 1860s/70s, the intensity of review in Germany resembled that of England more than that of France. The discussions among German scholars in the 1860s showed that the development German law would take in the late 1800s and the early 1900s was largely open. By the 1910s, however, both French and German judges had adopted a remarkably intense review, whereas English judges had not. If it is nowadays considered as axiomatic for civil lawyers that questions of law are entirely for the courts, the present chapter has shown this axiom

taking shape in France and Germany during the late 1800s and early 1900s, and that it did not take shape in England at the same time.[295]

[295] Paul Craig, 'Judicial Review of Questions of Law: A Comparative Perspective' in Susan Rose-Ackerman, Peter Lindseth, and Blake Emerson (eds), *Comparative Administrative Law* (2nd edn, Elgar 2017) 389, 401.

Chapter 5 – Conclusion

This thesis compared judicial review in England, France, and Germany in the period between the 1860s and the 1910s. The aim was to give an account of judicial review in each legal system on its own terms and by reference to the other two, thus comparing all three.

As explained in the introductory chapter, the three legal systems can be considered as constituting different models of administrative law as well as forming the 'parent' legal order of different legal families. Given the discrepancy in conceptualising government, the judiciary, administrative law, and the law more broadly, a robust analytical framework proved essential to comparing judicial review as between the three legal systems. The path taken in this thesis examined how each system conceptualised judicial and administrative powers during the period in question, and whether and how these conceptualisations, in turn, shaped judicial review. This was not only a methodological choice; it also stands in close connection to the principal argument of the thesis. I have argued that the institutional and doctrinal frameworks for judicial review were carefully crafted around specific notions of judicial and administrative powers in France and Germany, but less so in England. With certain nuances, I have substantiated this principal argument for the institutional arrangement of decision-makers, for review on the ground of an unlawful decision-making procedure, and for review on the ground of an error of law. By way of conclusion, I would here like to draw the main findings of chapters 2, 3, and 4 together and relate them to one another, so as to provide a final bird's eye view of the thesis overall.

Chapter 2 established that in France and Germany judicial review was characterised by the clear-cut distinction between two kinds of decision-makers: 'administrative courts' and the decision-makers which together constituted 'public administration'. In England, by

contrast, no separate 'administrative courts' existed, and the various administrative decision-makers were not designed to form a centralised and hierarchically organised 'public administration'. Judicial review in England was characterised by a variety of processes and remedies, some of which initially targeted inferior and ecclesiastical courts (the writs of certiorari and prohibition) or the exercise of public powers (the writ of mandamus), whilst others were available against public and private persons alike (collateral challenges via tort actions, injunctions and declarations). None of these processes were specifically designed for the judicial oversight of administrative decisions or decision-makers, but they nonetheless were being used to that end.

The French and German administrative courts, by contrast, had been designed for this very purpose. Additionally, distinct processes existed in French and German law for the oversight of 'public administration', namely the *recours pour excès de pouvoir* and the *recours de pleine juridiction* in France, and the *Anfechtungsklage* in Germany. The precise institutional and remedial arrangements differed as between France and Germany. In France, the Council of State had evolved from within the executive and gradually increased its independence over the course of the 19th century. The legislative reform introducing a genuine 'delegated jurisdiction' (*justice déléguée*) in 1872 and the dismissal of the so-called 'theory of the minister-judge' in the *Cadot* case in 1889 brought this development to a temporary end. In the larger German states, legislators introduced separate administrative courts between 1863 and 1900. In addition to the Administrative High Courts, administrative courts of first instance were created within the administrative hierarchy as institutions of a dual remit, acting as administrative authority in certain matters, and as administrative court in others.

The different institutional and remedial frameworks for judicial review were unique and adapted to the constitution of each respective legal system. In the absence of an entrenched

distinction between public and private law and in light of Albert Venn Dicey's account of the Rule of Law, which equated public officials with private persons, English law required neither an abstract notion of 'public administration', nor institutions or remedies specifically designed for the oversight of administrative action. Key to the French institutional arrangements was the Council of State's ambiguous status as an 'intermediary' power within the French conception of separation of powers. In Germany, the interplay between the 'monarchic principle' and the *Rechtsstaat* was foundational for judicial review.

