

# Judicial Review, Methodology and Reform

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## Introduction

Reform of judicial review has featured prominently in Ministry of Justice initiatives, with independent panels established on judicial review,<sup>1</sup> and the HRA,<sup>2</sup> and the possibility of an investigation concerning the Supreme Court. These initiatives have been fuelled prominently, albeit not exclusively, by claims of judicial overreach, but they have not been empirically tested. There is indeed an inverse relationship between the force of such allegations, and the empirical evidence that underpins them. This article seeks to redress this important gap.

It begins with the conceptual connection between judicial review, allegations of judicial overreach and reform. The focus then shifts to the empirical evidence that underpins such claims. This is beset by a twin malaise, mining and lumping, and path dependency.

Mining and lumping captures the historical methodological error whereby a proposition is sustained by searching for supporting evidence, aggregating it and ignoring contrary evidence. It is manifest in four ways, which are termed the macro, the micro, the temporal and the transformative. This is followed by consideration of what would have to be shown quantitatively and qualitatively to sustain the claim of judicial overreach for any year.

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\* I am grateful for comments from Tom Adams, Hayley Hooper, Theodore Konstadinides, and Joe Tomlinson and the anonymous Public Law reviewer.

<sup>1</sup> Independent Review of Administrative Law, CP 407, 2021, henceforth IRAL.

<sup>2</sup> Independent Human Rights Act Review, IHRAR, 2021.

Path dependency captures the idea from political science that policy choice may be constrained by history. It can also inform intellectual thought, such that we think about an issue along a well-trodden intellectual track. It is manifest in the way we consider judicial review. The ‘issue’ is cast as judicial overreach, thereby ignoring four important facets of judicial review. We ignore contrary evidence; we disregard the normal incidence of review; we disregard circumstances where judicial review can favour the legislature or the executive; and we fail to consider that judicial review might be too limited in certain instances. This is followed by consideration of the quantitative and qualitative implications of this analysis for discussion of judicial overreach.

The final section of the article focuses on the principle of legality. It received attention in IRAL and in the MOJ’s response. The latter regarded the court’s jurisprudence as evidencing judicial overreach, thereby echoing some academic literature. We must, however, be mindful of the very small number of successful actions; we must be equally mindful of cases where the courts rejected such claims, since ignoring this data gives an unbalanced view of judicial practice; and we must take care to distinguish successful claims that are controversial from those that are not. When the data is thus analysed the claims of systemic judicial overreach do not withstand examination.

### **Judicial Review, Judicial Overreach and Reform: The Conceptual Connection**

There is a proximate conceptual connection between judicial review, judicial overreach and reform. It is manifest in the headline banner of the Judicial Power Project, which states that “judicial overreach increasingly threatens the rule of law and effective, democratic government”.<sup>3</sup> The assumption is that there is such overreach, which must be quelled to restore

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<sup>3</sup> [About the Judicial Power Project | Judicial Power Project](#)

balance to the Westminster constitution, the central idea being “that the decisions of Parliament ought not to be called into question by the courts and that the executive ought to be free from undue judicial interference, which fails to respect political judgment and discretion”.<sup>4</sup>

It is evident in the 2019 Conservative Party manifesto. There was a commitment to “update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government”.<sup>5</sup> The government would “ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays”.<sup>6</sup> This was the backdrop for the reviews into administrative law and the HRA.<sup>7</sup>

The concern was apparent yet again in the Ministry of Justice’s response to the Independent Review of Administrative Law. Judicial overreach assumed centre-stage, the Lord Chancellor stating that,<sup>8</sup>

“The Panel’s analysis identified a growing tendency for the courts in Judicial Review cases to edge away from a strictly supervisory jurisdiction, becoming more willing to review the merits of the decisions themselves, instead of the way in which those decisions were made. The reasoning of decision makers has been replaced, in essence, with that of the court. We should strive to create and uphold a system which avoids drawing the courts into deciding on merit or moral values issues which lie more appropriately with the executive or Parliament.”

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<sup>4</sup> [About the Judicial Power Project | Judicial Power Project](#)

<sup>5</sup> [Conservative Manifesto 2019 | Conservatives](#), p. 48

<sup>6</sup> [Conservative Manifesto 2019 | Conservatives](#), p. 48.

<sup>7</sup> See further, T. Konstadinides, L. Marsons and M. Sunkin, ‘Reviewing Judicial Review: The constitutional importance of the Independent Review of Administrative Law 2020’, U.K. Const. L. Blog (24th Sept. 2020) (available at <https://ukconstitutionallaw.org/>) for discussion of the substantive concerns as to judicial overreach that underpinned the terms of reference for the two reviews.

<sup>8</sup> Judicial Review Reform, The Government Response to the Independent Review of Administrative Law, CP 408, 2021, henceforth MOJ Response, at [2].

This was the empirical backdrop to the MOJ's subsequent discussion concerning judicial review and the constitution. It was premised on the assumption that there was a problem of judicial overreach as evidenced through, inter alia, expansive application of the grounds of review and development of the principle of legality.

## **Judicial Review and Empirical Evidence: Mining and Lumping**

### *The malaise*

This article is not an analysis of the Independent Review of Administrative law, IRAL, and the government response thereto, although reference will be made to them. The objective is to consider the methodological and empirical foundations of the way the subject is commonly discussed. Judicial overreach features prominently in this discourse, fuelled, inter alia, by a steady stream of Judicial Power Project postings. This message suited the government, and was centre stage in its response to IRAL.

IRAL, the government response and the many excellent submissions contain a wealth of data about judicial review, and there have been valuable empirical studies.<sup>9</sup> There is,

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<sup>9</sup> The Public Law Project is a valuable source of data and analysis concerning the incidence of judicial review, [Home - Public Law Project](#). There have also been many valuable studies concerning the empirical dimension of judicial review, see, e.g., A. Le Sueur and M. Sunkin, "Applications for Judicial Review: the Requirement of Leave" [1992] PL 102; M. Sunkin, L. Bridges and G. Meszaros, *Judicial Review in Perspective: An Investigation of Trends in the Use and Operation of the Judicial Review Procedure in England and Wales* (Public Law Project, 1993); V. Bondy and M. Sunkin, "Accessing Judicial Review" [2008] PL 647; T. Cornford and M. Sunkin, "The Bowman Report, Access and the Recent Reforms of the Judicial Review Procedure" [2011] PL 11; Sarah Nason, *Reconstructing Judicial Review* (Hart, 2016); M. Sunkin and V. Bondy, "The Use and Effects of Judicial Review: Assumptions and Empirical Evidence", in J. Bell, M. Elliott, J. Varuhas, and P. Murray, (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, 2016); R. Thomas, "Legitimate

nonetheless, an important piece of missing data, which is the numerical incidence of cases that might be controversial in terms of alleged judicial overreach. The reader might agree, but respond that such evidence is unknowable, since there would be controversy as to the definition of controversial cases. There is force in this argument, but stay with me for a little longer because the problem is not insurmountable. There is more than one way to crack an empirical nut.

Before revealing the suggested method, let us consider the methodology that informs those who speak most fiercely against the courts. Historians frequently caution against the danger of mining and lumping. A writer seeks to establish a particular historical proposition. The author searches to find evidence, which is then lumped or aggregated to support the thesis, while ignoring evidence that might detract therefrom. The danger is endemic in all forms of scholarship. It is manifest at four levels in current discourse concerning judicial review: the macro, the micro, the temporal and the transformative. They will be considered in turn.

