§ Law in Context

Law and Administration

THIRD EDITION

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CAMBRIDGE

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Elite dimension: Court structures and process

Contents

Although this book does not adopt the court-centred approach of many administrative lawyers, we have learned a good deal about judicial review in its pages. Consideration of the relationship between law and administration, and the contribution law can make to administration, bears directly on the question of the proper constitutional role of the courts. Intended to produce a more rounded picture of the part played by judicial review, the next chapters look to the dynamics, routings and effects of this form of litigation. This chapter focuses on major institutional developments over the last thirty years and on the procedural devices for rationing access to the system. Chapter 16 considers

the make-up of the caseload, the workings of the judicial 'tool-kit' of remedies, and the cloudy issues of impact and compliance. What is the value of judicial review read – as the judges are naturally disposed to do[1] – as the 'apex' of a pyramid of dispute resolution (see Chapters 10–11)? Is it, as de Smith thought,[2] sporadic and peripheral? We shall discover that, conveniently obscured by the roll-call of leading cases, judicial review in England and Wales has a secret dimension; the expansion of parameters runs alongside a large-scale exclusion of people.

1. Models of judicial review

'Judicial review' is a slippery concept. Different constitutional systems show a wide range of possible arrangements – for example, constitutional review (United States), a dual jurisdiction (France) and systematised administrative appeals (Australia). As evidenced in the UK with equality and human rights, models of judicial review also change in line with societal values.[3] Wade's classic description[4] of a supervisory – inherent – jurisdiction directed on grounds of legality to the decisions and other public functions of public bodies is no longer sufficient.

Judicial review may have a number of overlapping functions (which different models emphasise to a greater or lesser extent under the broad rubric of legal accountability):

- *upholding the rule of law (control of government)*: constitutional symbolism and legal authority, imposition of law on state actors – the imagery of 'lions behind the throne'
- *protection of the individual*: redress of grievance and defence of private interest – a strong historical theme in the common law
- *determining institutional relationships*: constitutional allocation of powers, intra-state litigation
- *establishing general principles*: as with proper exercise of discretion (rationality, proportionality, no-fettering) – 'hortatory function'
- *vehicle for interest representation*: alternative forum for public discussion – competing conceptions of 'public interest'
- *structuring deliberative and administrative processes*: for example, reason-giving requirements, duty to consult, structural procedural review ('judicialisation')

[1] Not least the influential figure of Lord Woolf, *Protection of the Public: A new challenge,* (Stevens, 1990).

[2] S. de Smith, *Judicial Review of Administrative Action* (Stevens, 1959), p. 3. Even if the hundreds of cases scattered through the footnotes did not give precisely that impression.

[3] For a valuable discussion, see R. Cotterrell, 'The symbolism of constitutions: Some Anglo-American comparisons' in Loveland, *A Special Relationship? American influences on public law in the UK* (Clarendon Press, 1995).

[4] H. W. R Wade, *Administrative Law*, 1st edn (Clarendon Press, 1961).

- *insistence on core values of good governance*: normative and expository role associated, for example, with legitimate expectation, *audi alteram partem* and no bias – 'the state must act fairly and honestly'
- *elaboration and vindication of fundamental rights*: increasingly informed by transnational judicial dialogue.

(a) Substance and procedure; a multi-streamed jurisdiction

It is of the essence of the common law tradition that substance and procedure march hand-in-hand.[5] A defining feature of judicial review in this jurisdiction is its strong holistic quality, such that particular procedural and/or substantive changes frequently have significant knock-on effects elsewhere in the system. Viewed from this perspective, the judicial review process is very much a living system, and one that, as history demonstrates, may well take unexpected turns.

For the English lawyer, the classic touchstone is remedy. Suitably lauded in Dicey's formulation of the rule of law, a cardinal feature of common law models of judicial review is the possession of mandatory and stop orders.[6] Together with the famous writ of *habeas corpus*, which allows the court to test the legality of a detention in custody,[7] three 'prerogative orders' traditionally provided the backbone of the supervisory jurisdiction:

- *certiorari* – to quash a decision (now 'quashing order')
- *mandamus* – to order performance of a public duty (now 'mandatory order')
- *prohibition* – to forbid the hearing of a case or taking of a decision (now 'prohibiting order').

In more recent times *injunctions* and *interim injunctions* have also become available generally against public authorities. We noted the symbolism of *M v Home Office* (see p. 10 above), expressed by Lord Woolf in terms of movement towards a model of judicial review premised on coercion, in contrast to one based on trust and co-operation**.** Yet this is only part of an expanded and expanding judicial toolkit. Centre-stage today is the *declaration*, appropriately termed the judges' 'flexible friend' because of the precise control courts enjoy over the form or writing of declaratory relief,[8] a feature especially prized by reason of the myriad complexities of competing interests familiarly associated with judicial review.[9]

The modern procedural development in England and Wales is also a history

[5] W. H. Maitland, *The Forms of Action at Common Law* (Cambridge University Press, 1968).
[6] Flanked by the contractual (Ch. 8) and tortious liability (Ch. 17) of statutory authorities.
[7] Though with decreasing regularity in the light of judicial and legislative restriction: see Lord Woolf, J. Jowell and A. Le Sueur, *de Smith's Judicial Review of Administrative Action*, 6th edn (Sweet & Maxwell, 2007), pp. 865–71.
[8] As illustrated by *Bibi*, see p. 225 above (drawing the fangs of substantive legitimate expectation).
[9] Lord Woolf and J. Woolf, *Zamir and Woolf: The declaratory judgment*, 3rd edn (Sweet and Maxwell, 2001). The classic authority is *Dyson v Attorney General (No. 1)* [1911] 1 KB 410, *(No. 2)* [1912] 1 Ch 158.

of the distinctive 'permission' (formerly 'leave') stage, whereby, ahead of the full hearing on grounds of review and remedies, cases are subjected to a whole series of filtering mechanisms (or 'safeguards').[10] The reasons for refusing permission to proceed include:

- insufficiently arguable case
- delay (three months time-limit as the 'default' position)
- no sufficient interest in the matter (lack of *locus standi* or standing to sue)
- no issue of 'public law'
- availability of alternative remedies
- challenge is premature.

In so regulating access to their elite system, the judges exercise strong discretion. As well as control for volume, there is much scope for individual fine-tuning in 'the public interest'. We shall see how claimants commonly have their interest in redress of grievance overridden at this point.

Looking more closely at the dynamics of the litigation, we identify several sets of tensions that generate friction and produce pressure points. Prominent among these is the tension between a judicial desire to open up access to the machinery more widely, so facilitating the vital normative and expository function, and a managerial instinct to protect the efficient functioning of that process by keeping litigants out. Particular pressures are generated by the efforts of elite repeat-players to incorporate the idea of judicial review as a surrogate political process, most obviously in the field of human rights law. While the judges have proved increasingly receptive to an open, pluralist form of proceeding, there must be limits in order to maintain, in Fuller's terms (see p. 618 above), the integrity of the adjudicative system. The various interests in litigation also need to be balanced against a wider public interest in the effectiveness of the administrative process, as also in protection of the public purse. The relationship of judicial review with 'ordinary' civil procedure constitutes another source of tension: a tailoring of process to the 'special demands' of the jurisdiction, an approach historically weighted in favour of government ('Crown proceedings'), versus the pull of generalised forms and nostrums of legal practice.

Today, as we have seen in earlier chapters, 'a multi-streamed jurisdiction' has emerged, in which judicial review encompasses not only common law principles as the vibrant senior partner but also applications of EU law and of Convention rights where these are relevant.[11] Increasingly, a public international law dimension is emerging, as unhappily illustrated in the Iraq cases.[12]

[10] A. Le Sueur and M. Sunkin, 'Applications for judicial review: The requirement of leave' [1992] *PL* 102.

[11] R. Rawlings, 'Modelling judicial review' (2008) 61 *Current Legal Problems* 95. And see, R. Gordon, *EC Law in Judicial Review* (Oxford University Press, 2007); and J. Beatson *et al.*, *Human Rights: Judicial protection in the United Kingdom* (Sweet & Maxwell, 2008).

[12] See *R (Al-Jedda) v Defence Secretary* [2008] 2 WLR 31 (see p. 15 above); Sir Stephen Richards, 'The international dimension of judicial review' 2006 *Gray's Inn Reading*, available on the website of the Gresham Society.

AJR procedure is a shared vehicle for all these types of cases. Competing pressures from diversity and commonality are an inevitable consequence (see further below).

