Remedies in Judicial Review: Confronting an Intellectual Blindspot

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The year is 2020. A group of public law scholars meet (over Zoom, of course – there is a pandemic on!) to discuss the terms of reference underpinning the Independent Review of Administrative Law (IRAL).[1] On the first three questions, dealing with codification, justiciability and the grounds of review, discussion is extremely lively. Then, the convenor directs discussion to question 4: 'whether procedural reforms to judicial review are necessary… to "streamline the process."' Suddenly, the frequency with which zoom hands are offered dips. The issues raised by this question – disclosure and candour, time-limits, relief, costs – are, after all, the stuff of practice, not of scholarly debate or academic journals. This is an imaginary story. But I suspect it reflects a common experience. The story also reflects a simple but important reality: some aspects of judicial review are seen as more interesting, are more rigorously researched, and are generally far better understood by scholars than others.[2]

If a prize were available for most neglected area of judicial review, remedies would surely be a firm nominee.[3] It has been said that remedies in public law litigation are treated as an 'afterthought.'[4] 'Viewed as "practical" but not necessarily "exciting,"'[5] remedies tend to be 'relegated to the "if I have room" or "if I must" categories of most student and teaching timetables,'[6] textbooks and, indeed, judgements. This was certainly reflected in the recent IRAL and related Gross Review of the Human Rights Act[7] processes. Although small flurries of research have emerged on important practical remedial issues, such as judicial treatment of Convention-inconsistent statutory instruments[8] and the extent of common law powers to

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[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915624/independent-review-admin-law-terms-of-reference.pdf (accessed 6 October 2021).

[2] Joe Tomlinson, 'Do We Need a Theory of Legitimate Expectations?' (2020) 40(2) Legal Studies 286, 297-300; Joe Tomlinson, Katy Sheridan and Adam Harkens, 'Judicial review evidence in the era of the digital state' [2020] PL 740.

[3] To borrow from Adam Perry, 'The Flexibility Rule in Administrative Law' (2017) 76(2) CLJ 375, 375.

[4] Carolyn Mouland, 'Remedying the Remedy: *Bedford*'s Suspended Declaration of Invalidity' (2018) 41(4) *Manitoba Law Journal* 281, 317.

[5] Beverley McLachlin, 'Rights and Remedies - Remarks' in Robert J Sharpe and Kent Roach (eds), *Taking Remedies Seriously* (Ottowa: Canadian Institute for the Administration of Justice 2010), 30.

[6] Ibid.

[7] https://www.gov.uk/guidance/independent-human-rights-act-review.

[8] Joe Tomlinson, Lewis Graham and Alexandra Sinclair, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?' *UK Constitutional Law Blog* (22nd February 2021).

suspend quashing orders,[9] it is striking that there was no published research on these topics in England and Wales before they became utterly urgent.

A core aim of this paper is to encourage public law scholars to ask more questions about, and engage more closely with, judicial review remedies. The bulk of the paper focuses on one reason why the time is especially ripe for more sustained focus: significant recent and ongoing Governmental interest in legislative reform. There are, however, other reasons to lament the relative lack of academic engagement with remedies, some of which are discussed towards the end of the paper.

The paper is divided into six sections. Section 1 begins with a brief discussion of recent and ongoing Governmental interest in reforming remedies in judicial review. Section 2 then introduces a study of remedial discretion on which the paper will repeatedly draw. This study involved a close reading of 438 successful judicial review challenges, decided across a recent four-and-a-half year period. The study is offered as an illustration of the contributions scholarly research on remedies can add to debate about reform. Parts 3-5 address three important questions, drawing on the study for insights. First, concerning recent reform, whether there are important lessons to be learnt from the judicial experience to date with legislative amendments to remedial discretion introduced in 2015?[10] Secondly, concerning current reform, whether the study suggests anything of value about proposed reforms contained in the Judicial Review and Courts Bill? Thirdly, concerning future reform, are there remedial issues not presently on the reform and research agendas which ought to be? Part 6 finally concludes with a brief discussion of two further reasons for scholars to engage more with remedies. Judicial review remedies may well have fallen from the agenda accidentally, rather than consciously. There is, furthermore, a long list of underexplored, but deeply practical legal questions, not directly related to legislative reform, which would benefit from close scholarly consideration.

1. Remedies & Reform

In July 2021, the UK Government published its much-anticipated Judicial Review & Courts Bill (JRCB). For the most part,[11] the public law community breathed a sigh of relief: 'after much huffing and puffing the Government is not going to blow the house down.'[12] A pre-Bill consultation had suggested the Government might pursue a dramatic range of measures.[13] In the end, the contents of the Bill are modest and limited to implementing two recommendations

[9] Lewis Graham, 'Suspended and prospective quashing orders: the current picture' *UK Constitutional Law Blog* (7 June 2012).
[10] Criminal Justice and Courts Act 2015, s.84 (amending Senior Courts Act 1981, s.31).
[11] There were, of course, those who pushed more radical reforms not pursued by the Bill. See e.g. Richard Ekins, *Protecting the Constitution* (Policy Exchange 2019).
[12] Tom Hickman, 'Quashing Orders and the Judicial Review and Courts Bill' *UK Constitutional Law Blog* (26 July 2021).
[13] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975301/judicial-review-reform-consultation-document.pdf (accessed 12 September 2021).

proposed in the IRAL report. First, partial[14] abolition of *Cart* judicial reviews.[15] Second, and more relevantly, tweaks to the courts' remedial discretion to issue quashing orders.[16]

Although much less objectionable than it might have been, for many the JRCB has still left a nasty taste. There are aspects of the Bill's content which have generated concern, some of which are discussed in more depth below.[17] The public and scholarly debate which has surrounded both the JRCB and IRAL has also been, at times, divisive and emotive.[18] There have also been hints from senior government Ministers that the JRCB is far from the end of the story.[19] Perhaps the aspect of the Bill which many scholars have found hardest to swallow, however, is the nature of the process which preceded it. Many consultees, in both the pre- and post-IRAL iterations of consultation, took the opportunity to comment on the hurried nature of the process, a perceived lack of transparency and the framing of many of the consultations' questions. Indeed, there was even talk for a period of a judicial review of the adequacy of consultation on potential reforms to judicial review.

Two aspects of the process leading to the JRCB are especially relevant to this paper. First, IRAL and the JRCB are not isolated events. Only six years ago the UK Government concluded a similarly broad review[20] of judicial review. As in 2020-21, the 2013-2015 process saw an initially broad package of proposed reforms result in comparatively narrow changes. Most relevantly,[21] s.84 of the Criminal Justice and Courts Act 2015 now directs the High Court to refuse relief where it is 'highly likely that the outcome for the applicant would not have been substantially different,'[22] in the absence of 'reasons of exceptional public interest.'[23] This reform was not completely novel. The courts have long recognised a principle, known as the *Simplex* principle,[24] that relief may be refused where a legal error clearly has no bearing on an outcome. Indeed, the *Simplex* principle continues to govern the judicial approach in 'statutory reviews,'[25] which are untouched by the 2015 reforms. In the case of AJRs, however, the 2015 reforms both transform judicial discretion into a presumptive duty and lower the threshold for

[14] Judicial Review and Courts Bill 2021, clause 2(4) will retain judicial review for some categories of legal error including 'fundamental breaches of natural justice.'
[15] *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663; Joanna Bell, 'The relationship between judicial review and the Upper Tribunal: what have the courts made of *Cart*?' [2018] PL 394.
[16] See part 4.
[17] See part 4.
[18] Compare e.g. Ekins (n 11) with Mark Elliott, 'Judicial review reform I: nullity, remedies and constitutional gaslighting' (6 April 2021), available: Judicial review reform I: Nullity, remedies and constitutional gaslighting – Public Law for Everyone (accessed 6 October 2021).
[19] Maximilian Steinbeis, 'Lean Authoritarianism' *Verfassungblog* (3 September 2021). Available: Lean Authoritarianism – Verfassungsblog (accessed 6 October 2021); Suella Braverman QC MP, 'Judicial Review Trends and Forecasts 2021: Accountability and Constitution' (lecture delivered at 2021 Public Law Project Conference (19 October 2021)).
[20] Judicial review: proposals for reform - GOV.UK (www.gov.uk) (access 6 October 2021).
[21] Criminal Justice and Courts Act 2015, s.84(2) and (4) introduce similar changes to the grant of leave to seek judicial review by the High Court and the award of remedies by the Upper Tribunal. The 2013-2015 review process also lead to procedural changes in the planning context, including the creation of a Planning Court. See David Elvin QC, 'The Planning Court' (2014) 19(2) *Judicial Review* 98.
[22] Ibid, s.84(1)(2A).
[23] Ibid, s.84(1)(2B).
[24] *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [1988] 3 PTSR 1041 (CA).
[25] Especially Town and Country Planning Act 1990, s.288.

refusal of relief from a test of inevitably to one of high likelihood.[26] For these, and other reasons, the CJCA reforms were enacted among a great deal of resistance.[27]

Despite their recency, the pre-JRCB process barely engaged with the events of 2013-2015. Indeed, the Government referred questions to IRAL, such as whether the test of standing should be narrowed, which had been addressed and answered negatively only a few years earlier. Perhaps most concerningly, further reform to remedies is now being pursued without the benefit of a comprehensive review of the 2015 reforms. As the IRAL report commented, in the absence of a detailed study, there was 'no consensus' among consultees 'as to [their] impact.'[28] Legislative reform has not, however, been very common in the English and Welsh administrative law context, where the courts have largely been left to develop judicial review' principles and policy. There may be important lessons to be learnt from this unusual intervention.