The malaise is evident at the macro-level in the way that judicial overreach is conceptualized. There is no interest in pressing further to see whether the cases thus described are exceptional, nor is there any interest in considering evidence that points in the opposite direction. The methodology is to ‘mine’ for examples of alleged overreach, lump them together and present the package as representative of judicial review. The writers who speak most fiercely against judicial review show no inclination to engage in quantitative analysis, or to

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Expectations and the Separation of Powers in English and Welsh Administrative Law”, in M. Groves and G. Weeks (eds.), *Legitimate Expectations in the Common Law World* (Hart, 2017); R. Thomas and J. Tomlinson, “A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals” [2019] PL 537; R. Kirkham, and E. O’Loughlin, “Judicial Review and Ombuds: A Systematic Analysis” (2020) P.L. 680; J. Bell and E. Fisher, “Exploring a Year of Administrative Law Adjudication in the Administrative Court” forthcoming in *Public Law*.

determine whether their finding in a particular case is borne out by other case law. This may be because they know the results will not favour their desired direction of travel. This is exemplified by critique of the courts' treatment of delegated legislation for alleged judicial overreach in HRA cases. However, detailed study revealed that there were only 14 such successful HRA challenges in the last seven years, which is tiny given the number of statutory instruments per annum; that such instruments commonly received little scrutiny in Parliament; there was scant evidence of judicial overreach; and the courts commonly showed very considerable deference to the executive, with the consequence that most challenges were unsuccessful.<sup>10</sup>

This flawed methodology is also present at the micro-level, when considering a particular doctrinal area, such as the principle of legality. The story will be articulated below. Suffice it to say for the present, that the approach focuses on cases that are alleged to be problematic; it does not reveal cases where the courts have declined to apply the principle; nor does it tell us anything about use of the principle of legality within the overall fabric of judicial review. When this evidence is considered the story appears in a very different light.

There is a third dimension to this methodological stance, which is temporal. The evidence for judicial overreach is gleaned from case law examples that span 10, 50 or 100 years. There is nothing untoward in drawing on such examples, or in aggregating them, provided that the concluding figure is related to the totality of case law in the years considered. This step is never undertaken, thereby undermining conclusions drawn therefrom, insofar as the evidence is intended to tell us something about judicial review to decide whether reform is necessary. Thus, the fact that sixty cases spread over a decade might be proffered as examples

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<sup>10</sup> J. Tomlinson, L. Graham and A. Sinclair, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?', U.K. Const. L. Blog (22nd Feb. 2021) (available at <https://ukconstitutionallaw.org/>)).

of courts venturing too far has considerably reduced impact given that the chosen examples represent, as will be seen below, circa 1% of the overall case law during this period.<sup>11</sup> If this is said to constitute systemic judicial overreach, then we have a serious problem with terminology. This assumes, moreover, that such cases really warrant this classification.

The final dimension to the methodological malaise is transformative. It entails reasoning from reform to address an exceptional problem, to generalization therefrom to propose far-reaching change for which there is no empirical warrant. This is exemplified by the Ministry of Justice response to IRAL.<sup>12</sup> The MOJ sought views on the IRAL suggestion that there should be provision for suspended quashing orders, and the MOJ's suggestion for prospective remedies.<sup>13</sup> There is much to be said for according the courts discretionary power in both respects to deal with exceptional cases where this is warranted. Nothing untoward thus far. The 'transformative' dimension emerges but a few pages further into the document.

The transformation is evident in three stages. There is the step whereby the suspended quashing order intended for exceptional cases is to be either presumptively applicable, or the mandatory form of the order, subject to a public interest qualification.<sup>14</sup> There is the further step whereby suspended quashing orders are applicable to all instances where administrative action is quashed, subject to the choice between the presumptive and mandatory formulation.<sup>15</sup> The final step is the assumption that there must be some fundamental overhaul of the consequences of invalidity, manifest in radical curtailment of instances where the decision is

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<sup>11</sup> This is based on 600 cases per annum, which is conservative for the reasons set out below.

<sup>12</sup> MOJ Response.

<sup>13</sup> MOJ Response, [55]-[57], [60]-65].

<sup>14</sup> MOJ Response, [66]-[68].

<sup>15</sup> MOJ Response, [69].

void, the default assumption being that it should only be voidable.<sup>16</sup> There is then the ‘postscript’ that review may be precluded by an ouster clause.

Reflect on the transformative process. We begin with suggestions to deal with occasional problematic cases where a quashing order should be suspended, or the remedy should be prospective. The cases are real, but relatively rare. The great majority of judicial review actions involve no such problems. They concern individual decisions, which do not have broader implications. We then extrapolate from the rare cases and detect a general problem that is said to warrant generalization of suspended quashing orders, notwithstanding that there is no evidence to warrant such extrapolation.

It might be thought that this is, to coin a phrase, a machine that would go by itself. This maybe so, but the contrary is almost certainly true. It depends, as they say in political thrillers, whether you believe in coincidences. What unfolds in the MOJ document is almost certainly not fortuitous, it is by design, not happenstance. Remedial constraints are an effective technique to curtail judicial review. A legislative presumption that suspended quashing orders should be the norm, or the stronger mandatory formulation, coupled with legislative specification that invalidity normally renders the order voidable, would constitute the most significant restriction in judicial review in 400 years.

### *The numbers*

We now consider how to assess the reality of claims of judicial overreach. The starting point is as follows. We estimate the number of cases in which issues of administrative law arise. Note the formulation here. It is public law issues, not simply formal judicial review actions.

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<sup>16</sup> MOJ Response, [70]-[84].



This exceeds the number of cases logged in the Administrative court, because public law issues arise in the Queens Bench, Family and Chancery Divisions, in criminal law actions, and in the Tribunal system. They can also occur in actions in tort, restitution, contract and the like. There are cases in the Divisional Court, the Court of Appeal, the Supreme Court, the Privy Council, and in the Northern Irish and Scottish courts. It is also necessary to read cases from the European Court of Human Rights that have implications for the HRA, and, prior to Brexit, relevant EU judicial decisions.

I have, for forty years, written a text on Administrative law. I estimate, having just completed a new edition, that I read approximately 800 cases per year. Let us take this figure as a starting point. There is nothing canonical about it. The calculus set out below is not altered if the numbers are run from a different base line of 700 or 600. UK courts are the subject matter of the inquiry, and what follows is therefore confined to them. If one believes that there is some systemic judicial overreach, or serious incidence thereof, then it must be substantiated on the preceding numbers. Thus, let us imagine that 5% of cases are alleged to be troubling in this regard. This requires identification of the 40 cases per annum that fit this bracket, assuming a benchmark of 800 cases per annum, or 30 cases per annum if it is 600 cases. This must be done for every year. By parity of reasoning, if one thinks that judicial overreach is present in 10% of cases, then the person making the claim must specify the 80 or 60 cases per annum where this malaise is to be found. Each case counts once and only once. There is no double counting. To put the same point in another way, I do not mind how many times *Evans*<sup>17</sup> is cited, it still only counts as one case for these purposes. The importance of the particular case in the overall fabric of judicial review will be considered below. Before doing so, we must, however, be more specific about ‘running the numbers’. This will not per se avoid contestation as to the cases

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<sup>17</sup> *R. (Evans) v Attorney General* [2015] UKSC 21; [2015] 2 W.L.R. 813.

placed on the ‘suspect list’, but it will reduce the incidence thereof. The following criteria are central in this regard.