(b) Ideal types

How then, both in terms of substance and procedure, might the process of 'transforming judicial review' (see Chapter 3) be visualised? Writing in the early 1990s in the context of a unified common law system still highly insular in character, the authors postulated three sharply differentiated models of judicial review.[13] Today, two further ideal types may help to illuminate basic contours and so the path of historical development and possible futures.

Predominant for much of the twentieth century, the story begins with the 'drainpipe': see Fig 15.1. Narrow, inflexible, and with rigid collars, this is the determinedly formalist model encountered by Davis (see p. 95 above), with the judge as Cotterell's 'modest underworker'. The touchstone is *Wednesbury* in its original guise as a doctrine of judicial restraint and Lord Greene's classic statement of the authority being protected from assault, castle-like, 'within the four corners of . . . jurisdiction' (see p. 43 above). Firmly anchored in the ultra vires justification for judicial review, the model also demonstrates little interest in factual exploration (see below) or reasons-giving requirements.

The 'drainpipe model' was in its own terms both coherent and viable. Infused with Dicey's peculiarly English conception of the rule of law, it was highly individualistic in orientation and essentially geared to the protection of private interests.[14] A strict insistence on the traditional canon of adversarial, bipolar procedure, coupled with strict interpretation of the doctrine of precedent and a remedy-oriented approach as part of the common law inheritance, further underpinned this classic 'private law model' of judicial review.

But the drainpipe model was obviously criticisable as presenting a wholly unreal picture of the adjudicative process. Artificial limitation of the ambit of adjudication associated with the establishment of significant judicial 'no-go areas' put in issue the real accountability of political actors. The break-up of this model through the 'rebuilding' of judicial review in the 1960s, rapid expansion in the 1970s and 1980s targeted on executive discretion and the 'rationality' principle, were assumed in our second ideal type. A snapshot of how things looked at the start of the 1990s, this

[13] C. Harlow and R. Rawlings, *Pressure Through Law* (Routledge, 1992), Ch. 7.

[14] See further, C. Harlow, 'A special relationship? American influences on judicial review in England', in Loveland (ed.), *A Special Relationship? American influences on public law in the UK* (Clarendon Press, 1995); also, M. Taggart, '"The peculiarities of the English": Resisting the public/private law distinction' in Craig and Rawlings (eds.), *Law and Administration in Europe* (Oxford University Press, 2003).

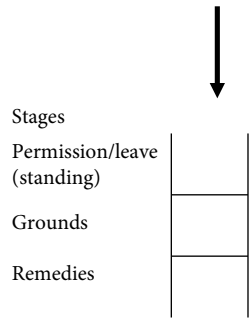

Fig 15.1 The drainpipe

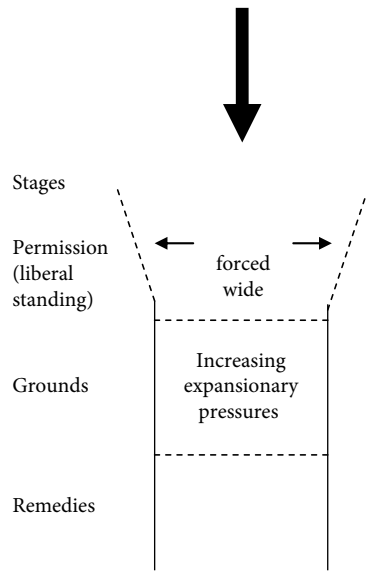

Fig 15.2 The funnel

'funnel model' also reflects the courts' ten years of experience with AJR procedure.

The judicial review process now appeared increasingly permeable at the initial stage, but restrictive later on, especially in terms of information gathering. While the grounds of review continued to expand, orthodox legal remedies remained the order of the day. The funnel model did not represent a state of equilibrium – quite the reverse! It was an obvious compromise whereby the courts had abandoned some of the strict procedural certainties associated with judicial restraint but had not squarely embraced a pluralist logic; a situation in which the close mix of expansive and restrictive elements created much difficulty and pressure for further change.

The hallmark of the 'funnel' was a more relaxed approach to standing to

sue *(locus standi)*, whereby the judges determine what types of interest they are willing to protect in judicial review proceedings (see p. 694 below). This represented a departure from the prevailing private-interest rationale ('protection of the individual') and gave explicit recognition to the role of pressure groups as 'public interest advocates'.[15] Based on a concept of public interest in administrative legality, the funnel model thus satisfied a range of normative and expository functions.

Notably however, the funnel model was predicated on a sharp increase in judicial discretion as, for example, by allowing standing to be considered in conjunction with the merits (the *Federation* case, see p. 696 below). And behind the greater liberality on standing lay a tightening of the procedural screw in other respects, an exhibition in judicial mastery of the system. The key criterion at the permission stage is a 'sufficiently arguable' claim. In the light of increasing numbers of judicial review challenges, especially from immigrants and homeless people, a process had already begun of ratcheting-up the interpretation of this most slippery of concepts (see p. 689 below).

Reflecting and reinforcing the rise of a rights-based approach to judicial review (see Chapter 3), later years have seen movement in the direction of our third ideal type, the '(American) freeway'.

Participative and pluralist in orientation, this 'interest-representation' model ultimately stands for judicial review as a surrogate political process. A defining feature is permeability at each stage of the litigation. As well as a generous approach to standing to sue, interventions in the proceedings by third parties (see p. 701 below) are a standard feature, the rules of evidence gathering are enhanced (greater openness), and the approach to remedies becomes that of the interventionist or 'managerial judge'. This in turn links with expansive grounds of review, with heavy emphasis on the constitutional properties of judicial review. Especially favourable to groups, the freeway model is well suited to 'test-case strategy'.

The largely hypothetical or sporadic freeway model[16] was inspired by some famous writings in the heady days of judicial activism in the United States,[17] where judicial review could occasionally provide the hard-biting collective remedy of the 'structural injunction'. The very strength of the model is however its Achilles heel. Concerns about the courts' institutional competence are magnified, threatening the old icon of 'disinterested justice'. The judges'

[15] See further, R. Rawlings, 'Courts and interests' in Loveland (ed.), *A Special Relationship? American influences on public law in the UK*.

[16] Not least, these days, in the US; see M. Feeley and E. Rubin, *Judicial Policy-Making and the Modern State* (Cambridge University Press, 1999); M. Tushnet, *The New Constitutional Order* (Princeton University Press, 2003); J. Beermann, 'Common law and statute law in US Federal administrative law' in Pearson, Harlow and Taggart (eds.), *Administrative Law in a Changing State* (Hart Publishing, 2008).

[17] R. Stewart, 'The reformation of American administrative law' (1975) 88 *Harv. LR* 1776; and A. Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harv. LR* 1281.

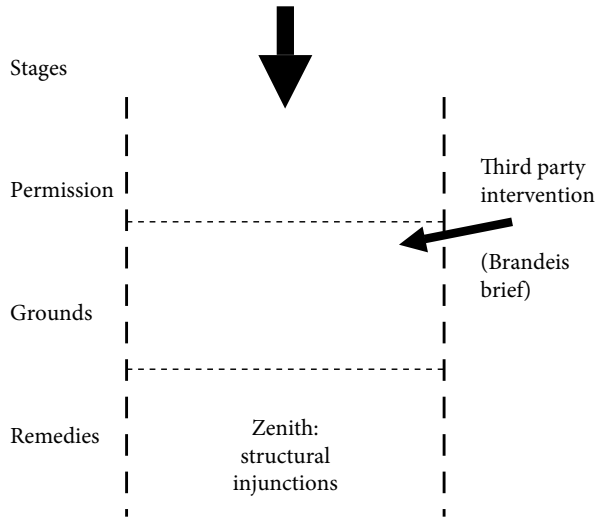

Fig 15.3 The (American) freeway

own representativeness is necessarily called into question. And the freeway's unstructured character means that it can all too easily degenerate into a 'free-for-all' with no clear rules.[18]

The more modest development in this jurisdiction is typically piecemeal in character, a mix of institution-building (see below) and specific procedural amendment.[19] The judges are seen advancing the broad capacities of the system, for example in terms of fact-finding, so further buttressing the normative dimension of legal supervision. The judicial toolkit of remedies is considerably expanded, not least by reason of European requirements and spill-over effects (see further below). Continued development of the declaratory order is an important feature.

This is not a one-way progression however. At the same time, we have noted the prevalence of light-touch approaches under both the *Wednesbury* and proportionality principles; the use of the dubious 'mirror principle' as a limiting device (ECHR 'floor' of rights a domestic 'ceiling' – see p. 136 above); and the scant enthusiasm for structural procedural review under ECHR Art. 6 (see p. 653 above). The machinery has in fact been stretched through formal requirements for early party interaction (see p. 692 below) – a 'front-loading' of the process designed to produce space for settlement and, through better information for the judges at the permission stage, a counterweight for the more intensive judicial scrutiny available on the substantive application. In this way, the judges have constructed the 'British motorway' (see Fig. 15.4).