Secondly, and relatedly, the approach to information-gathering used in IRAL and by the MoJ relied heavily on the submission of evidence by consultees. Despite the exceedingly tight timeframes, a large range of public authorities, professional organisations, non-government organisations, research groups and individuals took part.[29] Nonetheless, the evidence gathered in this process was necessarily incomplete: much depended on consultees having researched and given detailed thought to the various aspects of judicial review under consideration.

This inevitably injected an element of luck or randomness into the pre-JRCB process. To repeat an important point stressed in the introduction, some aspects of judicial review are understood far better than others. This had the consequence that far more evidence was available on some subjects. For instance, a dearth of evidence on costs left the IRAL panel simply unable to say anything substantive, beyond issuing a call for further research.[30] There was also an element of randomness in the process' outcome. Put bluntly, the two reforms in the JRCB are being pursued because *they seemed to the IRAL panel to be a good idea*.[31] This, of course, does not mean that they are *not* good ideas. But it is far from clear that a less time-restrained process, informed by a broader range of evidence, would have identified *Cart* challenges and quashing orders as the most pressing issues faced by judicial review today.

These episodes highlight very clearly the importance of ongoing, rigorous scholarly study of judicial review. This is true generally, but it is especially true of remedies. Legislative reform to remedial discretion appears to be becoming something of a regular occurrence. The reasons for this are undoubtedly varied and debatable, but there is perhaps a sense that remedies are low-hanging fruit. To legislate on justiciability or the grounds of review would involve a

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[26] *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] PTSR 1446, [272].
[27] See e.g. Ben Jaffey & Tom Hickman, 'Loading the Dice in Judicial Review: The Criminal Justice and Courts Bill 2014' *UK Constitutional Law Blog* (6th February 2014); Conor Crummey, 'Why Fair Procedures Always Make a Difference ' (2020) 83(6) MLR 1221.
[28] *The Independent Review of Administrative Law* (March 2021) (IRAL), [7]
[29] See e.g. Collection of responses to the Independent Review of Administrative Law (IRAL) | UKAJI (accessed 12 September 2021).
[30] IRAL (n 28), 77-79.
[31] See ibid, 7 which states ambiguously that the panel 'received a request from judges to look at *Cart* judicial reviews.'

major restructuring of the legal landscape[32] and/or generate immense political controversy. Remedies are not the stuff of high academic debate, are a less emotive topic and can be tweaked without major overhaul. At the same time, however, they are of immense practical importance to both parties and others. When used well, judicial review remedies can provide an effective mode of redressing unlawful public authority conduct. When used badly, they can denigrate the significance of a finding of unlawfulness or produce unintended and unwieldly legal consequences.

The next four parts of this paper offer a worked illustration of the light scholarly research on remedies can shed on debates about remedial reform. This example stems from a study of the exercise of remedial discretion across a substantial body of successful judicial review challenges. Part 2 introduces the study. Parts 3-5 then draw out its implications for three important questions about recent, current and potential future reforms.

2. A Study of Remedies

This paper stems from a study borne of intellectual curiosity. The pre-JRCB process highlighted significant holes in the shared understanding of judicial review. One of the most gaping concerns the relative dearth of scholarly literature on remedies. There is a lively, ongoing debate about the legal status of unlawful administrative action[33] and certain remedial issues,[34] especially concerning powers conferred by the Human Rights Act have generated valuable literatures.[35] There are also important, long-standing practitioner works on the remedies in public law.[36] But, by and large, there has been little detailed academic study or discussion of the role(s) played by remedies in modern judicial review,[37] or of how the courts decide to award them, especially when compared with other aspects of judicial review. The study described in this section was directed at this scholarly blindspot. It was undertaken to obtain a clearer idea of how remedial discretion is exercised in judicial review and, put simply, to see what could be seen.

The study is based on a sample of successful judicial review challenges decided in the period between 1st January 2017 and 30th June 2021. The aim was to use as recent a sample as possible, so as to incorporate new developments. One obvious drawback of using so recent a sample is that decisions may be subject to successful appeal. The findings have, however, been periodically updated to accommodate appeals. Cases were located by searching the BAILII

[32] See e.g. Cora Hoexter, 'Administrative Justice and Codification' in Joe Tomlinson and others (eds), *Oxford Handbook of Administrative Justice* (OUP 2021).
[33] E.g. Christopher Forsyth, 'The Rock and the Sand: Jurisdiction and Remedial Discretion ' (2013) 18(4) *Judicial Review* 360; Thomas Adams, 'The Standard Theory of Administrative Unlawfulness' (2017) 76(2) CLJ 289
[34] For instance, on the need to exhaust alternative remedies see Clive Lewis, 'The Exhaustion of Alternative Remedies in Administrative Law' (2009) 51(1) CLJ 138.
[35] For instance see the literature on section 4 declarations of incompatibility (e.g. Shona Wilson Stark, 'Facing Facts: Judicial Approaches to Section 4 of the Human Rights Act 1998' (2017) 133(4) LQR 631) and human rights damages (e.g. Jason Varuhas, *Damages and the Human Rights Act* (Hart 2016)).
[36] E.g. Clive Lewis, *Judicial Remedies in Public Law* (6th edn, Sweet & Maxwell 2020); Jeremy Woolf, *Zamir & Woolf: The Declaratory Judgment* (4th edn, Sweet & Maxwell 2011).
[37] The same was not true in the early-mid 1900s. See discussion in the conclusion below.

databases[38] relating to each of the Administrative Court, Court of Appeal and Supreme Court. Challenges which (i) proceeded as AJRs, (ii) against a body other than a criminal court and (iii) resulted in success for the applicant on at least one ground were included. To elaborate on (ii), challenges to decisions by Magistrates and the Crown Court have not been included in the sample. While judicial review plays a continued important role in the criminal law context,[39] the focus of this paper is on judicial review of administrative and executive action.

The search parameters resulted in a sample of 438 cases, including 27 UK Supreme Court,[40] 68 Court of Appeal and 343 High Court (Administrative and Planning division) decisions. It is simply not possible, due to the limits of the informational landscape, to know with certainty what proportion of challenges falling within the parameters of the study have been included.[41] There are, however, indications that the great majority of successful judicial reviews have been included. According to the MoJ interactive data tool, the number of non-criminal judicial review challenges resulting in a 'found_claimant' outcome was 103 and 110 for claims lodged in 2018 and 2017 respectively.[42] According to these figures, just over a hundred non-criminal judicial reviews of those lodged each year result in success.[43] The sample underlying the study details an average of 97 successful cases decided per year. In any event, the aims of this paper are not to generate a comprehensive statistical analysis.[44] The study is a scoping exercise, designed to illustrate the value of ongoing scholarly research on remedies.

It is important to note that judicial review is not the exclusive province of the Administrative and appellate courts. The Upper Tribunal (UT) now hears many judicial review challenges, especially in the immigration and asylum context,[45] and the county court conducts statutory reviews of housing decisions.[46] This study does not consider remedies in either context, though they may be worthy subjects of future study.[47] Similarly, this study focuses on final, not interim, remedies.[48] It is also important to note that this study focuses on the grant or refusal of relief in successful judicial reviews, following a substantive hearing. It does not

[38] BAILII was chosen over other databases, primarily because it facilitated a straightforward search of cases decided by relevant courts in the time-period of the study. An earlier research project found 37 judicial review judgments in a one-year period reported on Westlaw, but not on BAILII. However, of these, many fell outside the parameters of the study, either because unsuccessful or because they concerned criminal courts. (See Joanna Bell and Elizabeth Fisher, 'Exploring a Year of Administrative Law Adjudication in the Adminstrative Court' [2021] PL 505, footnote 8).

[39] *Belhaj v Director of Public Prosecutions* [2018] UKSC 33, [2019] AC 593, [16]; David Feldman, 'Changing Boundaries: Crime, Punishment and Public Law' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2019).