First, the claim that a case should be included on the list must be substantiated. This is self-evidently so. Asseveration is not argumentation. Nor is production of a list of suspect cases, where inclusion is ‘justified’ by three lines, in which the ‘succinct observer’ purports to capture the misguided reasoning in a complex case in a manner akin to a CNN soundbite.<sup>18</sup> This is not serious academic engagement, nor does it warrant a response.<sup>19</sup> Maybe we should run an analogous site on suspect academic articles, with similar three-line condemnation, justified by the idea of provoking academic discourse. The academic response can readily be imagined. If you wish to include a case on the list, you must do the work on every case, elaborating why it embodies judicial overreach. There are no short cuts, nor should there be. Claims of judicial overreach are serious. They have and are intended to have political consequences. This is serious business, not just some academic spat. The danger, ever present, is that the political and the legal become confused. I refer here not to the normal ways in which the political and the legal may be intertwined. The point is different. The line betwixt the legal and the political can become blurred when the rationale for academic scrutiny is the finding of judicial overreach, with the intent of influencing the political process. It requires continuous material to keep the machine turning. The search for subject matter for the next blog post that will pay maximum political dividends can then blunt academic objectivity.

Secondly, there must be conceptual clarity, and the elliptical use of concepts should be avoided. This is exemplified by repeated statements concerning judicial overreach, which are cast in terms of the courts intruding on the merits. There may be instances where conceptual

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<sup>18</sup> [50 Problematic Cases | Judicial Power Project](#) .

<sup>19</sup> See further in this respect, P. Craig, “Judicial Power, the Judicial Power Project and the UK” [2017] University of Queensland Law Journal 355.

disagreement cannot be avoided. This is not one of them. The central principle is as follows. It is not for the courts to substitute judgment on the merits. They should not replace their choice as to how the discretion was exercised for that of the administrative authority. Decisions as to political and social choice are made by the legislature, or a person assigned the task by the legislature. To sanction judicial intervention simply because the court would prefer a different choice runs counter to this fundamental assumption, and would entail a re-allocation of power from the legislature and bureaucracy to the courts. This primary proposition is based on the separation of powers and accepted by pretty much everyone working in this area, academics and courts alike. UK courts do not substitute judgment. They are fully mindful of the limits of their legitimate role, as attested to in thousands of cases. If substitution of judgment does occur it is a clear instance of judicial overreach, but as per the previous point, the argument must be sustained, not merely stated.

Thirdly, it can be accepted that there may be instances of judicial overreach, even where there is no substitution of judgment on the merits. It might be felt that judicial review was nonetheless too intrusive. However, the distinction between merits review and non-merits review is not determinative in this regard. The reason is readily apparent. Tests of substantive judicial review commonly entail the judiciary taking some view of the merits of the contested action, such as whether compensation should be given and the amount thereof. This remains so where the courts consider the reasoning process that informs the contested decision, and whether it suffices to sustain it, given the terms of the enabling legislation. The court's analysis of the reasoning process is framed by the substantive decision, which shapes the intensity of such review.<sup>20</sup> What distinguishes tests for review is, therefore, not whether they 'consider' the merits or not, but the stringency of the judicial scrutiny. It is possible to range different tests

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<sup>20</sup> P. Craig, "The Nature of Reasonableness Review" [2013] C.L.P. 1; H. Dindjer, "What Makes an Administrative Decision Unreasonable?" (2021) 84 M.L.R. 265.

for review along a spectrum. Classic, limited *Wednesbury* review is at one end of the spectrum, judicial substitution of judgment, whereby the court imposes what it believes to be the correct result lies at the opposite end. Various forms of heightened *Wednesbury* review occupy intermediate positions. In terms of case law, the reality is that the default position is low intensity *Wednesbury* review.

Fourthly, it follows that we should not elide a commentator's conclusion about the appropriate intensity of review in a particular case with the conclusion that the courts overreached. Whether this conclusion is warranted must be for discursive consideration. Statements to the effect that a court crossed the line between legitimate supervisory jurisdiction and illegitimate merits review are conceptually flawed and politically charged in equal measure. Such statements betoken a contestable value judgment as to how intensively the court should have reviewed the discretionary determination. This may well be contentious. It is then tempting for a commentator to have recourse to the dichotomy between supervisory jurisdiction and merits review, as if mere invocation thereof sufficed to accord their contestable view as to the proper intensity of review with canonical status. We should perforce engage in reasoned debate about whether the court deployed the appropriate intensity of review in a particular case. The answer is not, however, predetermined by a magic line between supervisory jurisdiction and merits review, and use of the divide merely reflects in a conclusory manner a prior substantive determination as to the proper intensity of review, adding nothing to that determination.

Fifthly, there is the relation between quantitative and qualitative considerations. The preceding analysis is principally quantitative. There is, however, also a qualitative dimension. Not all cases are created equal. Judicial overreach by the Supreme Court or Court of Appeal is more important than by the High Court or Divisional Court. We must, however, tread carefully when considering the relation between the quantitative and qualitative. This is in part because

the latter does not obviate consideration of the former; the significance of alleged judicial overreach by the Supreme Court in an important case will diminish if it constitutes .01% of the case law for that year. It is in part because the qualitative significance of a case must be demonstrated, not simply asserted. It is also in part because qualitative calibration cuts both ways. There may be instances where the Supreme Court might be felt to have gone too far, but where the case is not qualitatively significant in the overall scheme of things; there may be cases where it is felt that a lower court has done so, but it is not qualitatively significant because its decision lacks precedential value; or it might be because the facts of the case are unlikely to recur, as exemplified by the *Miller* cases,<sup>21</sup> which in my view were correctly decided, but even if one takes the contrary view such litigation is unlikely to recur.

Sixthly, it is especially important when calculating the numbers not to elide two separate issues. There is the issue of judicial overreach, as articulated above. There is a distinct issue as to whether courts should have jurisdiction in certain areas, as exemplified by the Human Rights Act 1998. It is perfectly possible for a commentator to argue that Parliament was wrong to give such authority to the courts. The soundness of this argument would then be assessed. It cannot, however, be argued that the courts exceed their authority, merely because they make difficult value judgments under the HRA. To the contrary, they are fulfilling the legislative remit. It might be argued that courts have misconstrued the terms of the HRA, but this must be sustained, not just stated. It does not, moreover, necessarily entail judicial overreach, since if it did then any contentious issue of statutory interpretation could be so regarded.