[18] J. Resnik, 'Managerial judges' (1982) 96 *Harv. LR* 374.
[19] C. Harlow, 'Public law and popular justice' (2002) 65 *MLR* 1.

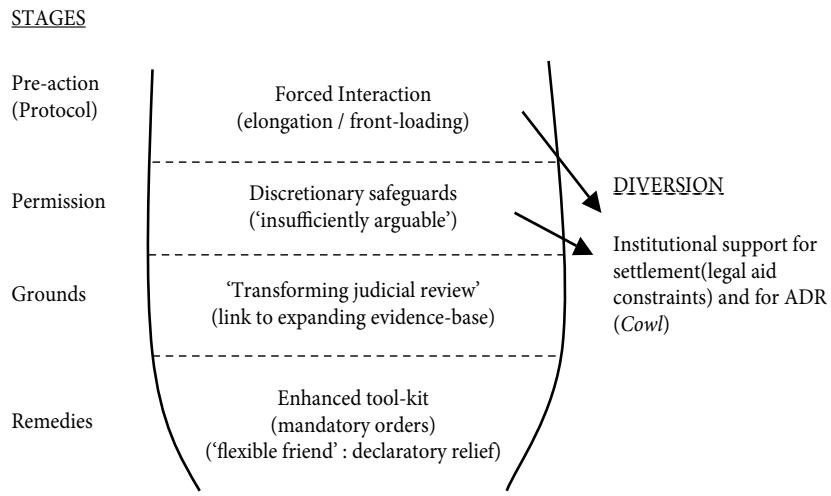

Fig 15.4 The British motorway

(c) Multiple streams

The cluster of legal issues associated with a multi-streamed jurisdiction is scarcely a phenomenon confined to the UK or England and Wales. But in a country in more ways than one the crossroads of the world, the mix is peculiarly potent. There is the historical legacy of Empire, as represented in 'the common law globe'. There is the regional development associated with the 'two legal Europes'. The UK is a big player on the international stage. It would be absurd to ignore the high standing and influence of British courts in many other jurisdictions in an Internet age of transnational judicial dialogue and precedent swaps.

Bamforth has highlighted the scale of the challenge that confronts the national judges in this situation. He describes 'a multi-layered constitution' containing European, state and sub-state systems in which, in determination of the appropriate judicial role, 'red light' and 'green light' perspectives are crosscut by 'minimalist' and 'maximalist' views of the reception of EC law and the ECHR.[20] This is indicative of a changing mindset: a move beyond the (transitional) style of a common law framework subject to 'European influences'[21] to explicit recognition of a sometimes well-suited, sometimes ill-fitting, range of jurisprudential architecture.

So how might the contemporary multi-streamed system of judicial review be visualised? One approach obviously would be to specify three somewhat different ideal types, one for each of the clearly established jurisdictional sources:

[20] N. Bamforth, 'Courts in a multi-layered constitution' in Bamforth and Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2003).

[21] Woolf, Jowell and Le Sueur, *Judicial Review*, p. 3.

common law, EC law and Convention rights. But this would obscure the considerable continuity in practice and procedure under the shared umbrella of the AJR, as also the increased influence of comparative materials and the growing public international law dimension. It would too be highly artificial in light of the common experience of different claims mixed in a single case, for example:

- common law/EC law — *Edwards* (see p. 651 above)
- common law/Convention rights — *Daly* (see p. 118 above)
- EC law/Convention rights — *Countryside Alliance* (see p. 113 above)
- common law/Convention rights/ — *A (No. 2)* (see p. 131 above)
- public international law.

Let us instead try a single layout:

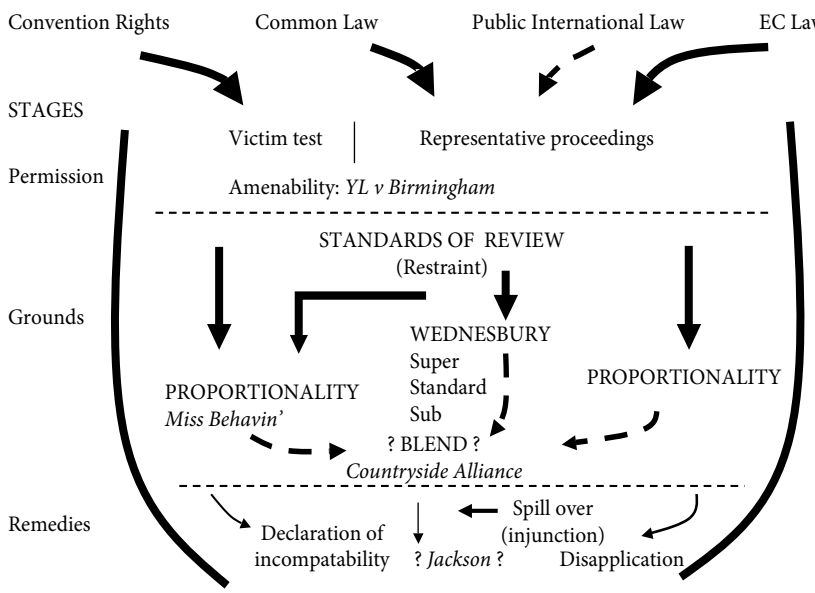

Fig 15.5 Spaghetti junction

As the metaphor implies, our contemporary judicial review framework is apt to appear somewhat bewildering, even a little scary, to the uninitiated.[22] But increased complexity – more problems of navigation[23] – is part and parcel of a system in which major, overlapping jurisdictional sources are more or less closely linked together. This model serves as a reminder, first, of the scope for

[22] Yet the model is highly simplified, the aim again being to focus attention on certain key elements. See further, R. Rawlings. 'Modelling judicial review'.

[23] Particular twists and turns, e.g. as regards standing to sue, are discussed in later sections. See also, in relation to amenability to jurisdiction, p. 380 above.

overlap as regards the pegs on which to hang a case; secondly, that each of the jurisdictional sources reaches parts the others cannot reach; thirdly, of the need not to think in terms of hermetically sealed compartments. The model further highlights the expansionary tendencies of judicial intervention and discretionary control. Since, in Sir Konrad Schiemann's words, 'the light in which a lawyer views a set of facts and the way in which he formulates the legal problem is very much conditioned by the legal system he is applying',[24] some mental gymnastics are also called for.

The 'spaghetti junction' model is exemplified in the debate surrounding the proportionality principle (see p. 106 above). In the domestic law stream of cases, the *Wednesbury* doctrine of unreasonableness is normally applicable; in the two European streams, proportionality is the governing principle. As counsel argued in the *Countryside Alliance* case (see p. 113 above), however, the concept of proportionality does not carry identical meanings in EC and Convention law.[25] British judges therefore have to manoeuvre with three streams of doctrinal traffic at spaghetti junction. With the advent of the Human Rights Act (HRA) and greater familiarity with the proportionality principle, however, pressure for replacement of *Wednesbury* at common law was bound to intensify, pointing up the possibility of a fork in the road whereby *Wednesbury* and proportionality coexist within the domestic law stream. This is already occurring, as statute imposes a proportionality test in particular policy domains, as with the Race Relations (Amendment) Act 2000,[26] or when a particular doctrinal development seems to call for proportionality, as we saw with substantive legitimate expectation in the case of *Naharajah and Abdi* (see p. 229 above).

Similarly, variable demands may be placed on the machinery at the stage of remedies. The pressure for conformity and resultant 'spill-over effect' is strongest in the EU stream, where the doctrines of supremacy and direct effect in EC law and the duty of loyal co-operation operate to push domestic courts towards harmonisation in the interests of the 'effectiveness' of EC law, a principle of primary importance to the ECJ.[27] The most notable example is *Factortame*, where we saw the prohibition against injunctions against the Crown modified (see p. 180 above). The 'spill-over effect' came in *M v Home Office* where the consequent disparity between EC and English law appeared to leave litigants in the domestic stream disadvantaged, an argument that featured in the House of Lords proceedings (see p. 10 above). Something very similar

[24] Sir K. Schiemann, foreword to R. Gordon, *EC Law in Judicial Review*.

[25] Compare G. de Burca, 'The principle of proportionality and its applications in EC Law' [1993] 12 *Yearbook of European Law* 105 and J. McBride, 'Proportionality and the European Convention on Human Rights' in Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, 1999).