[40] Although the primary focus of the study is English and Welsh case law, some challenges heard by the Supreme Court originated in Northern Ireland (e.g. *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27, [2019] 1 All ER 173).

[41] The main reason is that the MoJ Civil Justice Quarterly Statistics detail cases by the year in which they are lodged not decided.

[42] Judicial Review Interactive Data Tool (mojanalytics.xyz) (accessed 6 October 2021). Note that the numbers recorded for the later years are smaller. This is unsurprising given that many cases lodged in these years may still be awaiting resolution.

[43] See also IRAL (n 28), 173-175.

[44] See further discussion in part 5.A. below.

[45] Tribunals, Courts and Enforcement Act 2007, ss.15.

[46] Housing Act 1996, s.204.

[47] See e.g. *Secretary of State for the Home Department v R (AM)* [2018] EWCA Civ 1815, [92], concerning the Upper Tribunal's approach to the award of a mandatory order.

[48] See Kent Roach, *Remedies for Human Rights Violations* (CUP 2021), chapter 3.

encompass cases in which permission to proceed is refused on the grounds, for instance, that the applicant has not exhausted alternative remedies or there is a high likelihood the alleged legal defect made no difference.[49] Given the infrequency with which permissible decisions are made publicly available,[50] such a study would face immense practical challenges.

Cases which fell within the parameters of the study were closely read, and several details were collated for each case. In particular, the following was tracked:

- Court
- Defendant
- Area of decision-making
- Decision, measure or omission being challenged
- Successful ground(s)
- Remedy(/ies)
- Discussion of the 2015 reforms
- Further notable features

It is important to stress that this paper is not *about* the study as such. It is first and foremost a call to scholars to show more intellectual curiosity about judicial review remedies. Parts 3-5 will draw on the study as a mode of illustrating some of the important contributions scholarly research can make to ensuring debate about reform is properly informed.

The reader should not, in other words, expect case lists and tables, detailing every element of the study. One downside of this approach is that there are many interesting findings from the study which there will not be space to discuss. There will not, for instance, be opportunity to comment on the relatively widespread role of monetary damages across the sample (64 cases, including 54 cases in which damages were awarded for false imprisonment[51]). Nor is there space to discuss the significance of the complete absence of prohibiting orders (0 cases[52]) and scarcity of injunctions (1 case[53]) and mandatory orders (12 cases[54]). These issues, however, will simply have to await more detailed consideration. Indeed, the paper is intended to highlight the benefits of scholars asking more questions about remedies in judicial review. It does not aim to comprehensively answer them.

3. Recent Reform: Lessons from 2015

As part 1 stressed, the JRCB is the latest round of a series of reforms to judicial review. It is also taking place without the benefit of a detailed study of the last round. Since 2015, courts have been directed to refuse relief if satisfied that the 'outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.'[55] There has

[49] Criminal Justice & Courts Act 2015, s.84(2).
[50] e.g. Bell & Fisher (n 38), 507 (in a study of Administrative Court decisions in 2017, it was possible to access through BAILII and Westlaw only 56 decisions relating to permission).
[51] *Lumba v Secretary of State for the Home Department* [2011] UKSC 11.
[52] Requested but refused in *Bruton v Governor of HMP Swaleside* [2017] EWHC 704 (Admin).
[53] *R (EL) v Essex County Council* [2017] EWHC 1041 (Admin)
[54] E.g. *R (KS) v London Borough of Haringey* [2018] EWHC 587 (Admin).
[55] Ibid, s.84(1)(2A).

not yet been a comprehensive study of the impact of the 2015 reforms,[56] which have been the subject of concern both at the time they were enacted[57] and since.[58] It is important to be clear that the study underlying this paper does not wholly fill the void for three main reasons. First, temporally, the study begins in January 2017. Secondly, the study encompasses only successful judicial reviews and not, therefore any obiter remarks about how the 2015 reforms may have applied in unsuccessful challenges.[59] Finally, this study does not consider the operation of the reforms at either the leave stage[60] or in the Upper Tribunal.[61] While these caveats should be borne in mind, the study offers useful insights into the implementation of the 2015 reforms which, in turn, offer broader lessons for the future.

Two striking findings are worth mentioning immediately. First, the 2015 reforms were discussed in a substantial number of cases: 83 of the cases in the sample. This indicates that courts are being invited to refuse relief with some frequency. Secondly, however, there was only a very small handful of cases – 9 in total[62] – in which relief was refused on this basis. 3 of these cases concerned a failure to conduct an impact assessment, which was either subsequently,[63] or would soon be,[64] corrected. In 1,[65] revocation of a sponsorship licence was clearly inevitable, due to the applicant's failure to meet a mandatory requirement. In the remaining 5, the court was broadly convinced that the legal error was technical because, for instance, despite misconstruing the statutory[66] or policy[67] test, or improperly delegating a decision to a panel,[68] the public authority properly directed its mind to all issues of substance.[69]

9 cases across a four-and-a-half year period is a small number, representing only 2% of the sample. It is also important to recall that relief also may well have been refused in these cases in any event. Asking in which of these cases the court would have found that the higher *Simplex* threshold would have been made out is something of a speculative exercise. There is reason to think that in some, perhaps most, to think the court regarded a particular outcome as, not only highly likely but, inevitable.

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[56] Although see James Maurici QC and Admas Habteslasie, 'When Does the "No Substantial Difference Test" Make a Difference in Judicial Review Applications?' (2019) 24(2) *Judicial Review* 127.
[57] See e.g. Jaffey & Hickman (n 27).
[58] See e.g. Crummey (n 27).
[59] See e.g. *Finney v Welsh Ministers* [2018] EWHC 3073 (Admin), [47]-[48]; *R (Christchurch BC) v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 2126 (Admin), [66]-[69]. Obiter remarks, of course, ought to be treat with caution, in any event.
[60] Criminal Justice and Courts Act 2015, s.84(2).
[61] Ibid, s.84(4).
[62] There were also three cases in which courts considered the statutory threshold was met in the case of one ground,: *Cemex (UK) Operations Ltd v Richmondshire District Council* [2018] EWHC 3526 (Admin); *R (Blundell) v Secretary of State for Work & Pensions* [2021] EWHC 608 (Admin); *R (Danning) v Sedgmoor DC* [2021] EWHC 1649 (Admin).
[63] *R (Durand Education Trust) v Secretary of State for Education* [2020] EWCA Civ 1651; *R (Langton) v Secretary of State for Environment, Food & Rural Affairs* [2019] EWHC 597 (Admin).
[64] *R (Cairns) v Hertfordshire CC* [2018] EWHC 2050 (Admin) (in which a planning condition prevented development until the neglected environmental issues were addressed).
[65] *R (Sivayogam) v Secretary of State for the Home Department* [2017] EWHC 2575 (Admin).
[66] *R (Shropshire and Wrekin Fire Authority) v Secretary of State for the Home Department* [2019] EWHC 1967 (Admin).
[67] *R (Advearse) v Dorset Council* [2020] EWHC 807 (Admin)
[68] *R (Gossip) v NHS Surrey Downs Clinical Commissioning Group* [2019] EWHC 3411 (Admin).
[69] See also *R (Sensar Ltd) v Chief Land Registrar* [2021] EWHC 13 (Admin); *Hoare v Vale of the White Horse District Council* [2017] EWHC 1711 (Admin).

The question then arises of *why* this number was so small. Sceptics may be tempted by the view that the courts have cynically interpreted and applied the legislative reforms in a manner which cuts down on their operation. The Court of Appeal, in *Gathercole*,[70] however, emphasised the importance of courts not doing this. Its warning to the High Court not to 'shirk the obligation imposed by Section 31(2A)'[71] has now become oft-cited dicta. A close study of the case law, rather, suggests two main reasons for the seemingly limited impact of the 2015 remedial reforms.[72]

First, the 2015 reforms interact with several long-standing doctrinal features of judicial review which curtail the circumstances in which the 'high likelihood' threshold can be made out. Consider, for instance, planning judicial reviews. There were 72 cases raising planning law issues in the sample, making it the largest subject-matter category (16%). In reviewing planning decisions, the courts have long drawn a distinction between questions of law which it is proper for the courts to form a view on and the 'planning merits'[73] of a decision. The upshot is that, while courts play important roles ensuring that, for instance, planning authorities operate from a proper understanding of relevant policy[74] and address all material considerations,[75] planning decisions cannot be overturned on the basis that an improper balance was struck between competing factors: the 'planning balance'[76] is firmly the remit of planning authorities.