Chapter 3 examined judicial review on the ground of an unlawful decision-making procedure, particularly for failure to give a hearing required by law. In French and German law, a distinct set of procedural rules applied depending on whether an administrative court gave a 'judgment', or whether an administrative authority rendered an 'administrative act'. In England, judges frequently invoked notions of 'judicial' and 'administrative' in their reasoning on the common law principle of natural justice. Similarly to France and Germany, the procedural obligation of a decision-maker to hear affected parties was stricter in (what English judges perceived as being) the exercise of 'judicial', as opposed to 'administrative' powers. Yet the terms 'judicial' and 'administrative' did not crystallise into a clearcut distinction which could have provided reliable guidance to English judges. By contrast to the administrative judges in France and Germany, English judges could not build on legislation that differentiated expressly and coherently between judicial and administrative institutions, decisions, and decision-making procedures. English law and legislation did not generally operate with such distinction. The reasoning on 'judicial' and 'administrative' in natural justice cases thus remained an awkward doctrinal tool in England, causing significant confusion.

Chapter 3 further looked into the sources of procedural rules and principles, especially the scope of legislation on decision-making procedures and the interplay between written and

unwritten law. In these matters, similarities and differences were distributed more evenly between the three jurisdictions. French and English law, for instance, were similar in the absence of generally applicable statutory rules for administrative decision-makers. By contrast, some German legislators enacted procedural rules with a wide scope for administrative decisions, applicable across various subject-matters (eg planning law, licensing etc.). Unwritten principles of procedural fairness had the highest operational relevance in England, but German Administrative High Courts occasionally resorted to unwritten principles of procedural fairness, too. The French Council of State, by contrast, did not invoke any unwritten principle of fairness for the decision-making of public administration.

Review on the ground of an unlawful decision-making procedure was importantly shaped by the divergent institutional arrangements in the three legal systems, which were discussed in chapter 2. The constitutional foundations of judicial review, by contrast, were more important in chapter 4. The reason is that review for error of law was more closely related to the substance of administrative decisions, in other words to *what* was being decided (rather than *how* a decision was made).

Chapter 4 explored judicial review on the ground of an error of law, understood broadly as pertaining to the interpretation of a statutory or regulatory text and its application to a specific case. French and German judges delivered a much more 'intense' control over how decision-makers interpreted and applied statute, particularly in the early 1900s. By comparison, English judges were relatively 'deferential' to administrative decision-makers. The French conception of separation of powers and the German notion of the *Rechtsstaat* facilitated an intense review for error of law by the State Councillors and, respectively, the judges in the German Administrative High Courts. In England, by contrast, there was no constitutional principle that would have encouraged English judges to review every error

of law. The precise degree of deference shown by English judges was sensitive to context, such as the rights or interests at play, and whether a certain decision required specialist or local administrative expertise. Whether English judges reviewed a decision on the ground of an error of law further depended on the precise process and remedy sought. On an application for a prerogative writ and in tort actions, for example, English judges only interfered with how primary decision-makers construed statutory texts where they thought that an error was 'jurisdictional'. Overall, English law conceptualised the judicial role in review cases as merely 'supervisory', and thus narrower than French and German law ('Rechtskontrolle').

The doctrinal frameworks for error of law review in France and Germany were tailored to the issue of drawing the boundary between administrative autonomy and judicial control, or to put the matter differently, determining what was for the administration to decide, and what was for the judges to decide. The French answer was that the French Council of State, if a plaintiff brought an admissible case before it, had the general authority to quash decisions based on a flawed interpretation or application of statute. In Germany, the dichotomy between 'law' and 'discretion' targeted the delimitation of the authority of (primary) administrative decision-makers and administrative courts. English judges, it was shown, had a variety of doctrinal tools available to the balancing of administrative autonomy and judicial control, yet these tools did not build on a specific distinction between judicial and administrative powers in the same way the French and German doctrines did. The confinement of the writ of certiorari to 'judicial', as opposed to 'ministerial' or 'administrative' acts did not have the same overarching significance to error of law review, and it mostly caused confusion. The distinction between 'jurisdictional' and 'non-jurisdictional' errors was applied to inferior courts and administrative bodies alike.

Ultimately, English, French, and German law each provided some form of judicial review. In all three legal systems, parties aggrieved by what they claimed to be an unlawful administrative decision could challenge that decision in court. But the precise institutional, remedial, and doctrinal frameworks, as well as the constitutional foundations of judicial review, differed significantly. Examining how each legal system conceptualised judicial and administrative powers enabled us to better understand the ways in which English law differed from French and German law, whilst at the same time illustrating certain similarities between the legal systems, as well as the differences between French and German law.

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