[26] See *Defence Secretary v Elias* [2006] EWCA Civ 1293.

[27] See generally, G. Anthony, *UK Public Law and European Law* (Hart Publishing, 2002) and M. Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing, 2005)

<?> See generally,

has happened in the field of restitution.[28] And just as *Factortame* brought a new remedy in the shape of a power to 'disapply' statutes incompatible with EC law so the HRA brought the lesser 'declaration of incompatibility' with Convention rights.

Looking forwards, the shaping of the streams, with more or less intermingling at spaghetti junction, is likely to emerge as a permanent feature of the new 'multi-layered jurisdiction'. The traffic may of course change. Some streams may gradually merge: proportionality could, as Lord Steyn wished, replace *Wednesbury* unreasonableness altogether (see p. 120 above).[29] New streams might be added. International law might, for example, be pulled more strongly into the system; other streams might be modified, as could be the case if a British Bill of Rights were to be adopted. At least for the foreseeable future, however, a single-track road seems unlikely.

2. Organisational arrangements

Institutional reform is a recurring theme in the recent history of judicial review in England and Wales – in the face of recurring problems of delay and inefficiency, of mismatch between caseload and court resources, and of an inward-looking administrative culture. The period 1977–81 witnessed a major rationalisation of the machinery. Following the introduction of AJR procedure through revision to Order 53, then the governing instrument in the Supreme Court Rules, this phase culminated with s. 31 of the Supreme Court Act 1981, which incorporated some important provisions on access and party delay that remain in place. The years 2000–2 saw a recasting of the process with active case management and regulation and settlement of claims. Grounded in Part 54 of the new Civil Procedural Rules (CPR), this set the seal on the establishment of the Administrative Court, a bastion of judicial power in the constitution. The current phase sees the Administrative Court facing incipient competition from the revamped tribunals structure (see Chapter 11), but opening up the exciting prospect of a regional structure: 'the Administrative Court for users'.

(a) AJR and Crown Office List

Prior to 1977 a mind-numbing complexity surrounded the remedies available in different courts and with different rules on amenability to jurisdiction, standing to sue and time limits. Remedial reform had been a long time coming to this product of the centuries. Whereas Lord Denning had urged replacement of the 'pick and shovel' with 'new and up to date machinery'

[28] See p. 764 above. And see Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR 3595.

[29] See further, M. Hunt, 'Against bifurcation' in Dyzenhaus, Hunt and Huscroft (eds.), *A Simple Common Lawyer* (Hart Publishing, 2009).

in 1949,[30] it was only in the post-*Ridge v Baldwin* era that successive Law Commission reports helped to generate a sufficient head of steam.[31] With the aim of simplification, the AJR was explicitly designed as an umbrella procedure covering the prerogative orders and the two 'ordinary' remedies of declaration and injunction in cases designated as 'public law'. In addition, the court was empowered to award damages provided there was a recognised cause of action. Such would be the vehicle for judicial review for the next twenty years.

Reform of procedure paved the way for court reform. The impetus came from problems in the Divisional Court, with responsibility for the prerogative orders and traditionally composed of three High Court judges, which in the late 1970s was sinking under an increasing caseload.[32] With AJR procedure it would commonly be single judges who presided at full hearings and the practice was adopted of nominating a small cadre of judges considered specialists in some aspect of administrative law to take Ord. 53 cases. Provision was made for transferring into this 'Crown Office List' other High Court matters seen to involve administrative law issues, as with appeals on points of law from tribunals. The idea of judicial review as a significant and distinctive area of jurisdiction was thus given a powerful boost.

We touch here on Dicey's *bête noire*, a separate system of courts predicated on a jurisdictional distinction between public and private law, alien to the common law tradition (see Chapter 1). Although there had been seeds of this in the shape of the prerogative orders, the Divisional Court was emphatically not an administrative court in the sense to which Dicey had objected; composed of 'ordinary' judges, it possessed no monopoly in remedies against the administration. Declarations and injunctions were available from the Chancery Division, while actions for damages lay in the ordinary civil courts (see Chapter 17). The Law Commission, in proposing AJR procedure, had been looking for more, not less, procedural flexibility, the assumption being that applicants would have the option between AJR and a civil action in cases where both were available on the facts of the case.[33] However, in *O'Reilly v Mackman*,[34] Lord Diplock took it upon himself to invent 'procedural exclusivity', the doctrine that AJR procedure should generally be considered obligatory in public law cases. The case concerned challenges by several prisoners to decisions of the Board of Visitors punish-

[30] A. Denning, *Freedom under the Law* (Stevens, 1949).

[31] Law Commission, *Remedies in Administrative Law* (WP No. 40, 1971); *Report on Remedies in Administrative Law* (Law Com. No. 73), Cmnd 6407 (1976).

[32] See L. Blom-Cooper, 'The new face of judicial review: Administrative changes in Order 53' [1982] *PL* 250.

[33] *Report on Remedies in Administrative Law* [34]. S. 31(2) of the Supreme Court Act 1981 provided that, whereas certiorari, mandamus and prohibition 'shall' be awarded under AJR procedure, declarations and injunctions 'may' be. Ord. 53, r. 1(2) and CPR 54(2)(3) are successively to the same effect.

[34] [1983] 2 AC 237.

ing them with loss of remission; complaint was made of breach of natural justice. Either because they were out of time for judicial review, or because they wanted to be sure of an opportunity to cross-examine on disputed facts (see p. 705 below), the prisoners went by ordinary civil procedure, asking for declarations. They were stopped in their tracks. Lord Diplock stressed the importance of the special 'safeguards' in AJR procedure in guarding against 'groundless, unmeritorious or tardy attacks on the validity of decisions made by public authorities'. It would generally be 'contrary to public policy, and as such an abuse of process' to permit a person 'seeking to establish that a public authority infringed rights to which he was entitled to protection under public law' to proceed by ordinary action and so 'evade' Ord. 53 filtering processes. 'The development of procedural public law' could see exceptions 'decided on a case to case basis'.

The one substantial argument in favour of procedural exclusivity was that for concentration of expertise in a judicial power base: channelling cases in this way helped to cement the position of the 'nominated judges'.[35] *O'Reilly* otherwise represented a variation on a theme: not filtering cases out of the judicial review process, but rather sucking cases in so as to repress them. In this regard, *O'Reilly* was both about rationing – time limits and the choice of a 'wrong' procedure ended it without reference to the merits – and judicial management – with judicial review procedure being seen as more streamlined (especially as regards the evidential techniques: see p. 703 below). The further twist was express provision in Ord. 53 for transfer out of, but not into, AJR procedure.

Lord Diplock had set sail against the tide: an emphasis on internal jurisdictional boundaries at the very time that new modalities of regulatory and contractual governance saw policy and administration moving in the opposite direction. Nor was the Crown Office List about to spread wings; reflecting entrenched interests in an elite system centred at the Royal Courts of Justice, procedural exclusivity worked to cement a London monopoly in public law cases. Little attention was paid to the competing value of access to justice. For example, community lawyers, accustomed to suing local councils in local county courts on behalf of homeless people, now faced an arduous trek.[36]

Entirely predictably,[37] *O'Reilly* resulted in a mass of so-called 'satellite litigation', sterile in the sense of being solely concerned with procedural form, whether one could sue and where one had to sue, and not with the merits.

[35] M. Sunkin, 'What is happening to applications for judicial review?' (1987) 50 *MLR* 432.

[36] On the basis that the decision whether or not to provide accommodation was a public law matter challengeable solely through AJR procedure: *Cocks v Thanet DC* [1983] 2 AC 286.

[37] C. Harlow, '"Public" and "private" law: Definition without distinction' (1980) 43 *MLR* 241. See also, S. Fredman and G. Morris, 'The costs of exclusivity: Public and private re-examined' [1994] *PL* 69.

Gradually a more generous judicial attitude prevailed, with Lord Diplock's concession of possible 'exceptions' being increasingly exploited.[38]Arguments that individuals should be able to invoke the law as a shield against public authorities without bringing separate proceedings prevailed.[39] Prior to the introduction of the CPR, however, the law concerning 'exclusivity' remained exceedingly complex: an object lesson for a whole generation of administrative lawyers in the pitfalls of 'procedural public law'.

(b) CPR and the Administrative Court

Another Law Commission report in 1994 drew attention to major inefficiencies in the handling of Crown Office business, while advocating increased accessibility in the manner of 'the funnel' model as well as enhanced procedural flexibility.[40] Nor could it be expected that Ord. 53 procedure would escape the new orthodoxy of the civil justice reforms promoted in the 1990s by Lord Woolf, not least the twin techniques of forced interaction between the parties at an early stage and active management of individual cases by the judiciary.[41] However, given the recent emergence of judicial review as a specialist jurisdiction, and also the evident constitutional sensitivities, changes had to await detailed consideration of the workings of the Crown Office List.