Finally, there is the conclusion of the running of the numbers and what this betokens more generally about judicial review. We should, as stated at the outset, be mindful of the

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<sup>21</sup> *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; *R. (Miller) v Prime Minister, Cherry v Advocate General for Scotland* [2019] UKSC 41.

dangers of judicial overreach. It is axiomatic that all institutions are imperfect. Mistakes happen. We must, nonetheless, avoid the dangers of mining and lumping set out above. We must also assess the figures. Let us imagine that there are indeed 30/40 cases per year, which might be regarded as judicial overreach. I do not think that there are, and I have seen no evidence to sustain such a figure. Let us nonetheless imagine that this might be so. This then begs the inquiry as to whether a 5% error rating constitutes systemic or serious judicial overreach. To regard it as indicative of a systemic problem is to misuse this adjective. Such a statistic is clearly not indicative of a malaise that runs through the entire system, except in the formalistic sense that any court might commit such an error. It is, moreover, not self-evidently a serious problem. If a 5% error rating is to warrant far-reaching change, then by parity of reason an identical error rating in organs of government, including the Ministry of Justice, should be treated in the same manner. If this were so, then departments of state would be in continual upheaval to address such issues. The figures, whatsoever they might be, must moreover be read in the light of the considerations in the next section, since they are equally important in forming a balanced vision concerning the nature of judicial review.

It might be argued that the preceding analysis pays insufficient attention to the ‘chilling effect’ that can flow from the case law, and that this somehow obviates the need for more detailed empirical inquiry. This does not withstand examination. The statement is tendentious, insofar as it is premised on the assumption that such an effect is negative. However, all law, public, private and criminal, is designed, *inter alia*, to make people think before they take action that might breach the relevant rules. The normal principles of judicial review should be considered by those that fall within their remit, and they can be beneficial to administration.<sup>22</sup> The salient issue for present purposes is the extent to which judicial overreach might be felt to

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<sup>22</sup> Catherine Haddon, Raphael Hogarth and Alex Nice, *Judicial Review and Policymaking, the Role of Legal Advice in Government*, Institute for Government, 2021.

exacerbate such chilling effect illegitimately by very reason of the overreach. This is itself an empirical issue. It is not to be settled by vague generalizations about chilling effect. Thus, the empirical plausibility of any incremental chilling effect flowing from judicial overreach will differ very markedly depending on whether the incidence is rated at 1% of cases per annum, or 20%. If the figure is closer to the former, then the claim is empirically implausible. The contrary assumption based on such figures would mean that the relevant government department would need to hire a new risk analyst or econometrician.

### **Judicial Review and Empirical Evidence: Path Dependence**

#### *The malaise*

The preceding discussion focused on the way in which mining and lumping distorts assessment of judicial review. There is another dimension to this problem, which is path dependence. The concept is well-known in political science. It connotes the idea that policy choice might be constrained by history, such that institutions can develop in certain ways as a result of their structural properties, or their beliefs and values.

Path dependency can also inform patterns of intellectual thought. It captures the idea that we think about a particular issue along a well-trodden intellectual track, whereby the choice of considerations that are deemed relevant is taken as a given. It is manifest in the way in which we consider judicial review.<sup>23</sup> The ‘issue’ is cast in terms of judicial overreach, and the data

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<sup>23</sup> The particular focus of earlier government reform initiatives into judicial review has varied, but constant themes have been the overly intrusive nature of such review, the need to curtail it and reduce the burden on government. See, e.g., Judicial Review: Proposals for Reform, Cm 8515, 2012; Reform of Judicial Review: Proposals for the Provision and Use of Financial Information, Cm 9303, 2016. For comment, see, e.g., M. Elliott, ‘Judicial review – why the Ministry of Justice doesn’t get it’ UK Constitutional Law Blog (16th December 2012) (available at <http://ukconstitutionallaw.org>); V. Bondy and M. Sunkin, ‘Judicial Review Reform: Who is afraid of judicial

that fuels the inquiry is case law said to exhibit this trait. There are four manifestations of the path-dependent nature of discussion concerning judicial review: the ignoring of contrary evidence; the disregard for the normal incidence of review; the disregard for circumstances where judicial review can favour the legislature or the executive; and the failure to consider that judicial review might be too limited in certain instances.

The first dimension of path dependency is disregard for evidence that points in the opposite direction. This is exemplified by the large body of case law in which the courts repeatedly attest to the limits of their role in judicial review. They do so in different ways. These include choice as to the limited intensity of review, and the deference/respect/weight accorded to the primary decision-maker on grounds of democratic pedigree, expertise and the like. It is evident in ordinary judicial review and HRA adjudication alike. Indeed, the courts have made it repeatedly clear even in the context of rights-based litigation under the HRA 1998 that respect is to be accorded to the primary decision-maker, more especially in terms of democratic pedigree, with the consequence that the boundaries of judicial review are thereby constrained.<sup>24</sup> The government might still lose, and rightly so. Judicial respect does not entail

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review? Debunking the myths of growth and abuse.' UK Const. L. Blog (10th January 2013) (available at <http://ukconstitutionallaw.org>); J. Dawson and A. Horne, *Judicial Review: Government Reforms in the 2010-2015 Parliament*, House of Commons, Briefing Paper 6616, 2015.

<sup>24</sup> See, eg, in relation to the House of Lords/Supreme Court, *R. v DPP, ex p Kebilene* [2000] 2 A.C. 326; *R. (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 A.C. 295 ; *R. (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 A.C. 173; *R. (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 W.L.R. 1681; *R. (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 A.C. 719; *R. (ProLife Alliance) v BBC* [2003] UKHL 23, [2004] 1 A.C. 185; *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 A.C. 167; *R. (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 A.C. 1312; *Miss Behavin' v Belfast City Council* [2007] UKHL 19, [2008] 1 A.C. 719; *Bank*



abnegation of judgment. It means what it says on the tin, which is that in making the requisite assessment at common law or under the HRA the court recognizes the limits of its authority. The respect is accorded to the legislature and executive for epistemic, institutional and constitutional reasons. There is a large body of literature discussing the conceptual and normative foundations of this case law.<sup>25</sup> It did not, however, feature in the terms of reference to IRAL, nor in those of the IHRAR. Nor was it apparent in the MOJ's response to IRAL, an omission that was especially pertinent given that the central feature of this reply was the MOJ's assertion that courts were routinely trespassing on the merits of the decisions being reviewed. The salient point is that if the purpose of the inquiry is, as it assuredly must be, to provide an accurate overall picture of judicial review, then the case law discussed in this paragraph must count, both literally and figuratively, just as much as any instance of judicial overreach.

There is a second, less obvious, aspect to intellectual path dependency when discussing judicial review. It is in some respects the most prosaic. It is the ignorance of the normal every day business of judicial review. Good news is news. Bad news is sometimes even better for those seeking a topic for an article. Standard news is not news at all. We do not write academic articles about another unremarkable 50 cases in the Administrative court. If we did no one would publish it. There is nothing untoward about this, when viewed from the perspective of academic engagement or law journal policy. There is, however, something very wrong if the

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*Mellat v HM Treasury* [2013] UKSC 39, [2014] A.C. 700; *R. (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] A.C. 1355; *R. (Carlile) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] A.C. 945; *General Medical Council v Michalak* [2017] UKSC 71, [2017] 1 W.L.R. 4193; *R. (MA) v Secretary of State for Work and Pensions* [2016] UKSC 58; *R. (Agyarko) v Secretary of State for the Home Department* [2017] 1 W.L.R. 823; *R. (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73, [2019] A.C. 845; *R. (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7.