An invitation to find that the high likelihood threshold is met, can sometimes invite the court to do precisely what long-standing planning law principle directs them *not* to do. Namely, form a view on the relative merits of an application. The courts have emphasised that the 2015 reforms should not be understood as a direction to disrupt the well-established and important constitutional balance which characterises planning judicial reviews. [77] For instance, in *Plan B Earth*[78] the Court of Appeal was invited to conclude there was a high likelihood that, had the Government properly complied with its legislative obligations to consider climate change,[79] it would still have supported Heathrow expansion. The court concluded it could not be satisfied the threshold was met.[80] To inquire more closely into the likelihood that addressing climate change would have made a difference would involve entering into 'forbidden territory'[81] of forming a judgment on planning merits.

A further way in which established doctrine has shaped the application of the reforms occurs in categories of case in which the courts have explicitly gone beyond a traditional

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[70] *Gathercole v Suffolk County Council* [2020] EWCA Civ 1179.
[71] Ibid, [38].
[72] The reasons listed here are not exhaustive but they are the factors which emerged most clearly from the study. For instance, it is clearly relevant that courts are empowered, or required if requested, to address the likelihood that the legal error made a difference in granting leave by the Criminal Justice and Courts Act, s.84(2).
[73] See e.g. *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL), [58].
[74] *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983.
[75] Town and Country Planning Act 1990, s.70(2); *R (Wright) v Resilient Energy Severndale Ltd* [2019] UKSC 53, [2019] 1 WLR 6562.
[76] See e.g. *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, [64].
[77] See e.g. *R (Urmston) v City of York Council* [2018] EWHC 2102 (Admin), [79]; *R (Holborn Studios Ltd) v London Borough of Hackney* [2017] EWHC 2832 (Admin), [161].
[78] *Plan B Earth* (n 26). An appeal was allowed in *R (Friends of the Earth) v Heathrow Airport Ltd* [2020] UKSC 52, [2021] PTSR 190, but not on this point.
[79] Planning Act 2008, ss.5(8) and 10(3).
[80] *Plan B Earth* (n 26), [275]-[276].
[81] Ibid, [273].

supervisory role. The most notable example is immigration detention where many challenges centre on application of the *Hardial Singh* principles.[82] These principles limit the use of detention powers to cases where removal appears possible within a reasonable period and is effected with reasonable expedition, among other things. Importantly, where courts engage with *Hardial Singh*, their role is not to review the Home Secretary's view on whether the criteria were met on public law grounds. *Hardial Singh* review has thereby been described as a 'radical departure from the usual approach in a public law challenge'[83] in which the court is 'to substitute its own view… on the basis of the same primary material as was available in real time to the Secretary of State.'[84] As the High Court stressed in *Sheikh*[85] there cannot be room for a court to refuse relief based on the 2015 reforms in a case where breach of the *Hardial Singh* principles has been made out. By definition, a court in such a case will have decided that the Home Secretary reached the *wrong* conclusion. It cannot therefore make sense to inquire into the likelihood that the error made a difference.[86]

This is a point of broader importance than it might first appear. Immigration detention challenges form a significant portion of judicial review challenges.[87] There were 67 in the sample, constituting around 15% of the case total. Furthermore, immigration detention is not the only category of challenge in which judicial review has been modified in this way.[88] Another major case cluster concerns challenges to refusals to recognise British or British Overseas citizenship, which are common in citizenship and passports[89] challenges. Michael Fordham QC recently remarked in a citizenship challenge that it was

> …no conventional judicial review… on a secondary and supervisory basis... The Court's substitutionary function is a familiar one…. In the present context [it is] necessitated by Article 6 of Schedule 1 to the Human Rights Act… It is a good illustration of the adaptability and contextually enhanced level of scrutiny which judicial review can deliver, where necessary in the interests of justice.[90]

The task of the court in such cases is, in other words, not to determine whether the Home Secretary's view was lawful and rational. It is to decide whether, on the available evidence, the applicant *is* a British or British Overseas citizen. Although the issue does not seem to have been addressed in case law, the 2015 reforms would therefore seem to be as inapplicable in such cases as they were in *Sheikh*. Once a court has found that the Home Secretary was *wrong* to conclude that the applicant lacked citizenship, it could make no sense to say that that legal error made no difference to the outcome.

More briefly, there are numerous other doctrines which have curtailed the circumstances in which the 2015 threshold can be made out. For instance, it is a precondition of a finding that a decision is tainted by the consideration of an irrelevant matter[91] or a factual

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[82] *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704.
[83] *R (SB (Ghana)) v SSHD* [2020] EWHC 668 (Admin), [71].
[84] Ibid, [72].
[85] *R (Sheikh) v Secretary of State for the Home Department* [2019] EWHC 147 (Admin), [109]-[110].
[86] Note that the existence of an alternative legal basis for detention may be relevant to the award of damages: *Lumba v Secretary of State for the Home Department*.
[87] Bell and Fisher (n 38), 510.
[88] See also discussion at *Safety-Kleen UK Ltd v Environment Agency* [2020] EWHC 3147 (Admin), [6].
[89] See e.g. *R (Nooh) v Secretary of State for the Home Department* [2018] EWHC 1572 (Admin).
[90] *R (Din) v Secretary of State for the Home Department* [2018] EWHC 1046 (Admin), [2].
[91] Harry Woolf and others, *De Smith's Judicial Review* (8th edn, Sweet & Maxwell 2017), 5-131.

error[92] that the defect played a 'material' role in decision-making. A finding of materiality in assessing the lawfulness of a decision has been said to necessitate a conclusion that the high likelihood threshold is not met at the remedial stage.[93] There are also categories of case which are governed by their own remedial principles, squeezing out the room for the 2015 reforms to apply. For instance, in environmental impact assessment (EIA) challenges, the Supreme Court ruling in *Champion*[94] provides that development consent will generally not be quashed 'if the applicant has been able in practice to enjoy the rights conferred by European legislation, and there has been no substantial prejudice.'[95] In EIA cases, the courts continue to have regard to the framework set out in *Champion*, meaning there is no reason for parties or judges to have recourse to the 2015 reforms.[96]

Secondly, the 2015 also interact with a several important *procedural* characteristics of judicial review which shape their application.[97] Most notably, the limited role of evidence in judicial review. Traditionally, disclosure and cross-examination do not feature in judicial review. Most commonly, a reviewing court will have before it the arguments of the parties, formal documentation, such as reasoned decision letters and, sometimes, though much less commonly,[98] witness statements or other ex post facto evidence.[99] This evidence may offer a clear picture of the basis of the decision which *was* made. Commonly, however, it will not give the court any indication of the decision which *would* have been made, but for the unlawfulness, for the simple reason that such an assessment was not part of the decision-making process. In consequence, there will often simply not be evidence on which courts can make anything approaching a sensible prediction of how the decision-maker would likely have reasoned in the absence of legal error. In *Dawes*[100] for instance a local authority failed to make reasonable inquiries[101] prior to making a general vesting order. The court was unable to conclude there was a high likelihood the order would have been deemed sound in any event, precisely because there was no evidence on which to make a prediction of what proper inquiries would have turned up.

At least two overarching lessons emerge from the courts' experience with the 2015 changes which should inform debate about future reform. The first is a reminder that judicial review is not monolithic.[102] The courts have developed particularised legal principles which govern judicial review in different types of case: planning, immigration detention, citizenship,

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[92] *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044, [63].
[93] See e.g. *R (Rainbird) v Council of the London Borough of Tower Hamlets* [2018] EWHC 657 (Admin), [134]-[135]. Indeed, in some cases the courts have been invited to refuse relief on the basis that an error was not material, rather than explicitly on CJCA grounds. See e.g. *R (Karagul) v Secretary of State for the Home Department* [2019] EWHC 3208 (Admin).
[94] *R (Champion) v North Norfolk DC* [2015] UKSC 52, [2015] 1 WLR 3710.
[95] Ibid, [54].
[96] E.g. *Secretary of State for Communities and Local Government v Knight Developments Ltd* [2017] EWCA Civ 39.
[97] Including that judicial review is sometimes facilitated by statutory procedures to which the 2015 reforms do not apply: see part 1.
[98] See *Flaxby Park Ltd v Secretary of State for Communities and Local Government* [2020] EWHC 3204 (Admin), [15]-[18] on the restrictive approach taken by courts.
[99] See *R (United Trade Action Group Ltd) v Transport for London* [2021] EWCA Civ 1197, [125] on the restrictive approach taken by courts.
[100] *R (Dawes) v Birmingham City Council* [2021] EWHC 1676 (Admin).
[101] *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014.
[102] Joanna Bell, *The Anatomy of Administrative Law* (Hart 2020), especially chapter 3.

etc. These particularised principles may well shape how general legislative reform 'beds in' in a particular area. In contemplating reform, it is therefore important not only to ask whether change is a good idea in principle. It is also important to ask questions such as 'how will the reform operate in planning, or immigration detention, judicial reviews?' The second is a reminder that, in determining judicial review challenges, court engage with relatively little evidence. This shapes the questions a court is sensibly able to address. Arguably, a problem with the 2015 reforms is that, in a great many cases, they direct judges to undertake a predictive assessment in circumstances where the evidence yields no meaningful basis on which to do so. This highlights the importance of asking of any legislative reform which directs a court to address a question, whether the approach to evidence in judicial review will enable a court to meaningfully form a view. Clause 1 of the JRCB, for instance, directs courts prior to quashing a decision to have regard to, among other things,[103] 'any detriment to good administration'[104] and 'the interests or expectations of persons' who would benefit from quashing[105] or have relied on the unlawful act.[106] It is far from clear that courts will generally have access to evidence which will enable a sensible assessment of these impacts.