Eventually published in 2000, the study by accountant Sir Jeffrey Bowman painted a grim picture.[42] After a brief period of respite, delay, which in the early 1990s often involved judicial review cases taking over two years to be heard, was increasing. The work of the review was hindered by a basic lack of management information about the handling of business. Continuing the Dickensian theme, Bowman drew attention to the mishmash of jurisdictions making up the Crown Office List. He stressed the importance of changing the organisational culture; 'reducing delays as far as possible' and 'strengthening the capacity of the list . . . to deal with its expanding jurisdiction'. The HRA was casting a shadow; a further increase in the judicial review workload could reasonably be anticipated once it came fully into force.[43] Bowman demanded careful planning and resource allocation and proper lines of responsibility and firm office management, necessitating 'a

[38] See e.g. *Davy v Spelthorne BC* [1984] AC 264 and *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624.

[39] See *Wandsworth LBC v Winder* [1985] AC 461 and (sharply distinguishing the earlier case of *R v Wicks* [1997] 2 All ER 801) *Boddington v British Transport Police* [1999] AC 143.

[40] Law Commission, *Administrative Law: Judicial review and statutory appeals* (Report No. 226, 1994).

[41] Lord Woolf, *Access to Justice: The final report to the Lord Chancellor on the civil justice system in England and Wales* (HMSO, 1997).

[42] Sir J. Bowman, *Review of the Crown Office List* (Lord Chancellor's Department, 2000).

[43] Previously, not only judicial review and statutory appeals and applications but also matters ranging from extradition to contempt of court were handled by the Crown Office. Bowman actually erred in budgeting for a deluge of human rights claims.

continuing need for a specialised court as part of the High Court to deal with public and administrative law cases'. 'Speed, certainty, efficiency, consistency and quality of decisions in public law cases can only be realised by having a dedicated office to administer cases and dedicated judicial resources to hear them.' The Crown Office List duly metamorphosed into the fully-fledged Administrative Court,[44] better to emphasise the principal nature of the jurisdiction. Dicey's concept of the Rule of Law by 'ordinary courts' had again been stretched but not violated.

Most of Bowman's procedural recommendations were incorporated in the current scheme of Part 54 of the CPR, which – replacing RSC Ord. 53 as machinery for judicial review litigation – was inaugurated in October 2000 to coincide with general implementation of the HRA. Reflecting the ideology of the Woolf reforms to civil justice, and building in turn on the prior trends in judicial review, a strong dose of discretionary judicial control is of the essence of this.[45] Practitioners thus note the creeping tentacles of active case management.[46]

The tailored provisions in CPR 54 are subject to the 'overriding objective' set out in CPR Part 1 'of enabling the court to deal with cases justly'. This includes, 'so far as is practicable', ensuring that the parties 'are on an equal footing'; 'saving expense'; and dealing with the case 'in ways which are proportionate' to its importance, the amount of money involved and the complexity of the issues. So, Administrative Court judges must follow the practice in ordinary civil actions of regulating the conduct of litigation, for example by encouraging co-operation between the parties, fixing timetables or otherwise controlling the progress of the case, helping the parties to settle in whole or in part and encouraging recourse to alternative dispute resolution (ADR). While this may seem unremarkable, we will see how judicial review litigation raises particular problems in this regard, especially at the distinctive permission stage.

Much of the sting of procedural exclusivity was drawn. First, the new formula in CPR 54(1) for identifying cases appropriate for AJR procedure was phrased to reflect the more expansive approach in *Datafin* (see p. 317 above) – 'a decision . . . in relation to the exercise of a public function'. Secondly, as part of the Woolf reforms to civil justice, the stress in judicial review on discretionary 'safeguards' was read across under the CPR to 'ordinary' civil claims via techniques of case management.[47] With procedural differences thus flattened, through greater judicial control across the piece, why not greater

[44] *Practice Direction: Administrative Court* [2000] 1 WLR 1654.

[45] T. Cornford and M. Sunkin, 'The Bowman Report, access and the recent reforms of the judicial review procedure' [2001] *PL* 11.

[46] M. Fordham, *Judicial Review Handbook*, 5th edn (Hart Publishing, 2008), pp. 215–19.

[47] E.g. delay could now be taken into account on an application to strike out or for summary judgment. See further, D. Oliver, 'Public law procedures and remedies: Do we need them?' [2002] *PL* 91.

procedural flexibility as between 'public' and 'private' law? Thirdly, underwriting this, there was now provision for transfer of cases into, as well as out of, AJR procedure (CPR 30.5 and 54.20).

Lord Woolf, who had earlier been an advocate of the 'procedural divide' because of the judicial review 'safeguards',[48] duly shifted position. In the key case of *Clark v University of Lincolnshire & Humberside*,[49] C was awarded an inferior degree amid allegations of plagiarism; without a university 'visitor' to complain to, and following dispute about its appeal procedures, she sued the university in contract. Several years later, the point was taken that she should have sought (and so been subject to the strict time limit in) judicial review. The Court of Appeal allowed the private law claim to proceed, saying that, although C could have applied for judicial review, it was not right to deny her access to the courts for abuse of process:

> *Lord Woolf:* The court's approach has to be considered in the light of the changes brought about by the CPR. Those changes include a requirement that a party to proceedings should behave reasonably both before and after they have commenced proceedings. Parties are now under an obligation to help the court further the over-riding objectives which include ensuring that cases are dealt with expeditiously and fairly . . . The intention of the CPR is to . . . avoid barren procedural disputes which generate satellite litigation . . . The emphasis can therefore be said to have changed since *O'Reilly v Mackman.* What is likely to be important . . . will not be whether the right procedure has been adopted but whether the protection provided by [judicial review process] has been flouted in circumstances which are inconsistent with the proceedings being . . . conducted justly in accordance with the general principles contained in [CPR] Part 1.

Attesting to the broad influence of *Clark*, cases on procedural exclusivity are today notable by their absence and as regards 'public' and 'private' functions, it is the issue of amenability to jurisdiction under HRA s. 6 that commands attention! A further development is shown in the *Mullins* case(s).[50] Judicial review proceedings had again been launched against a decision of the Jockey Club; eventually the applicant only sought the ordinary remedy of a declaration. Having held that the *Aga Khan* case (see p. 319 above) still held sway under the CPR, such that judicial review was not available in light of the parties' contractual relationship, the judge transferred the case to himself sitting in the Queen's Bench Division. Echoes of the bridging of the public/private 'divide' in the *Bradley case* (see p. 320 above), the judge then determined it on the basis of

[48] Lord Woolf, 'Droit public, English style' [1995] *PL* 57. See also C. Harlow, 'Why public law is private law: An invitation to Lord Woolf' in Zuckerman and Cranston (eds.), *Reform of Civil Procedure* (Clarendon Press, 1995).

[49] [2001] WLR 1988. See further, Lord Woolf, 'The Human Rights Act 1998 and remedies' in Andenas and Fairgrieve (eds.), *Judicial Review in International Perspective* (Kluwer, 2000).

[50] *R (Mullins) v Jockey Club* [2005] EWHC 2197; *Mullins v McFarlane* [2006] EWHC 986.

a supervisory jurisdiction. Artificial yes, but the prevailing sense of procedural flexibility is palpable.

(c) The Administrative Court in transition

For a little while, Bowman appeared to have done the trick. Armed with a new budgetary allocation, with six courtrooms regularly in use and a lead judge given overall responsibility for speed, efficiency and economy, the Administrative Court exuded a more professional air. As against a mere handful in the early days of AJR, there were by 2003 some thirty 'nominated judges' contributing their services.[51] But with a virtual doubling of the Administrative Court caseload[52] driven by applications to require the Asylum and Immigration Tribunal (AIT) to reconsider (see p. 519 above), things turned sour. By 2007 there were grave delays: on average sixteen weeks for applications for permission to be considered on the papers and eighteen months from initial claim to a substantive hearing. In an embarrassing manoeuvre, the Public Law Project threatened the Ministry of Justice with judicial review proceedings for breach of the common law right of access to justice (*Witham*: see p. 114 above), of the ECHR Art. 6 right (determination of civil rights and obligations 'within a reasonable time') and of the duty to ensure an efficient and effective court system (s.1 of the Courts Act 2003). A significant increase in the numbers of sitting judges was eventually conceded.[53]

We are back too with questions about the relationship between courts and tribunals. In light of the problems afflicting the Administrative Court, pressure from the judges to have the AIT properly nested inside the new two-tier tribunal system (see p. 520 above) was eminently predictable. Asserting the idea of courts as an elite forum of dispute resolution, a judicial working group observed of the reconsideration process: 'each case is intrinsically important, but the applications are numerous and repetitive. We do not consider that this is an appropriate use of High Court judge time.'[54]

Here the use or otherwise of powers in the Tribunals, Courts and Enforcement Act 2007 (TCEA) to order transfer of judicial review cases from the Administrative Court to the Upper Tribunal will be significant. There is provision not only for case-by-case transfer, a sensible element of flexibility, but also for automatic transfer of designated classes of case.[55] The risk is that the inner institutional strength of the Administrative Court, so painstakingly built up, will be diluted by the loss of major categories of case.