<sup>25</sup> The literature is listed in P Craig, *Administrative Law* (Sweet & Maxwell, 9<sup>th</sup> edn, 2021) Ch 20, fn 265.

objective is to gain an accurate picture of judicial review. This is more especially so if the assumption is that reform is warranted because of judicial overreach. Viewed from this perspective, the standard news deserves front-page billing. The reality is that a very great majority of judicial review cases are decided on process grounds, or on technical issues of statutory interpretation, and entail individual contestation as to the application of policy, not challenge to the policy itself. This matters a great deal. It is impossible to form an accurate picture of judicial review by ignoring what is statistically the largest share of the case law.

The third instance of path dependency is disregard for circumstances where judicial review can favour the legislature or the executive. Judicial review is not principally about contestation between individuals and the executive, where the balance is between the rule of law and executive efficiency. It is there to ensure, *inter alia*, that the executive complies with the limits to its authority in the enabling legislation, and from the broader system of parliamentary governance. It is wrong to regard administrative law as being based on a transmission belt theory, whereby the courts simply execute the legislative will. It is, in equal measure, mistaken to believe that this has no place in the administrative law schema. To the contrary, it has a role in doctrinal areas such as error of law, control of discretion, and the principle of legality. The courts review decisions to ensure that they comport with what the legislature intended when conveying authority over the designated area to the executive. Judicial review can, moreover, be beneficial to the executive, over and beyond ensuring that it remains within its legislative remit. It can clarify legislation that is vague or ambiguous, thereby providing a more secure foundation for executive action, and provide incentives for decisions

to be carefully thought through.<sup>26</sup> It can, in addition, be beneficial to the executive through teleological interpretation of legislation that facilitates attainment of the legislative purpose.

The final manifestation of intellectual path dependency is that it operates as a one-way ratchet. The discourse is dominated by judicial overreach, thereby ignoring the reverse side of the coin, judicial underreach. Consider the following. Natural justice was properly criticized prior to *Ridge*,<sup>27</sup> because the contours of due process were beset by unwarranted limitations. Public interest immunity prior to *Conway*<sup>28</sup> gave the executive unjustified procedural advantages in litigation. Review for error of law before *Anisminic*<sup>29</sup> was rightly critiqued for the difficulties of the collateral fact doctrine.

Judicial review has expanded in the last sixty years, in part through common law change, and in part through legislation, principally the HRA. The accretion of judicial power does not, however, preclude critique based on judicial underreach. Consider the following. The limited nature of disclosure in UK law stands in stark contrast to the right of access to the file, which is conceptualized in some civil law systems and the EU as part of the rights of the defence. It might, furthermore, be felt that the courts have, in certain areas, accorded too much deference or respect to the legislature or executive when adjudicating on the HRA. Such claims must, like the more common claims of judicial overreach, be sustained by reasoned argument. It might also be felt that the courts have sometimes underreached when applying existing common law principles of judicial review. Consider the most emotive of topics, review of

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<sup>26</sup> L. Platt, M Sunkin and K Calvo, 'Judicial Review as an incentive to change in local authorities in England and Wales' (2010) *Journal of Public Administration Research and Theory* 20:i243-i260; Haddon, Hogarth and Nice, *Judicial Review and Policymaking, the Role of Legal Advice in Government*, Institute for Government, 2021.

<sup>27</sup> *Ridge v Baldwin* [1964] A.C. 40.

<sup>28</sup> *Conway v Rimmer* [1968] A.C. 910.

<sup>29</sup> *Anisminic Ltd v Foreign Compensation Commission*. [1969] 2 A.C. 147.

discretionary power. This is the terrain where contestation as to the proper boundaries of judicial review has been most fierce. To suggest that there might be instances of judicial underreach would seem to invite ‘trouble’. That is as maybe, but this sentiment is, in reality, yet another demonstration of the path dependency that affects our thinking. The sentiment is especially interesting, given that it is commonly expressed with scant, if any, regard for the values that inform judicial review of discretionary power. There are three principal values that underpin judicial intervention in this area.

There is the need to ensure that the executive does not subvert legislative objectives, by using the delegated power unreasonably: the object of a statute providing that employees who are injured at work may be given compensation, or shall be given due compensation, may be subverted if the compensation is rarely given, or if it is parsimonious.

There is the related, but distinct, idea that discretionary power should be reviewed to enhance the democratic process broadly conceived. Legislatures give discretionary power to ministers, agencies and the like, because not all aspects of the regulatory schema can be specified with exactitude in the enabling legislation. Judicial oversight can help to ensure reasoned administration, transparency as to the factors that shape the discretionary choices, and substantive control over the choices thus made.<sup>30</sup>

There is the idea that discretionary power should be controlled to ensure that it does not impose excessive burdens on those affected by it: if a statute empowers an agency to charge those who benefit from the work undertaken by the agency, then review is warranted to ensure that the burdens do not fall excessively on particular individuals, more especially when the beneficiaries are a broader class of people.

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<sup>30</sup> Jerry Mashaw, *Reasoned Administration and Democratic Legitimacy, How Administrative Law Supports Democratic Government* (Cambridge University Press, 2018).

We all accept that the courts should not overreach. We are mindful that they do not substitute judgment on discretionary power, or intervene too intrusively, even if this falls short of substitution of judgment. We should also be mindful of judicial underreach, since if review is too exiguous then the preceding values will not be served.

Thus, we can insist on the default *Wednesbury* test, whereby the claimant must show that the decision was so unreasonable that no reasonable public body would have reached it. We can do so in circumstances where there are no mandatory relevant considerations that the administration must consider. We can insist that the range of considerations chosen by the administration will only be overturned if it is *Wednesbury* unreasonable. We can reduce to vanishing point the deliberative dimension of reasonableness review. We can deny the admissibility of evidence through which such administrative reasoning can be tested. We can be sure to do all of the above. We should then ask whether this constitutes meaningful review, and whether it addresses the three values set out above.

### *The numbers*

We should, by parity of reasoning with the discussion on mining and lumping, also consider ‘running the numbers’. It is considerably easier in this context, since you take away the number that you first thought of. Thus, if quantification of judicial overreach is that 4% of cases can be so regarded, then 96% do not suffer from this infirmity and the results should inform any reform initiatives concerning judicial review. There is, however, a further aspect to running the numbers in this context, more especially in the context of discussion concerning reform of judicial review. We should, when considering whether such reform is warranted, be particularly mindful of cases where courts make clear their understanding as to the proper bounds of the judicial role.

## Judicial Review and Empirical Evidence: The Principle of Legality

The preceding discussion has considered the ways in which analysis of judicial review is affected by mining/lumping and path dependence respectively. The present discussion considers the relation between judicial review and empirical evidence by looking at a particular doctrinal topic, the principle of legality. The MOJ expressed concern about the principle of legality, opining that it allowed the courts to stray beyond the normal contours of judicial review.<sup>31</sup>

The focus is on how we think about such doctrine, when reflecting on reform of judicial review. We must be mindful of the numbers of successful actions viewed against the totality of public law claims; we must be equally mindful of cases where courts have rejected such claims, since ignoring such data gives an unbalanced view of judicial practice; and we must take care when addressing the successful claims to distinguish those that are controversial from those that are not.