4. Current Reform: Evaluating the Judicial Review and Courts Bill

The discussion so far highlights the importance of after-the-event scholarly study of the *impact* of recent reforms. This part develops a slightly different point: scholarly study of judicial review generally, and remedies specifically, can help to better understand the impact, and thus the extent of a case for, *current* reform proposals. To make this point, the discussion focuses on clause 1 of the JRCB which, if enacted, will make potentially significant changes to quashing orders. It is important to begin with a brief outline of its content, before returning to the study.

A major aim of clause 1 is to implement the IRAL panel's recommendation to legislate for suspended quashing orders.[107] There is reason to believe that the courts already *have* power to suspend.[108] The effect of such reform may therefore be to clarify and encourage the courts to use a remedial option already available, rather than introduce a novel power. Suspension will have the effect that the impugned measure is treated for all purposes as legally valid until the date of suspension,[109] from which point the measure will be quashed in its entirety, including retrospectively.[110] The clause, however, also controversially goes further in two ways. First, it confers an alternative[111] power on courts to limit the retrospective effects of quashing. The effect of this power would be to confer on, or recognise, the legal validity[112] of

[103] Judicial Review and Courts Bill 2021, clause 1(8).
[104] Ibid, clause 1(8)(a).
[105] Ibid, clause (1)(8)(c).
[106] Ibid, clause (1)(8)(d).
[107] IRAL (n 28), 70-75.
[108] Graham (n 9). See also *R v Paddington Valuation Office, ex parte Peachy Property Corporation Ltd* [1966] 1 QB 380.
[109] Judicial Review and Courts Bill 2021, clause 1(3).
[110] Ibid, clause 1(6).
[111] Note the significance of 'or' in ibid, clause 1(1).
[112] Depending on the position one takes in the voidness/voidability debate: see citations at (n 33).

a measure until the date of the quashing order.[113] From the date of quashing, however, the measure would be invalid. Secondly, subsection (9) directs a court which has determined to quash to consider whether modifying the quashing order through either suspension or limitation of retrospective effects would 'offer adequate redress'.[114] If so, the court is to modify unless there is 'good reason'[115] not to. The aim behind this provision is clearly to give courts a *nudge* away from using immediate, retrospective quashing: if enacted as drafted, courts will be positively encouraged to either suspend or limit retrospectivity.

Access to scholarly research on judicial review, and remedies in particular, is essential in being able to understand the likely impact of the various aspects of this clause, and thus to properly evaluate its justification. The study underlying this paper, for instance, suggests several important points about these impacts. The discuss here focuses on two.

A. Limited Use and Appropriateness of the Suspension Power

First, the study suggests that suspension of quashing will be appropriate in an extremely small handful of cases. Much like the 2015 reforms, the clause 1 powers will interact with several established features of judicial review which will limit the circumstances in which the suspension is both useful and appropriate.

Consider, for instance, the first proposed use of the suspension power by the IRAL report, concerning cases of high constitutional or political significance. *UNISON*,[116] *Evans*[117] and *Miller*[118] were given as instances where the suspension of quashing could have afforded Parliament an opportunity to speedily legislate to salvage the impugned decision.[119] At least three factors which will severely limit the utility of this option.

First, an obvious point is that *UNISON*, etc are highly atypical judicial reviews. The vast bulk of judicial review challenges target decisions which are politically mundane and do not raise issues of high constitutional principle. Parliament is unlikely, in other words, to be interested in most judicial review challenges. Secondly, suspending to afford Parliament an opportunity to legislate makes sense if the decision or measure is one which can be straightforwardly constitutionally saved. It would, however, be more difficult to see its justification where the relevant legal error is a breach of a Convention right. Placing a Convention-inconsistent measure on a primary legislative footing would not wholly redress its unlawfulness. Rather, the statute itself would be vulnerable to a claim for a section 4 declaration of incompatibility, and potentially a challenge before Strasbourg. Strikingly, Convention rights feature prominently in challenges to generalised legislative and policy measures. For instance, of 21 challenges to Statutory Instruments in the sample, almost half (10) were found to be Convention-rights-inconsistent. Thirdly, it is also important to recall that, while central

[113] Judicial Review and Courts Bill 2021, clause 1(5).
[114] Ibid, clause 1(9)(a).
[115] Ibid, clause 1(9)(b).
[116] *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869.
[117] *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787.
[118] *Miller v Prime Minister* [2019] UKSC 41, [2020] AC 373.
[119] IRAL (n 28), 70-71.

Government measures are a common target (202 cases in the sample), judicial review is concerned with a wide variety of public authority conduct. Other bodies which are routinely subject to judicial review, including local authorities (125 cases) and the Parole Board (20 cases), have no privileged route through which to influence Parliamentary activity. This first use of suspension is therefore likely, if it is favoured at all, to be confined to an extremely small handful of, highly unusual, cases.

Similar points can be made about the second use of suspension suggested by IRAL, and supported by the MoJ[120]: delaying the quashing of a Statutory Instrument to afford the public authority an opportunity to correct a procedural defect. *Hurley & Moore*,[121] a case of failure to undertake a proper equalities assessment prior to the introduction of Regulations, is given as an example in the IRAL report. MoJ consultation documents also highlight *British Blinds & Shutters Association* (*BBSA*),[122] concerning a breach of statutory duties to consult before enacting Regulations.

There are, again, at least three factors which will limit this proposed use. First, an important factor will be the extent of the public authority's powers to make legislative or policy changes *retrospectively*. Consider, for instance, *Public and Commercial Services Union*[123] where changes to a statutory scheme reducing benefits payable to civil servants were made following defective consultation. Suspending quashing would have afforded the Government a period to reconsult. Had it reached the conclusion the changes were justified, the Government would have been able to re-enact the provisions, giving them retrospective effect from the date they were initially made. *Public and Commercial Services Union*, however, is unlikely to be the norm. Section 1(8) of the Superannuation Act explicitly confers power to make amendments which 'have effect as from a date before the making of the order.'[124] This is not true of many statutory powers and in the absence of clear language powers are generally construed as having prospective-only effects.[125] In cases where the public authority does *not* have the power to make changes retrospectively, it is far harder to see any benefits in suspension. Consider, *British Medical Association.*[126] The Government unlawfully introduced a regulatory power to suspend pension payments, in breach, among other things, of the public sector equality duty. Had the court suspended quashing in this case, and had the Government concluded, following assessment, the power was justified, it would most likely[127] have had the power to introduce it on a prospective-only basis.[128] The onset of the quashing order would therefore invalidate the power, and any purported uses of it, from the time of its initial unlawful enactment. It is difficult to see what benefit there would be in enabling the Government to treat

[120] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975301/judicial-review-reform-consultation-document.pdf (accessed 12 September 2021)..
[121] *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin).
[122] *R (British Blind and Shutter Association) v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 3162 (Admin) (*BBSA*).
[123] *Public and Commercial Services Union v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin).
[124] Superannuation Act 1972, s.1(8)(a).
[125] *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539 (HL).
[126] *R (British Medical Association) v Secretary of State for Health and Social Care* [2020] EWHC 64 (Admin).
[127] See the discussion at ibid, [44]-[49] of the particularly egregious nature of the power.
[128] In the circumstances, other issues would have prevented re-enactment of the provision including inconsistency with Convention rights. Those issues are not, however, of direct interest here.

the Regulation as legally valid for a period in circumstances where it would shortly and inevitably be invalidated in full.

Secondly, as experience of the 2015 reforms shows, courts assume that legislative reforms are generally not intended to disturb long-standing legal principle. Of relevance here is that the courts have long emphasised both that consultation must be done with an open mind[129] and that public authorities must give the appearance of impartiality.[130] It seems likely courts will strive to avoid using the suspension power in a way which will create an incentive for a consultation or assessment to be concluded in a particular way. For this reason, it is foreseeable a court would refuse to suspend in a case such as *Public and Commercial Services Union*, where concluding in favour of retaining the unlawful measure would be greatly more convenient than not.[131] Thirdly and finally, it is not especially common for challenges to legislative and policy measures to succeed on a purely procedural basis. Rather, procedural defects are often connected to other types of legal errors. Defective consultation may, for instance, fail to turn up key information and thereby undermine the rationality of a decision.[132] Indeed, of the 21 challenges to Statutory Instruments in the sample, only 2[133] were unlawful on procedural grounds only.