[51] Administrative Court, *Annual Report 2003*.

[52] The case load rose from 6,202 new cases to 11,302 between 2002 and 2006; see p. 713 below for further details.

[53] Initially from 7 to between 9 and 12 per week, with more (especially Deputy High Court judges) to follow: see C. Haley, 'Action on Administrative Court delays' (2008) *Judicial Review* 69.

[54] The May Committee, *Justice Outside London* (2007) [46].

[55] TCEA, s. 19, currently with the exception of asylum and immigration matters. But see the Borders, Citizenship and Immigration Bill currently before Parliament.

A study in 2007 of judicial review claims against local authorities threw the issue of 'legal geography' – accessibility and outreach – into sharp relief. All the councils on a twenty-strong list of those most frequently challenged were in London.[56] What about protection of the individual elsewhere? Invocation of the so-called 'radiating effects' of court cases (see Chapter 16) is scarcely an answer. Perhaps hopefully, Lord Justice Sedley spoke of the judges themselves 'starting to appreciate that there are large geographical and social gaps in the legal profession's ability to provide advice and representation' in relation to Convention rights.[57] And if inculcating core values of good governance was important, was there not a case for making the elite machinery more visible and immediate?

In the long view, the facilitative model of 'the Administrative Court in Wales', whereby, post-devolution, judicial review claims against Welsh public bodies could be initiated and determined inside that country,[58] should be seen as heralding a more general break-up of a London monopoly. The May Committee has championed the 'very strong economic, business, professional and social case' for regionalisation of the Administrative Court:

> Proper access to justice is not achieved if those in the regions can only bring judicial review and other claims in the Administrative Court in London. There would be substantial saving in public and private expense. The present system discriminates against those who are not in the South East of England.[59]

Nor was the May Committee much impressed by objections from well-placed functionaries of 'interesting claims' being lost to the provinces, of local hearings leading to 'unacceptable isolation' among senior judiciary, and of something awful called 'a deployment nightmare'.[60] IT could assist in linking different Administrative Court centres, ensuring cohesiveness while allowing judicial review to be brought closer to the people.

Not before time, there are current plans for regional centres of the Administrative Court to open in Birmingham, Cardiff, Leeds and Manchester in 2009, with a further centre planned for Bristol in 2010.[61] Meanwhile, the potential synergies are already evident in the profession. Following the

[56] M. Sunkin, K. Calvo, L. Platt and T. Landman, 'Mapping the use of judicial review to challenge local authorities in England and Wales' [2007] *PL* 545.

[57] Sir S. Sedley, 'The rocks or the open sea: Where is the Human Rights Act heading?' (2005) 32 *JLS* 3, 4.

[58] Even if it has tended to be little more than a 'post-box'. See further, Sir J. Thomas, 'Legal Wales: Its modern origins and its role after devolution' in Watkin (ed.), *Legal Wales: Its past, its future* (Welsh Legal History Society, 2001); M. Williams and N. Cooke, 'The Administrative Court in Wales' (2005) 4 *Wales J. of Law and Policy* 102.

[59] May Committee, *Justice Outside London* [51].

[60] *Ibid.*, annex L.

[61] See further, R. Clayton, 'New arrangements for the Administrative Court' (2008) 13 *Judicial Review* 164.

example of the London-based Constitutional and Administrative Law Bar Association (1986), and the Wales Public Law and Human Rights Association (1999), barristers, solicitors and academics have now joined forces in a Northern Administrative Law Association designed to raise profile and foster specialist expertise.

3. Regulating access

(a) Permission

One justification for permission concerns the prompt and efficient despatch of public business, the need to protect public administration from unmeritorious and/or costly litigation and from the uncertainty engendered by delay. A second justification concerns the efficient use of court time; the preliminary filter may deter unmeritorious applications and facilitate their disposal with the minimum use of resources. According to Lord Woolf,[62] the judges have also been 'encouraged . . . to develop their power to intervene to control abuse of power in a way which they would not have done otherwise'. This may appear a powerful argument – discretionary 'safeguards' as the *sine qua non* of judicial activism – but it is obviously not susceptible of proof.

Prior to the CPR, the applicant had the right to choose an oral hearing at this stage.[63] After Bowman however, early party interaction today grounds the norm of permission decisions 'on the papers'. Other than in truly urgent cases (where application may be made by telephone to a designated out-of-hours judge),[64] oral procedure is typically confined to those initially unsuccessful applications that are renewed.[65] Fortunately, as regards a case challenging precedent for example, permission to appeal against refusal of permission can still be sought from the Court of Appeal.

The statistics testify to the scale of the filtering.[66] In the two years 2006–7 for example, of some 7,500 applications considered, less than a quarter (1,600) were granted permission. Figure 15.6 also reveals that, while the numbers attracted into 'the funnel' have continued to rise, the proportion going forwards has fallen significantly with the CPR framework.[67]

[62] Woolf, *Protection of the Public*, Ch. 1.

[63] As counterbalanced by a right to apply to set aside a permission.

[64] *Practice Statement (Administrative Court: Listing and Urgent Cases)* [2002] 1 WLR 810. E.g. for an interim injunction to protect a vulnerable person: see p. 743 below.

[65] See further, Fordham, *Judicial Review Handbook* , pp. 209–11.

[66] They actually understate it, a further component of the judicial discretion being 'partial filtering' (power to make the permission conditional or restricted to certain grounds). Originally emerging under Ord. 53 procedure, the practice has blossomed as part of CPR-style active case management. See for illustration, *R (Smith) v Parole Board* [2003] 1 WLR 2548.

[67] We noted this trend in the second edition of *Law and Administration*, Ch. 16. The numbers of leave applications increased sevenfold in the period 1981–96, while those successful roughly trebled: from some 550 to 3,900 cases, and 375 to 1,250 cases, respectively.

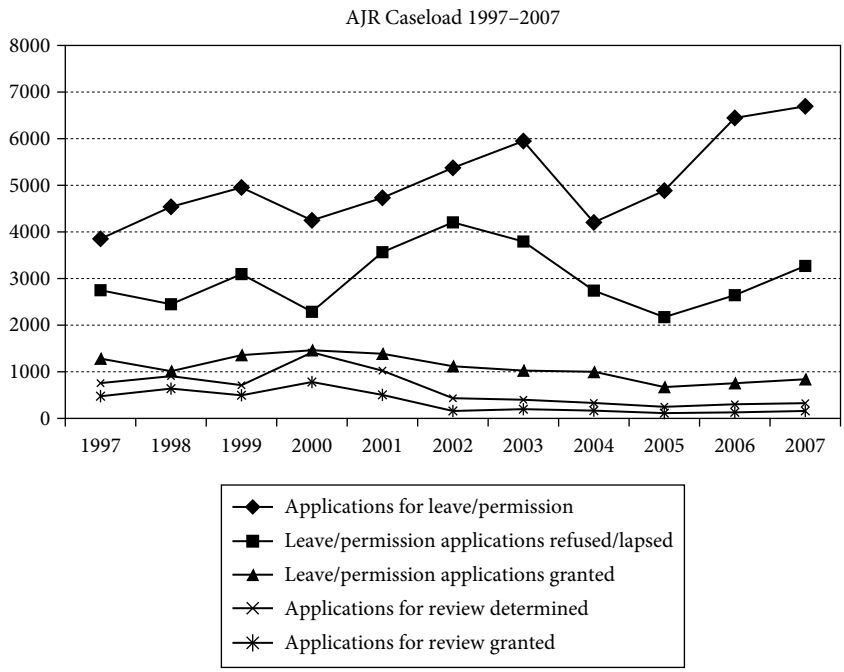

Fig 15.6 AJR caseload 1997–2007

One explanation for the discrepancy is tougher system management of the process by the judiciary – hardened attitudes under mounting pressures of work. This form of judicial gatekeeping is starkly illustrated in two decisions from the 1980s. Bound up in a powerful assertion of public interest, the first one is the homelessness case of *Puhlhofer*,[68] where Lord Brightman decreed 'a very hard look' before allowing legal claims from this vulnerable section of society to proceed. There should be 'a lessening in the number of challenges mounted against local authorities who are endeavouring in extremely difficult circumstances to perform their duty under the Homeless Persons Act, with due regard for all their other problems'. The homelessness caseload promptly fell. In issue in *Swati*[69] was the rule, also operated at the permission stage, against permitting judicial review where an alternative remedy was available. This rule is of long standing in relation to statutory procedures, but exceptionally may be disapplied if the court considers the alternative remedy inappropriate.[70] Refused admission at the port of entry, a foreign visitor only had a statutory right of appeal to a tribunal from abroad, which hardly constituted effective redress of grievance. In turn, a practice had developed in such cases of seeking

[68] *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484.