### *The numbers*

The numbers are revealing. A Westlaw search framed in terms of the ‘principle of legality’ between January 1<sup>st</sup> 1998 and March 31<sup>st</sup> 2021 generated 609 cases. However, 265 of the cases concerned non-UK courts, most prominently the EU Court of Justice and the European Court of Human Rights, which brings the number down to 344. This number must be further reduced. We are concerned with the principle of legality as enunciated by Lord Hoffmann in *Simms*.<sup>32</sup> The principle of legality is, however, used in diverse ways in the case law. The most prominent

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<sup>31</sup> MOJ Response, [27].

<sup>32</sup> *R. v Secretary of State for the Home Department, ex p Simms* [2000] 2 A.C. 115. See also, *R. v Secretary of State for the Home Department, ex p Pierson* [1998] A.C. 539.

alternative use is to signify that a Convention right must be limited in accordance with law.<sup>33</sup> The principle of legality has also been deployed to signify the need for procedural fairness,<sup>34</sup> that criminal offences must be defined with sufficient specificity;<sup>35</sup> the need for judicial procedures to be fair;<sup>36</sup> the importance that a judge should be unbiased;<sup>37</sup> that a public authority cannot levy money without lawful authority;<sup>38</sup> the need to interpret UK law in conformity with Convention rights;<sup>39</sup> and that discretion must be exercised in accord with the doctrinal legal constraints of public law.<sup>40</sup> These alternative uses of the principle of legality entail circa 40% of 344, which leaves 208 cases that raised the *Simms* principle.

There were 24 successful claims since 1998. There can be some question as to which cases were decided on the basis of the *Simms* principle. I have, however, erred on the generous side in this respect. The figure of 24 cross-correlates, moreover, with the results of a narrower Westlaw search framed in terms of cases applying the *Simms* case. We should reflect on what this figure tells us about the principle of legality in the context of reform of judicial review.

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<sup>33</sup> See, e.g., *R. (Rottman) v Commissioner of Police of the Metropolis* [2002] 2 A.C. 692; *AS (Somalia) v Secretary of State for the Home Department* [2009] UKHL 32; *R. (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35; *R. (Purdy) v DPP* [2010] 1 A.C. 245; *In re Gallagher* [2019] UKSC 3; *R. (Durand Education Trust) v Secretary of State for Education* [2020] EWCA Civ 1651.

<sup>34</sup> See, e.g., *R. (W2) v Secretary of State for the Home Department* [2017] EWCA Civ 2146; *Joint Council for the Welfare of Immigrants v The President of the Upper Tribunal (Immigration and Asylum Chamber)* [2020] EWHC 3103 (Admin).

<sup>35</sup> See, e.g., *R. v Choudary* [2016] EWCA Civ 61 at [50]; *R. v Jogee* [2016] UKSC 8.

<sup>36</sup> See, e.g., *Arkin v Marshall v Housing Law Practitioners Association* [2020] EWCA Civ 620.

<sup>37</sup> See, e.g., *Wozniak v District Court in Gniero Poland* [2020] EWHC 1459 (Admin).

<sup>38</sup> See, e.g., *Vodafone Ltd v Office of Communications* [2020] Q.B. 200.

<sup>39</sup> See, e.g., *GM (Sri Lanka) v The Secretary of State for the Home Department* [2019] EWCA Civ 1630 at [27].

<sup>40</sup> See, e.g., *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 4)* [2016] UKSC 35 at [10].

The figure of 24 constitutes slightly more than one per year, which is very small viewed against the totality of cases on judicial review per annum. It would then have to be shown which of these cases constituted judicial overreach. This will be examined below, but suffice it to say that most such cases clearly do not fall into this category.

*The concept: non-application*

It is important to reflect on the substantive use of the *Simms* principle. Jason Varuhas has raised a number of interesting issues in this respect.<sup>41</sup> The analysis is, nonetheless, incomplete, because Varuhas gives no considered attention to cases where the courts have declined to apply the *Simms* principle, which exceed those where the claimant was successful. The courts consider carefully whether the principle is warranted in the light of the relevant legislation. They routinely reject application of the *Simms* principle, either because the claimant does not possess a right that falls within the remit of the principle, or because the legislation is not general or ambiguous. Consider the following examples, which could be multiplied many times over.<sup>42</sup>

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<sup>41</sup> Jason Varuhas, “The Principle of Legality” (2020) 79 CLJ 578.

<sup>42</sup> See, e.g., *R. v Worcester CC* [2000] HRLR 702; *Colley v Council for Licensed Conveyancers* [2001] EWCA Civ 1137 at [44]; *R. v Saunders* [2001] EWCA Crim 2860 at [8]; *R. v Benjafield* [2003] 1 AC 1009 at [19]; *R. (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1 at [29]; *R. (Roberts) v Parole Board* [2005] 2 A.C. 738; *R. (Parminer Singh) v Chief Constable West Midlands Police* [2006] EWCA Civ 1118; *MT (Algeria) v Secretary of State for the Home Department* [2007] EWCA Civ 808; *R. (Juncal) v Secretary of State for the Home Department* [2007] EWHC 3024 (Admin); *R. (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] EWHC 2549 (Admin); *R. (GI) v Secretary of State for the Home Department* [2012] EWCA Civ 867 at [15]; *AJA v Commissioner of Police of the Metropolis* [2013] EWCA Civ 1342; *R. (W, X, Y, and Z) v Secretary of State for Health* [2014] EWHC 1532 (Admin) at [68]; *R. (Mohammed Gul) v Secretary of State for Justice* [2014] EWHC 373 (Admin) at [48]; *Browning v Information Commissioner*



In *Nicklinson*, the Court of Appeal rejected application of the *Simms* principle because there was no right to commit suicide, the legislation was neither ambiguous nor general and Parliament fully understood what a blanket ban on assisted suicide meant and why it was being imposed.<sup>43</sup> In *Coughlan*, the Court of Appeal declined to apply the *Simms* principle because it held that the contested measure did not abrogate the right to vote, but merely regulated the way it could be demonstrated and that this was directly contemplated by the legislation.<sup>44</sup> In *London Christian Radio*, the Court of Appeal held that section 321 of the Communications Act 2003 was not general or ambiguous, and that there was therefore no room for the *Simms* principle.<sup>45</sup>

In *Villers*, the Supreme Court held that the relevant legislation was intended to be a comprehensive code to govern jurisdiction for maintenance claims with a cross-jurisdictional dimension within the United Kingdom, the corollary being that the *Simms* principle was

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[2014] EWCA Civ 1050; *Moohan v Lord Advocate* [2014] UKSC 67; *R. (W) v Secretary of State for Health (British Medical Association intervening)* [2015] EWCA Civ 1034 at [55]; *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469; *Kamara v Southwark London Borough Council* [2018] EWCA Civ 1616 at [24]; *Roszkowski v Secretary of State for the Home Department* [2017] EWCA Civ 1893; *R. (Richards) v Teesside Magistrates' Court* [2015] EWCA Civ 7; *R. (A) v Secretary of State for Health* [2017] EWHC 2815 (Admin); *Southwark London Borough Council v Transport for London* [2018] UKSC 63; *R. (El Gizouli) v Secretary of State for the Home Department* [2019] 1 WLR 3463; *R. (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605; *R. (Abidoye) v Secretary of State for the Home Department* [2020] EWCA Civ 1425; *R. (Z) v Hackney LBC* [2020] UKSC 40; *R. (Kaitey) v Secretary of State for the Home Department* [2020] EWHC 1861 (Admin); *For Women Scotland Ltd v Lord Advocate* [2021] CSOH 31; *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2021] EWCA Civ 330; *R. (Project for the Registration of Children of British Citizens) v Secretary of State for the Home Department* [2021] EWCA Civ 193; *R. (CI) v Secretary of State for the Home Department* [2021] EWHC 242 (Admin); *R v R* [2021] EWCA Crim 35.