By placing the JRCB reforms in broader context, the study underlying this paper gives strong reasons to suggest that suspension of quashing will be far from the norm. This is a valuable insight of itself. It also gives reason to question the coherence of the underlying premises of the 'nudge' presently contained in subsection (9). There seems to be little sense in retaining a provision intended to direct courts towards a remedial option which will be appropriate only in rare cases.

B. Usual Quashing Case(s)

A second important insight of relevance to the JRCB offered by the study is a reminder that the quashing cases – *Hurley & Moore*, *BBSA*, etc - identified by IRAL and the MoJ are not representative of the usual case in which quashing takes place. All of the examples offered by the pre-JRCB of cases in which suspension of quashing would be useful concerned either issues of high constitutional principle or Statutory Instruments. The study underlying this paper, however, clearly emphasised how unusual these cases were as instances of quashing. Three findings are particularly worthy of note.

First, quashing is a very common occurrence in judicial review. Quashing was, by some distance, the most common remedy issued across the sample and was used (sometimes in conjunction with other relief) in at least[134] 211 cases, just under half the cases. Clause 1, which

[129] *R v Brent LBC ex parte Gunning* [1985] Lexis Citation 944.
[130] *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357.
[131] For instance, the alternative would have given rise to questions about whether Superannuation Act 1972, s.1(8)(a) empowered the Minister to retrospectively enact changes which would not apply prospectively.
[132] *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin).
[133] *BBSA* (n 122); *R (Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577.
[134] For the reasons behind this caveat see discussion in Part 5.A below.

bites wherever a court 'is to make a quashing order'[135] therefore has the potential to be a very widely applying provision.

Secondly, the vast majority of quashing orders were issued in relation to highly particularised decisions. The usual judicial review case is not a challenge to a generalised measure, such as a Statutory Instrument or broad policy measure. It is, to borrow language from Sarah Nason,[136] an 'individual grievance' case in which an applicant, very often an individual or company, seeks to contest the application of law and policy in a particular case. 175 cases could be straightforwardly described in this way, constituting around 80% of all quashing cases. Of these, 44 - around 25% of all quashing cases – concerned unlawful grants of planning permission. A further 13 concerned particularised planning decisions of other kinds such as certificates of lawful use,[137] prior approval decisions[138] and community infrastructure levy notices.[139] 118 additional cases focused on non-planning individualised measures, including 15 challenges to decisions by the Parole Board on a prisoner's application for release or transfer, 11 leave to remain decisions 5 decisions concerning an applicant's human trafficking status.

Thirdly, the frequency of quashing orders in some of these categories of challenge was so high it might be said that quashing has become the default remedy. Challenges to grants or refusals of planning permission are the prime example. There were, in total, 48 such cases in the sample. As already noted, in 44 the courts quashed the unlawful decision. In a further 2, the judgment simply did not make the remedy clear.[140] In the remaining 2 cases the court refused relief on the basis of the 2015 reforms (2).[141] Strikingly, no other remedies were issued in these cases. It may be, in other words, that in judicial review challenges to decisions on individual planning applications the courts seem to view the options as being either quashing or nothing.[142]

These findings have important implications for clause 1. Again, the most important concern the 'nudge' in subsection (9). Clause 1 will bite often and by far most commonly in challenges to highly particularised decisions, such as grants of planning permission. The nudge in subsection (9) seems particularly poorly suited to at least the vast majority of these cases for at least three reasons.

First, suspension in the vast bulk of these cases would be, at best, pointless and, at worst, misleading. Suspension of the onset of quashing in a successful challenge to a grant of planning permission,[143] for instance, would not change the end outcome, namely complete

[135] Judicial Review and Courts Bill 2021, clause 1(9).
[136] Sarah Nason, *Reconstructing Judicial Review* (Hart 2016).
[137] E.g. *UBB Waste Essex Ltd v Essex County Council* [2019] EWHC 1924 (Admin).
[138] E.g. *R (Marshall) v East Dorset District Council* [2018] EWHC 226 (Admin).
[139] E.g. *R (Trent) v Hertsmere BC* [2021] EWHC 907 (Admin).
[140] *R (Patel) v Dacorum Borough Council* [2019] EWHC 2992 (Admin); *Danning* (n 62).
[141] *Advearse* (n 67); *Cairns* (n 64). See discussion in part 3.
[142] One reason for this is perhaps that in certain forms of statutory planning review (see e.g. Town and Country Planning Act 1990, s.288(5)(b)), the governing legislation makes the quashing order the only remedy available. Given the practical similarities between judicial review and statutory appeal in the planning context, the courts perhaps consider that to adopt a different approach to remedy would be unjustified.
[143] *R (Thornton Hall Hotel Ltd) v Thornton Holdings Ltd* [2019] EWCA Civ 737 is an unusual example of a case where suspending quashing of planning permission may have been a helpful remedial option. The case is, however, very unusual. Not least because the court permitted the challenge to be brought after five and a half years on exceptional grounds, considerably extending the usual 6 week time limit which applies in planning cases.

invalidation of the decision. It would simply leave the parties sitting in limbo for a fixed period. It is difficult to see any benefit in doing so. There is also a risk that suspension would create the false impression that it is permissible to act on the permission for the period before the order came into effect. Secondly, retrospectively-limiting quashing in such cases would be conceptually awkward and potentially practically problematic. Consider a challenge to a refusal by the Parole Board to recommend release. Immediate quashing achieves the effect of invalidating a purported decision, making it as if the matter has not been resolved and is therefore still figuratively on the desk of the decision-making. Retrospectively-limiting quashing, in contrast, would mean that the unlawful decision would be treated as having been valid for a period. A potential question this might give rise to is whether the powers of the Parole Board, it having made a valid decision on an application, were now functus officio.[144]

Thirdly, as drafted, subsection (9) has the potential to encourage frankly bizarre arguments and outcomes. Take a successful challenge to a planning permission. Would delaying the onset of a quashing order by a day deprive the applicant of 'adequate redress'? Arguably not. Afterall, if a suspended quashing order results in total invalidation, what does it matter if the parties must wait a day? If a suspended quashing order would be 'adequate,' would the fact that suspension would be serve no particular purpose constitute a 'good reason' not to suspend? Again, arguably not given that subsection (9) appears to posit a positive reason not to suspend, rather than the absence of good reason do to it. The courts would, of course, strive to interpret subsection (9) 'sensibly.'[145] The point, rather is that subsection (9) is particularly ill-suited to the most common type of case in which it would, in practice, apply and will likely generate needless litigation.

5. Future Reform: Omissions from the Agenda

Turning, now, to the future of remedial reform, it was noted in part 1 that a major source of concern about the pre-JRCB process is the element of randomness which shaped how reforms were identified: the modifications being pursued are, to a large degree, being pursued because they happened to occur to the IRAL panel. This gives rise to the question of whether a different process would have identified different reforms, perhaps of greater urgency. The study underlying this paper suggests at least two issues which warrant far greater attention.

A. The Need for Transparent & Consistent Reasoning About Remedies

First, a striking theme across the case sample used in the underlying study was the lack of both transparency and consistency in judicial reasoning about remedies in judicial review. Judgments sometimes offer a detailed explanation of the reasons for which a particular remedial outcome is chosen. Very occasionally, the full remedial order is annexed to the judgment. Neither of these things are, however, the norm. Far more commonly, judgments

[144] *Dickins v Parole Board* [2021] EWHC 1166 (Admin).
[145] *Friends of the Earth* (n 78), [105].

simply state the remedy without offering any explanation. There were also 37 cases in the sample in which the court invited the parties to reach agreement and/or make further submissions where it was impossible to trace the eventual outcome. A further 32 cases simply contained no mention of remedies, leaving wholly unclear what remedy was awarded.

The sporadic nature of the way in which publicly available judgments address remedies is unfortunate for numerous reasons. It makes comprehensive mapping of remedial discretion impossible as it can be simply impossible to learn what, if any, remedy was awarded. More fundamentally, it makes the evolution of judicial guidance, through the building up of precedents, very difficult.