[69] *R v Home Secretary, ex p. Swati* [1986] 1 WLR 477. The case is a forerunner of the many problems over immigration tribunals, judicial review and ouster previously discussed.

[70] *R v Chief Constable of the Merseyside Police, ex p. Calveley* [1986] QB 424 is a notable illustration.

judicial review; so much so that, by 1985, visitor cases accounted for some 20 per cent of leave applications.[71] The Court of Appeal took action in *Swati* to halt this practice, even though the alternative procedure was unrealistic. 'Where Parliament provides an appeal procedure, judicial review will have no place, unless the application can distinguish his case from the type of case for which the appeal procedure was provided.'

As the commonest reason for refusal of permission, the phrase 'insufficiently arguable' underwrites the innate flexibility of the system. Early *dicta* from Lord Diplock had suggested a relatively open approach under the AJR. 'If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting the relief claimed, it ought to give leave to apply for that relief.'[72] This fitted with the idea of a new procedure sweeping away old limitations and technicalities – a generous 'funnel'. In the wake of *Puhlhofer* and *Swati*, however, Lord Donaldson, then Master of the Rolls, reiterated demands for a harder look, so targeting not only hopeless cases but also those in the 'potentially arguable' category. 'The judicial review jurisdiction . . . should be exercised very speedily and, given the constraints imposed by limited judicial resources, this necessarily involves limiting the number of cases in which leave to apply should be given.'[73] Leave ought only to be given if prima facie there was already clearly an arguable case for granting the relief claimed. In the absence of detailed information, this meant a large dollop of judicial intuition.[74] A contemporary observer duly remarked on the risk of over-regulation. Good applications might be summarily refused access to the courts, so undermining the several judicial review functions of redress of grievance, control of government, and elaboration of legal principle.[75]

Today, with the CPR, testing for the actual arguability of claims is a familiar feature of permission.[76] Recent *dicta* from the Privy Council in *Sharma v Brown-Antoine*[77] show no enthusiasm at the highest levels for a more open approach; it is rather a case of 'pick and choose'. As a vehicle of judicial discretion, the preferred formulation could scarcely be bettered:

> The court will refuse leave to judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success . . . But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is

[71] Sunkin, 'What is happening to applications for judicial review?'.
[72] In *IRC v National Federation of Self-Employed and Small Businesses* [1982] AC 617.
[73] *R v Panel of Take-overs and Mergers, ex p. Guinness Plc* [1990] 1 QB 146. And see *R v Legal Aid Board, ex p. Hughes*, *The Times*, 29 October 1992
[74] As Lord Donaldson effectively conceded in *R v Home Secretary, ex p. Doorga* [1990] COD 109. (The information-gathering requirements of early interaction were not yet in place.)
[75] R. Gordon, 'The Law Commission and judicial review: Managing the tensions between case management and public interest challenges' [1995] *PL* 11.
[76] V. Bondy and M. Sunkin, 'Accessing judicial review' [2008] *PL* 647.
[77] [2006] UKPC 57.

> a test which is flexible in its application . . . It is not enough that a case is potentially arguable.[78]

The criterion of delay involves an absurdly complicated set of rules. Statute provides that where the court considers there has been 'undue delay' in making an application, it may refuse to grant permission or, at the end of the case, any relief sought; that is, if granting such relief 'would be likely to cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration'. Meanwhile, under the CPR, a claim must be made 'promptly' and in any event within three months of the date on which the decision or action being challenged was taken.[79] The court retains power to extend the time,[80] but there is also discretion to refuse permission even if the claim is made within the period, in a fast-moving commercial/regulatory environment for example.[81]

Taking transaction typing to new heights, the 2008 case of *Finn-Kelcey*[82] graphically illustrates the role of promptness as a rationing device. A local landowner, who was denied permission to challenge the grant of planning permission for a wind farm, filed his claim form a few days before expiry of the three months time limit:

> *Keene LJ:* The importance of acting promptly applies with particular force in cases where it is sought to challenge the grant of planning permission . . . Once a planning permission has been granted, a developer is entitled to proceed to carry out the development and since there are time limits on the validity of a permission will normally wish to proceed to implement it without delay . . . It may often be of some relevance, when a court is applying the separate test of promptness, that Parliament has prescribed a six weeks time limit in cases where the permission is granted by the Secretary of State [[83]] rather than by a local planning authority, if only because it indicates a recognition by Parliament of the necessity of bringing challenges to planning permissions quickly.
>
> What satisfies the requirement of promptness will vary from case to case . . . Knowledge of a resolution to grant permission will often be relevant to whether a person has acted promptly, even though time does not formally run until the grant of permission.[[84]]

[78] *Ibid*. [14].

[79] Supreme Court Act 1981, s. 31, CPR 54.5 – as against the general limitation period of six years, or three for personal injuries.

[80] E.g. because of delay in the grant of legal aid: *R v Stratford-on-Avon DC, ex p. Jackson* [1985] 1 WLR 1319.

[81] See e.g. *R v Independent Television Commission, ex p. TSW Broadcasting Ltd* [1996] *EMLR* 291. For discussion of the 'flipside' doctrine, see J. Beatson, 'Prematurity and ripeness for review' in Forsyth and Hare (eds.), *The Golden Metwand and the Crooked Cord* (Clarendon Press, 1998).

[82] *Finn-Kelcey v Milton Keynes BC* [2008] EWCA Civ 1067; drawing in turn on *R v Hammersmith and Fulham LBC, ex p. Burkett* [2002] 1 WLR 1593.

[83] Town and Country Planning Act1990, s. 288.

[84] *R (Burkett) v Environment Secretary* [2002] UKHL 23. Note also *Hardy v Pembrokeshire CC* [2006] EWCA Civ 2140 (the obligation to act promptly does not offend ECHR requirements of legal certainty).

> In the present case there is a particular consideration because of the nature of the proposed development. The Secretary of State's . . . Planning Policy Statement] stresses the importance of renewable energy projects, referring to the UK target of generating 10 per cent of electricity from renewable energy sources by 2010, so as to comply with its international obligations entered into by the Government. As Sullivan J [has] said, 'the need for promptness in challenging planning decisions within this policy framework is particularly acute. Delay in challenging decisions in respect of renewable energy projects is more than usually prejudicial to good administration.' [85]

Discretionary control writ large, the case further illustrates the mixing of threshold requirements with the issue of merits:

> There may be considerations which mean that it is in the public interest that the claim should be allowed to proceed, despite the delay and the absence of any explanation for that delay. If there is a strong case for saying that the permission was ultra vires, then this court might in the circumstances be willing to grant permission to proceed. But, given the delay, it requires a much clearer-cut case than would otherwise have been necessary.

ADR is a classic means of diversion. A step beyond the old-style alternative remedies rule, CPR 1(4) speaks explicitly of 'encouraging' and 'facilitating' the use of techniques like mediation if 'the court considers that appropriate'.[86] In the much-cited case of *Cowl*,[87] which concerned an exhausting *Coughlan*-style controversy about the closure of a residential care home, Lord Woolf emphasised the need for judicial review practitioners to think creatively about ADR, especially where the individual was publicly funded. Judicial review really should be treated as a remedy of last resort:

> The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation wherever this is possible. The appeal also demonstrates that courts should scrutinize extremely carefully applications for judicial review in the case of applications of the class with which this appeal is concerned. The courts should then make appropriate use of their ample powers . . . to ensure that the parties try to resolve the dispute with the minimum involvement of the courts. The legal aid authorities should co-operate in support of this approach.