<sup>43</sup> *R. (Nicklinson) v Ministry of Justice* [2013] EWCA Civ 961 at [66].

<sup>44</sup> *R. (Coughlan) v Minister for the Cabinet Office* [2020] EWCA Civ 723.

<sup>45</sup> *R. (London Christian Radio Ltd) v Radio Advertising Clearance Centre* [2013] EWCA Civ 1495 at [24].

inapplicable.<sup>46</sup> In *Belhaj*, the Supreme Court rejected the argument that the Justice and Security Act 2013, section 6, should be read subject to the principle of legality, because it represented detailed legislative specification as to the balance between process rights and public security, as mediated through the closed material procedure.<sup>47</sup> In *Gillan*, the House of Lords concluded that the principle of legality had no application to legislative stop and search powers. This was because even if the legislation infringed fundamental human rights, it did do by detailed and specific provisions. There were, moreover, safeguards in the legislation.<sup>48</sup>

### *The concept: application*

We turn now to cases where the concept has been applied. There are undoubtedly issues concerning the rights that trigger the principle of legality. Philip Sales and Jason Varuhas have made valuable points in this respect.<sup>49</sup> Thus, for example, some might question application of the principle to legal professional privilege<sup>50</sup> and confidentiality.<sup>51</sup> I do not find such cases particularly problematic, but it is important to recognize that the same conclusion might well be reached without the *Simms* principle. Thus, it is legally axiomatic that contested action must fall within the empowering legislation, which necessarily requires interpretation as to what the legislation is deemed to permit.

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<sup>46</sup> *Villiers v Villiers* [2020] UKSC 30 at [36].

<sup>47</sup> *R. (Belhaj) v Director of Public Prosecutions* [2018] UKSC 33 at [14], [41]-[42].

<sup>48</sup> *R. (Gillan) v Commissioner of Police of the Metropolis* [2006] 2 A.C. 307 at [13]-[15].

<sup>49</sup> P. Sales, “A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998” (2009) 125 LQR 598; Varuhas, “Principle of Legality”, 580-590.

<sup>50</sup> *R. (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563; *Shlosberg v Avonwick Holdings Ltd* [2016] EWCA Civ 1138.

<sup>51</sup> *R. (Ingenious Media Holdings plc) v Revenue and Customs Commissioners* [2016] UKSC 54.

It is, moreover, important to recognize that many of the limited number of successful claims are straightforward applications of the *Simms* principle. They are cases in which general or ambiguous statutory wording impinges on an established liberty right.<sup>52</sup> Thus, in *GG* the Court of Appeal held that the fundamental common law rights of personal security and personal liberty prevented a search of an individual without explicit statutory authority; that general statutory words could not take away fundamental rights unless it was clear that Parliament thus intended; and that section 1 of the Prevention of Terrorism Act 2005 did not suffice in this respect.<sup>53</sup> In *B (A Minor)*, the House of Lords applied the *Simms* principle to quash a criminal conviction: mens rea was an essential element of every criminal offence unless Parliament expressly or by necessary implication provided to the contrary.<sup>54</sup> In *Welsh Ministers v PJ*, the Supreme Court held that it was not permissible for a clinician to impose conditions in a community treatment order that would amount to deprivation of a patient's liberty, and that general statutory words could not authorize such a deprivation.<sup>55</sup> In *B (Algeria)*, the Supreme Court held that since a grant of bail could be subject to statutory conditions that severely curtailed personal liberty, a statutory power should be construed in accordance with the

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<sup>52</sup> See, e.g., *A v Secretary of State for the Home Department (No 2)* [2006] AC 221; *B v Secretary of State for Justice* [2011] EWCA Civ 1608 at [53]; *R. (Veolia ES Nottinghamshire Ltd) v Nottinghamshire County Council* [2010] EWCA Civ 1214 at [110]-[111]; *M v Secretary of State for Justice* [2018] UKSC 60; *R (DSD) v Parole Board* [2019] QB 285; *R. (W (A Child)) v Secretary of State for the Home Department* [2020] EWHC 1299 (Admin) at [34]-[36], [99].

<sup>53</sup> *Secretary of State for the Home Department v GG* [2009] EWCA Civ 786.

<sup>54</sup> *B (A Minor) v DPP* [2000] 2 A.C. 428; *R. v Kumar* [2004] EWCA Crim 3207; *R. v Hughes (Michael)* [2013] UKSC 56.

<sup>55</sup> [2018] UKSC 66 at [24]-[26].

fundamental principle that Parliament was presumed not to intend interference with personal liberty without making such an intention clear.<sup>56</sup>

The limited number of successful claims includes cases where the legislation impinges on fundamental process rights. Thus, in *Ahmed* the Supreme Court held that the general wording of the United Nations Act 1946, section 1, did not empower the executive to override fundamental rights, including rights of procedural fairness.<sup>57</sup> In *Anufrijeva*, the House of Lords held that notice was a central requirement of natural justice, and that in the absence of express language or necessary implication, general statutory words could not override fundamental rights.<sup>58</sup>

#### *The concept: contested application*

Jason Varuhas contends that there is, however, a more troubling dimension to the case law, which he terms the augmented principle of legality. The ‘suspect’ case law is said to be *Daly*, *UNISON* and *Miller (No 2)*. The argument is that the contested legislation is sufficiently specific to curtail rights, but the court imposes a further condition as to proportionality, which is said to be unwarranted. The argument is wrong. To the contrary, the case law entails a diminished, not augmented, application of the principle of legality.

In *Daly* the House of Lords held that a person sentenced to a custodial order retained the rights of access to a court, to legal advice, and to communicate confidentially with a legal adviser under the seal of legal professional privilege; that such rights could only be curtailed

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<sup>56</sup> *R. (B (Algeria)) v Special Immigration Appeals Commission (Bail for Immigration Detainees intervening)* [2018] UKSC 5, [29]; *Secretary of State for the Home Department v SM (Rwanda)* [2018] EWCA Civ 2770 at [40]-[41].

<sup>57</sup> *Ahmed v Her Majesty's Treasury* [2010] UKSC 5.

<sup>58</sup> *R. (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 A.C. 604.

by clear and express words; and then only to the extent reasonably necessary to meet the ends that justified the curtailment.<sup>59</sup> Lord Bingham's reasoning was premised on section 47(1) of the Prison Act 1952, which was general in its wording. Their Lordships could, in accord with the *Simms* principle, have held that this statutory provision was general and ambiguous and hence did not authorize intrusion with legal professional privilege. Lord Bingham was, however, willing to allow this general statutory provision to have some impact, but held that it did not authorize excessive intrusion, and thus the contested prison regulations were invalid.<sup>60</sup> This was not, therefore, a case where the legislation was sufficiently specific to be compatible with the principle of legality, and the court then added a proportionality requirement. To the contrary, the *Simms* principle was applied in a diminished manner, to enable general and ambiguous legislation to impact on rights, provided that the impact was not unduly excessive.<sup>61</sup> This did not, moreover, touch the possibility that in some other instance Parliament might truly pay the political cost and frame the relevant legislation to make it clear that it was countenancing intrusion howsoever excessive, although it would undoubtedly be subject to an HRA claim.