Consider, by way of example, the following question: when faced with an unlawful provision in delegated legislation or policy, is quashing or a declaration the appropriate remedial response? At present, there is a high degree of variation in the judicial responses. There were, for instance, 21 challenges to Statutory Instruments and 31 challenges to policy or guidance in the sample. The most common remedial response, seen in 20 cases, was a declaration either that the applicant had been unlawfully treated[146] or that the measure was unlawful.[147] There were, however, also 12 instances of measures being quashed and 5 instances of courts awarding both a quashing order and a declaration.[148] The absence of a unified response is not necessarily problematic: the appropriate remedial response most likely depends on many factors. What is problematic, however, is that courts commonly make the remedial choice in these cases without offering any explanation of why, for instance, quashing is favoured over a declaration.[149] This makes it extraordinarily difficult to judge whether courts are wielding their remedial discretion in such cases consistently.

This lack of transparency and consistency in judicial reasoning appears from the study to be a far more widespread problem than the absence of an explicit legislative power to suspend quashing orders which, as noted above, will be appropriate in a very small handful of cases.[150] Perhaps the most valuable reform which could be pursued in this context is therefore a more open and rigorous approach to decision-making about remedies. This would not necessarily require legislation: these issues could be addressed to a large degree by a change in judicial practice. However, wider systemic change may help. Earlier this year, for instance, the UK Government announced its intention to develop a comprehensive, publicly-available database of court judgments.[151] It would be extremely helpful if the routine publication of court orders were to be introduced as part of this shift.

B. Anticipating 'Follow-on' Legal Questions

[146] *Mahabir v Secretary of State for the Home Department* [2021] EWHC 1177 (Admin).
[147] See e.g. *R (P) v Secretary of State for the Home Department* [2019] UKSC 3.
[148] In other cases the remedy was either unclear or refused (see e.g. *R (DS) v Secretary of State for the Home Department* [2019] EWHC 3046 (Admin)).
[149] See e.g. *R (Delta Merseyside Ltd) v Knowsley Metropolitan Borough Council* [2018] EWHC 757 (Admin). Sometimes courts offer fuller reasoning: see e.g. *Article 39* (n 133).
[150] Note again also the debate about whether the judicial power to suspend exists already: Graham (n 9); *Paddington* (n 108).
[151] Boost for open justice as court judgments get new home - GOV.UK (www.gov.uk) (accessed 22 August 2021).

A second issue which clearly emerged from the study, but which appears to have received no attention in either debates about reform or the broader academic literature concerns the legal questions which can arise following a successful judicial review. Successful challenges, especially to generalised legislative or policy measures, can give rise to further legal questions. This can occur in at least two ways.[152]

First, the impugned provision may not be unique. Rather it may be a provision which is replicated in other iterations of a legislative or policy scheme. The successful judicial review may therefore give rise to the question of whether *other* identical provisions are also unlawful and, if so, how public authorities are required to treat them. A good example occurred following the Supreme Court ruling in *Brewster*[153] that a provision in the Local Government Pension Scheme Regulations 2009 breached Convention Rights. Broader issues arose because the 2009 provision was not unique, but replicated in other iterations of the regulatory scheme which continued to apply in individual cases. *Elmes*,[154] for instance, raised the questions of whether an identical provision in 2007 Regulations was also unlawful and, if so, whether the local authority was required to disregard it in the applicant's case.[155] A similar issue arose before the Administrative Court[156] in *TN (Vietnam)*. In *Detention Action (No 6)* the Court of Appeal found the 2014 version of the Fast-track Asylum Rules[157] to be unlawful due to creating a systemic risk of procedural unfairness. The 2014 Rules, however, largely replicated an earlier iteration of a scheme introduced in 2005, giving rise to the question of whether the earlier Rules were also unlawful.[158]

Secondly, a judicial finding that a legislative or policy measure is unlawful may give rise to questions about the lawfulness of the treatment of individuals whose cases have been decided under it. There are many examples in the immigration detention context. *TN*,[159] for instance, also raised the question of whether individual asylum applications processed under the 2005 rules were automatically unlawful. The Court of Appeal ruling in *Gedi*[160] that the Home Secretary had unlawfully interpreted her statutory powers and engaged in an unlawful practice of subjecting immigration detainees to curfews on release gave rise to the question in *Jalloh*[161] of whether, and to what extent,[162] those who had been subject to curfews were entitled to claim damages for false imprisonment. Finally, *Majewski*[163] considered whether individuals who were detained pursuant to a rough sleeping policy found to be unlawful in *Gureckis*[164] were entitled to compensatory damages.

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[152] For a different example see *R (Gullu) v London Borough of Hillingdon* [2019] EWCA Civ 682 in which the court left open the question of whether the discriminatory treatment could be justified.
[153] *In the matter of an application by Brewster for Judicial Review* [2017] UKSC 8.
[154] *R (Elmes) v Essex County Council* [2018] EWHC 2055 (Admin).
[155] On the duty to disapply see *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, [2019] 1 WLR 6430.
[156] *R (TN (Vietnam)) v Secretary of State for the Home Department* [2017] EWHC 59 (Admin).
[157] *R (Detention Action) v First-tier and Upper Tribunals (Immigration and Asylum Chambers)* [2015] EWCA Civ 840, [2015] 1 WLR 5341.
[158] *TN (Vietnam)* (n 156).
[159] *R (TN (Vietnam)) v Secretary of State for the Home Department* [2021] UKSC 41.
[160] *R (Gedi) v Secretary of State for the Home Department* [2016] EWCA Civ 409; [2016] 4 WLR 93.
[161] *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4, [2020] 2 WLR 418.
[162] *R (Jollah) v Secretary of State for the Home Department* [2018] EWCA Civ 1260.
[163] *R (Majewski) v Secretary of State for the Home Department* [2019] EWHC 473 (Admin).
[164] *R (Gureckis) v Secretary of State for the Home Department* [2017] EWHC 3298 (Admin).

The present legal approach in such contexts is for courts to leave any follow-on questions to be resolved in the future, if/when a legal claim is brought. There is, in other words, no established practice of anticipating foreseeable 'follow-on' questions and making provision for them. There are undoubtedly reasons underlying this approach, but it certainly has downsides. One consequence is that public authorities can be left to make decisions in conditions of considerable legal uncertainty, with no way of obtaining clarity except to wait for an applicant with the motivation, resources and standing to bring a legal claim. The local authority in *Elmes*,[165] for instance, was clearly hesitant to disapply the provision in the absence of a specific court ruling. It had, however, no way of obtaining the ruling other than to await a judicial review. Individuals too can be placed in the unenviable position of being unable to understand or assert their legal position without bringing a legal claim. The *Detention Action 6*[166] and *TN*[167] rulings, for instance, have led to multiple challenges[168] by individuals seeking to clarify whether their asylum applications were processed unlawfully. The matter was finally resolved in late 2021 by the Supreme Court,[169] six years after the original *Detention Action 6* ruling.

Against this background, it is surprising that the various debates about judicial review reform which have taken place in the last decade have not even touched on a question of potentially fundamental practical importance: could and should courts do more to anticipate the 'follow-on' legal questions which arise from successful judicial reviews, and make provision for them in remedial orders? One possibility, for instance, could be recognition of a power to stipulate in a remedial order that named parties are able to refer follow-on questions to the deciding, or another, court for resolution. Another possibility could be courts treating follow-on questions as consequential matters to be determined following the handing down of a judgment. Courts, that is, could plausibly seek to anticipate follow-on questions and determine them in advance.

This is an important and untouched topic which cannot be fully unpacked here. It is, however, well deserving of careful thought. In particular, the prospect of recognising such powers gives rise to at least two sets of interesting questions for the future.

First, *legally* what would need to be done to recognise these powers and, specifically, would legislation be needed? On the one hand, the courts have a broad power to adapt procedures and remedies.[170] There are also numerous striking examples of remedial orders being used in innovative ways, to give very specific guidance about how the implications of a ruling are to be managed.[171] On the other hand, it is difficult to find specific precedents in which courts have made orders of this kind. It is potentially arguable that a change of this significance would warrant Parliamentary intervention.

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[165] *Elmes* (n 154).
[166] *Detention Action 6* (n 157).
[167] *TN (Vietnam)* (n 156).
[168] See e.g. *R (Hameed) v Secretary of State for the Home Department* [2019] EWCA Civ 456; *R (UN (Uganda)) v Secretary of State for the Home Department* [2020] EWCA Civ 1213.
[169] *TN (Vietnam)* (n 159).
[170] *Al Rawi v Security Service* [2011] UKSC 34.
[171] See *Havant Biogas Ltd & others v Gas and Electricity Markets Authority* [2021] EWHC 84 (Admin); *Joint Council for the Welfare of Immigrants v President of the UT* [2020] EWHC 3103 (Admin); *R (W) v Secretary of State for the Home Department* [2019] EWHC 254 (Admin).

Secondly, what would be the *practical* challenges of these powers? A particularly important issue in this regard concerns the conduct of hearings. The usual format of a judicial review hearing is a *contest.*[172] In some instances where these powers may be useful, it may be entirely obvious that the original parties are willing and able to contest further issues.[173] In other cases, however, the original parties may not have an interest in the follow-on matters, such as in *Brewster*[174] where the applicant's case was determined under the 2009, not the 2007, scheme. How would such cases be dealt with? The inability to fairly determine the issue may be treated as a reason not to make an order. There are, however, cases in which courts have thought themselves able to determine legal issues adequately and fairly in the absence of contestation.[175] A further possibility is that courts could make use of their discretion to request a court appointed advocate[176] to advise it on the legal issues.

The existence and challenges of follow-on questions is wholly unexplored territory. It is striking, however, from reading a large body of judicial review case law how frequently successful challenges can give rise to, entirely foreseeable, legal issues are left to be resolved through further litigation. Perhaps this issue should be high on the agenda in any further discussion of remedial reform.

6. Conclusion: Further Reasons to Lament the Scholarly Neglect of Remedies

The overarching aim of this paper is to encourage more scholarly engagement with remedies. The paper has focused centrally on one reason why a shift in focus towards remedies is especially timely: significant and ongoing Governmental interest in legislative reform. Judicial review remedies are experiencing a further round of reform, less than six years after the last, and further reform may be imminent.[177] Rigorous scholarly research on remedies is essential in ensuring that debate is properly informed.

This, however, is not the only reason to lament the relative lack of scholarly engagement with remedies.[178] It is helpful, by way of conclusion, to highlight two more.

First, judicial review remedies may well have fallen from the general academic research agenda accidentally, rather than because they do not raise important issues. Remedies in judicial review do not have a happy history. Prior to the procedural reforms of the late 1970s,[179] English and Welsh administrative law was marred by a great deal of procedural complexity. In the absence of a purpose-built process for challenging public authority decisions, applicants were left to pursue claims for two broad clusters of remedies: the prerogative writs and ordinary claims, especially for declaration and injunctions. Each 'ha[d] advantages and disadvantages

[172] *Elmes* (n 154).
[173] E.g. *Detention Action 6* (n 157).
[174] *Brewster* (n 153).
[175] *Elmes* (n 154), 168-179.
[176] Judiciary for England and Wales, *The Administrative Court Judicial Review Guide 2021* (July 2021), 60.
[177] See citations at (n 19).
[178] As emphasised above, there is not a wholesale absence of valuable literature. However, compared with other aspects of judicial review remedies have attracted little academic attention and important topics remain underexplored. See discussion in section 2 above.
[179] Now contained in the Senior Courts Act 1981, s.31. See Law Commission, *Report on Remedies in Administrative Law* ((1976, Law Comm No 73)).

compared to the other'[180] with 'nothing except history justif[ying] the distinctions.'[181] In consequence, pre-reform administrative law scholarship was dominated by a focus on remedies. There were, for instances, valuable treatises on the historical origins of the various remedies,[182] endless modern pieces exploring the downsides[183] and potential[184] of individuals remedies to assume a bigger role and a great many publications lamenting the existing state of affairs[185] and urging reform.[186] Indeed, a common complaint in this period was that the courts, and in consequence scholarship, was so intensely preoccupied with issues of procedure and remedy, that there was too little space to think seriously about the substantive principles of judicial review.[187]

Following the procedural reforms of the late 1970s and the introduction of the application for judicial review (AJR) procedure, it perhaps came as something of a relief to practitioners and scholars alike not to have to think too much about remedies. The focus shifted to new, questions. Who would, for instance, be able to rely on this new AJR[188] process and against which bodies?[189] Ought the list of general grounds of review against which public functions are tested to be changed or expanded?[190]

There has been relatively little since to actively turn scholars' heads back to remedies. Remedies are rarely headline news.[191] For the most part, they are the preoccupation of first-instance courts and judicial reasoning on remedies is often extremely terse or even non-existent.[192] It is also perhaps easy to be intellectually complacent about remedies. Remedies in judicial review are, after all, famously discretionary. What more, it might be asked, is there to know beyond the menu of options available to a court, and the broad principles which courts draw on to guide the choice?[193]

And yet, a second reason to hope for more scholarly engagement with remedies is that there are a great many important questions, of considerable practical importance, which have

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[180] Law Commission, *Working Paper No 40 Remedies in Administrative Law* (11 October 1971), 54.
[181] Ibid.
[182] E.g. Edith Henderson, *Foundations of English Adminstrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard UP 1963); Stanley De Smith, 'The Prerogative Writs' (1951) 11(1) CLJ 40.
[183] E.g. Alfred Denning, *Freedom Under the Law* (Stevens & Sons 1949).
[184] There was a particularly lively literature on declarations. See e.g. W Ivor Jennings, 'Declaratory Judgments Against Public Authorities in England' (1932) 41 Yale Law Journal 407; Edwin M Borchard, 'Declaratory Judgments in Administrative Law' (1933) 11(2) New York University Law Quarterly Review 139; Gordon J Borrie, 'The Advantages of the Declaratory Judgment in Administrative Law' (1955) 18(2) MLR 138; ECS Wade, 'Administrative Law. Action for Declaration. Scope of Remedy. ' (1957) 15(1) CLJ 6; Garth Nettheim, 'The Place of the Declaratory Judgment in Certiorari Territory' (1969) 6(2) *Sydney Law Review* 184.
[185] e.g. JDB Mitchell, 'The Causes and Effects of the Absence of a System of Public Law in the United Kingdom' [1965] PL 95.
[186] E.g. Lord Diplock, 'Judicial Review Revisited' (1974) 33(2) CLJ 233
[187] E.g. Kenneth Culp Davis, 'The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence' (1961) 61(2) Columbia LR 201.
[188] *R v Inland Revenue Commissioners, ex parte National Federation of the Self-Employed* [1982] AC 617 (HL).
[189] *R (Datafin plc) v Panel on Take-overs and Mergers* [1987] QB 815 (CA); Michael Taggart (ed) *The Province of Administrative Law* (1997).
[190] See e.g. the extensive legitimate expectations literature.
[191] Although, as noted above, some individual remedies, especially innovations under the Human Rights Act, have received considerable scholarly attention. See (n 35).
[192] Part 5.1.
[193] Famously discussed in *R v Monopolies and Mergers Commission, ex parte Argyll Group plc* [1986] 1 WLR 763.

simply gone unasked. This paper has highlighted some, primarily relating to the Government's recent reform agenda. There is, however, a much longer, and non-exhaustive list.

Some questions clearly emerged from the study underlying this paper, though they have not been discussed in its body. The courts are, for instance, continuing to struggle to identify the approach which should be taken to remedies in particular categories of judicial review. It is common for applicants in housing challenges to seek mandatory orders, directing that statutory duties owed to them are fulfilled within a particular time period.[194] These applications are characterised by tensions between upholding the legislative rights of individual applicants and ensuring the most effective and legitimate use of highly constrained resources.[195] Public law scholars are perhaps uniquely placed to usefully comment on the constitutional and normative questions raised by these cases.

Then there are much bigger questions about the extent of the courts' common law powers to evolve remedies. All of the items on the courts' remedial menu - quashing orders, mandatory orders, declarations, etc – have proven themselves over decades or centuries to be highly adaptive legal devices. Indeed, the foundations of modern administrative law were laid through the courts' gradual expansion of the circumstances in which these remedies were available. But how far does flexibility this go? Is there, for instance, a common law power to suspend or retrospectively limit the quashing order?[196] There are clearly circumstances in which the courts have been prepared to use the declaration to resolve abstract questions of law[197] but how far can and should this go? Should recent examples of declarations being used to clearly prescribe the practical steps needed to implement a judgment be more routinely replicated? Some of these questions will, of course, be put to rest in England and Wales by the JRCB. But they may remain of central importance in common law systems untouched by it. Perhaps *The Flexibility of Remedies in Common Law Judicial Review* is the one of the unwritten books which public law most needs.

[194] See e.g. *R (M) v London Borough of Newham* [2020] EWHC 327 (Admin); *R (Elkundi) v Birmingham City Council* [2021] EWHC 1024 (Admin).

[195] See generally Ian Loveland, 'Reforming the homelessness legislation? Exploring the constitutional and administrative legitimacy of judicial law-making' [2018] PL 299.

[196] While the JRCB will resolve this question for England and Wales, it will remain live in other jurisdictions.

[197] E.g. *Simply Learning Tutor Agency Ltd v Secretary of State for Business, Energy & Industrial Strategy* [2020] EWHC 2461 (Admin); *R (Enterprise Managed Service Ltd) v Secretary of State for Housing, Communities and Local Government* [2021] EWHC 1436 (Admin); *R (Ncube) v Brighton & Hove City Council* [2021] EWHC 578 (Admin).