For Varuhas, *UNISON*<sup>62</sup> brought back the augmented principle of legality after a long sleep of 16 years post *Daly*. The argument is that the Supreme Court regarded proportionality as an essential attribute of the principle of legality, hence the conclusion that it thereby

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<sup>59</sup> *R. (Daly) v Secretary of State for the Home Department* [2001] 2 A.C. 532.

<sup>60</sup> *Daly* [2001] 2 A.C. 532 at [21].

<sup>61</sup> The reasoning in the case is also explicable because the House of Lords considered the case both in relation to the common law and in relation to an HRA claim. Their Lordships recognized that the HRA claim would feature a government defence pursuant to Article 8(2) ECHR, and the reasoning was designed to address this in relation to the common law claim, as well as the HRA claim.

<sup>62</sup> *R. (UNISON) v Lord Chancellor* [2017] UKSC 51.

augmented that principle, which was, for Varuhas, dangerous and unwarranted. Space precludes detailed analysis. Suffice it to say the following. The *UNISON* decision has been controversial, although it was in my view correct. The Supreme Court proceeded in a two-step inquiry. Step one, the constitutional right of access to court meant that it could only be curtailed by clear and express statutory enactment. Step two, the legislation would be interpreted as authorising only such intrusion on the right of access as was reasonably necessary to fulfil the statutory objective, and this would not be interpreted to be greater than justified by the measures that the legislation was intended to serve. Step two was not, however, some unwarranted addition. To the contrary, it is part and parcel of statutory interpretation. We interpret a statute and decide, inter alia, what limits of the right are necessary to attain the statutory objectives. We interpret the legislation consistently with those objectives, but not beyond them. The reasoning in step two is, therefore, a legitimate part of ordinary statutory interpretation and is not dependent on the *Simms* principle.

The third of the suspect cases concerning the augmented *Simms* principle is *Miller (No 2)*.<sup>63</sup> The Supreme Court decision had, however, nothing to do with the principle of legality, as connoted by *Simms*. The judgment referred to *UNISON* and the use of constitutional principles when delineating the ambit of statutory power, which the Supreme Court held could also be used to demarcate the ambit of prerogative power. This has, however, nothing to do with the principle of legality as articulated in *Simms*. To the contrary, it reveals the dangers of elliptical use of terminology. The Supreme Court was determining the boundaries of the contested prerogative power. It used constitutional principles as part of that demarcation. This has been debated in the relevant literature. The salient point for present purposes is that if you do not think that it was legitimate for the court to consider the constitutional principle of parliamentary

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<sup>63</sup> *R. (Miller) v Prime Minister, Cherry v Advocate General for Scotland* [2019] UKSC 41.

accountability then you had better reflect carefully on the consequences, given that this principle is the foundation for the respect/weight given by the courts to the legislature and the executive.

Varuhas also argues that there is a further troubling dimension to the *Simms* principle, which he terms the proactive principle of legality, the hallmark being that in cases concerned with ouster clauses, such as *Privacy International*,<sup>64</sup> the reviewing court reads down provisions in legislation with scant regard for their natural meaning, in order to retain the courts' supervisory jurisdiction. This is not the place for detailed exegesis of ouster clauses. Suffice it to say the following. The case was controversial, as attested to by the dissent and the judgment in the Court of Appeal, which revealed differences of opinion to the majority as to how far the antipathy to ouster clauses should be taken where the primary decision-maker was a body such as the Investigatory Powers Tribunal. However, judicial antipathy to such clauses pre-dates the *Simms* principle by approximately 300 hundred years.

### *Conclusion*

It is fitting to reflect on the foregoing in the context of reform of judicial review. The number of successful claims was slightly more than one per year; the very great majority of these were uncontentious and fell four-square within the ambit of the *Simms* principle; and there were more cases where the courts refused to apply the principle because there was no requisite right, or because the legislation was not general or ambiguous. This was definitively not a story about judicial overreach.

Consider then the more contentious cases concerning the 'augmented' legality principle. The argument is wrong for the reasons set out above. There are, in any event, but 2

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<sup>64</sup> *R. (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22,

decisions<sup>65</sup> that are said to exemplify augmentation of the legality principle, and they were separated by a long sleep of 16 years. The casual observer might well wryly conclude that if the courts were intent on judicial overreach they were not very good at it. This is but 2 cases out of 144 that raised the *Simms* principle during these years, which constitutes 1.4% of the case law; it is but .015% of the public law cases during this period, predicated on 800 cases per annum. The very idea that this constitutes evidence of systemic judicial overreach does not withstand examination, more especially given that during these 16 years the courts rejected many claims based on the *Simms* principle. The idea of serious judicial overreach is further undermined by recognition that what was described earlier as step 2 in the judicial reasoning would in any event be undertaken in the context of an HRA analysis, as acknowledged in *Daly* and *UNISON*.

In relation to the proactive legality principle, it can be accepted that *Privacy International* and *Evans* were both controversial cases. Their salience in broader discourse concerning reform of judicial review should, nonetheless, be kept in perspective. This is because *Privacy International* was the first major ouster clause case post-*Anisminic* and because *Evans*, while binding on lower courts on the specific legal issue, has been distinguished in other cases.<sup>66</sup>

## Conclusion

The legislative outcome of the IRAL, IHRAR and MOJ response remain to be seen, although the government stated in the Queen's Speech that it intended to introduce legislation to rebalance relations between the judiciary, the executive and the legislature. There are

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<sup>65</sup> *R. (Miller) v Prime Minister, Cherry v Advocate General for Scotland* [2019] UKSC 41 does not constitute such an instance, and Varuhas is equivocal about regarding it as so.

<sup>66</sup> See, e.g., *Roszkowski v Secretary of State for the Home Department* [2017] EWCA Civ 1893.



undoubtedly changes that would improve judicial review, including suspended quashing orders and prospective remedies that could be used in exceptional circumstances. The more far-reaching changes posited by the MOJ should not be taken forward, because there is no empirical warrant for change of this magnitude.

In more general terms, it is important that reform be driven by evidence, not by supposition or allegation. There will always be controversial cases in any legal system. We should be mindful of instances where courts might have gone too far. This does not betoken systemic judicial overreach, or serious evidence thereof. If it is felt that this exists in relation to UK courts then the evidence must be duly furnished, in accord with the criteria adumbrated above. I do not believe that the numbers support any such allegation, nor have I seen anything that approximates to sound evidence to support such a conclusion. If you believe to the contrary then put the evidence on the table and we can consider it. If you do not, or cannot do so, then you need to stop pretending that the infirmity exists. You cannot play both sides of the street at the same time, which in this instance connotes wishing to be taken seriously as an academic, but being unwilling to furnish the evidence to support such claims that withstands academic scrutiny.