This analysis sits comfortably with the call for 'proportionate dispute resolution' in the White Paper *Transforming Public Services: Complaints, redress and tribunals* discussed in Chapter 11. Here the potential advantages of ADR are said to be greater flexibility, avoidance of confrontation, forward-looking

[85] *R (Redcar and Cleveland BC) v. Business Secretary* [2008] EWHC 1847.
[86] Note however *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 (lack of court power to direct parties to enter into ADR).
[87] *R (Cowl) v Plymouth City Council* [2002] 1 WLR 803.

focus and reduced cost. But Lord Woolf glosses over the problems stemming from the rigidity of such a pyramidal framework in the judicial review context. What happens when the alternative remedy proves to be inadequate or partial? Persons eventually driven to litigation are unlikely to see the system as providing speedy and effective redress of grievance.[88] Again, there is an underlying tension between the private function of ADR in meeting the needs of the parties and the normative and expository role of judicial review.

The courts have notably failed post-*Cowl* to generate clear and principled guidelines on the matter. One might hope for a more carefully targeted approach:

> Disputes concerning education and social services provision, in particular, may be among those most amenable to resolution by way of mediation, rather than litigation. These kinds of disputes very often centre on finance, rather than points of principle, and easily lend themselves to mediation as they concern a situation where there is likely to be a long-term relationship between the parties. They also concern a subject matter in respect of which litigation may seem the least appropriate forum for dispute resolution.[89]

(b) Front-loading

Bowman had been particularly concerned with the inefficiencies, for court time and resources, of a high rate of settlement *after* leave was granted.[90] Both parties ought to be encouraged to re-examine the strength of their case at the earliest possible stage. Building on 'best practice' in the profession, a solution lay ready to hand: regulated forms of 'private filtering', that is to say forced preliminaries of party interaction or elongation of the AJR process ahead of any judicial involvement.

Duly incorporated in the CPR framework, this front-loading consists of two main elements. First, a 'pre-action protocol for judicial review' provides that the potential claimant should send a letter before action to identify the issues in dispute and establish whether litigation can be avoided. In Bowman's words, the public body should 'consider such a letter with great care to see whether any settlement or resolution is possible', and then respond conceding all or part of the claim or otherwise explaining its position. Strictly speaking, the protocol as a code of good practice is not mandatory. Non-compliance is effectively sanctioned, however, since the court can take it into account when giving case-management directions or making costs orders.[91]

Secondly, CPR 54 effectively establishes the permission stage as an *inter partes* procedure by requiring service of the claim form and accompanying

[88] S. Boyron, 'The rise of mediation in administrative law disputes: Experiences from England, France and Germany' [2006] *PL* 320.

[89] M. Supperstone, D. Stilitz and C. Sheldon, 'ADR and public law' [2006] *PL* 299, 317.

[90] See further, Ch. 16.

[91] For the practical workings, see C. Banner, 'The Judicial Review Pre-Action Protocol' (2008) 13 *Judicial Review* 59.

documents on, and acknowledgement by, the defendant and any other 'interested parties', and lodging of the papers with the Administrative Court. More particularly, the applicant having communicated a detailed statement of the case, an acknowledgement of service should include a summary of intended grounds of opposition to the claim. Let us hope that not too many individual applicants are lost in this aggrandised paper chase![92]

Bowman had seen other possibilities: not only should the more straightforward cases be weeded out ahead of permission, but also the courts would be better placed at that stage to judge arguability (more information, less intuitive judgement). All of which may help to explain the further decline in permission rates under the CPR. According to the authors of a recent empirical study:

> The greater use of the written process and the greater involvement of defendants at the permission stage have made it more difficult for claimants to persuade judges that their claims are sufficiently arguable, and have enabled the judges to be more discriminating in their assessment of the quality of claims. While there has been no formal change in the permission criteria, the consequence has been to heighten the de facto barrier facing claimants. This, however, is only one aspect of the picture. Following the reforms, greater numbers of claims are being resolved prior to the permission stage. Our interview data indicate that a very high proportion of these are being resolved in favour of claimants . . . Despite the diminishing grant rate, the overall picture may be one in which access to substantive justice in terms of satisfactory outcomes has improved.[93]

(c) Lottery?

The same survey reports 'widespread disquiet' among practitioners about judicial inconsistency at the permission stage. 'The actual test applied depends on which judge you get.' 'You often know that if you get a certain judge you are going to win or lose.' 'There are very similar cases which result in different outcomes.' Statistical analysis confirmed a wide variation in grant rates between individual judges (from 11 to 46 per cent).[94] This is a running sore. One 1990s study had revealed an even greater discrepancy (from 21 to 82 per cent) with no obvious factors to do with the nature or type of cases to explain this;[95] a second showed that in practice a full spectrum of interpretations was in operation, with markedly different emphases being placed on the (apparent) merits of applications.[96] Today, practitioners still find it 'difficult to know precisely

[92] See further on the implications for costs, *Mount Cook Land Ltd v Westminster City Council* [2003] EWCA Civ 1346 and *Davey v Aylesbury Vale DC* [2007] EWCA Civ 1166.

[93] Bondy and Sunkin, 'Accessing judicial review', p. 666.

[94] *Ibid*., pp. 662–3, 665.

[95] L. Bridges, G. Meszaros and M. Sunkin, *Judicial Review in Perspective*, 2nd edn (Cavendish, 1995), Ch. 8.

[96] A. Le Sueur and M. Sunkin, 'Applications for judicial review: The requirement of leave' [1992] *PL* 102.

what the criteria entail from a claimant's perspective'.[97] The vagueness of the 'sufficiently arguable' test feeds the problem.

Against this backdrop, the question is sharply posed: why retain the permission requirement? Many other jurisdictions, including Scotland, manage without; why not England and Wales? Although Bowman urged retention, procedural developments in the wake of the Woolf report underscore the case for abolition. General provisions ground powers to strike out a case if it discloses no cause of action or is an abuse of process, and to give summary judgment if the claimant has no real prospect of success (CPR 3 and 24). Why not substitute these 'safeguards' for the special procedural protections currently afforded public authorities through the permission requirement?[98]

The judicial fear of opening a floodgate makes such a solution unlikely. If, however, permission is to be used as part of a coherent strategy for managing the case-flow, then, as in other areas of public administration, discretion should be properly structured and confined. It is significant that the major exception to incorporation of Bowman's procedural recommendations in the CPR is the absence in Part 54 of a presumption in favour of permission and explicit statement of relevant criteria. Evidently, behind the scenes, the judiciary was successful in maintaining strong discretion.

4. Matters of interest

(a) Standing. . .

Standing to sue functions as a rationing device by requiring potential litigants to demonstrate some recognised 'interest' in the matter in question. As such, the doctrine has significant constitutional connotations, bearing directly on the nature and purpose of judicial review. How should the balance be struck between (a) an individualist and – prioritising the collective good in vindicating the rule of law – a communitarian analysis of rights and public law, and (b) dispute resolution as the primary role for judicial review and a freer-flowing normative or expository function?[99]

Emblematic of the 'drainpipe' model, standing was long seen as a separate issue or threshold requirement, premised on an interest over and above that of the general public and raising directly the right to apply for a remedy. We noted how, with the 'funnel' model, it subsequently came to be linked more closely to the merits of the case and the grant of remedies. The development, we shall see, has culminated in some remarkably liberal requirements (and legislative reaction in the case of the HRA).

[97] Bondy and Sunkin, 'Accessing judicial review', p. 660.

[98] The argument is pursued by Oliver, 'Public law procedure and remedies - Do we need them?'.

[99] A theoretical framework elaborated by J. Miles, 'Standing in a multi-layered constitution' in Bamforth and Leyland (eds.), *Public Law in a Multi-Layered Constitution*.

The notion of 'interest' is obviously complex. A wide variety of individuals and organisations may subjectively feel themselves 'affected' by an administrative decision. Suppose that a local authority decides to increase its subsidy to the city's public transport system. As a result, fares fall but local taxes increase (the *Bromley* case: see p. 103 above). Who might be said to have an interest in this decision? One answer might be 'local taxpayers and users of public transport', but they are not necessarily the only groups affected. Again, one person may be able to assert a variety of interests. An employer may be a taxpayer or member of an environmental group; a taxpayer may oppose the decision because she lives in the inner city or is offended by urban deprivation.

One approach would be to distinguish 'material interests' (which concern an individual's economic or physical well-being) from 'ideological interests' (which include the affirmation of moral principles).[100] If the classification is applied to our example, however, the open-ended nature of 'material interest' becomes apparent. A restrictive interpretation might confine decisions concerning an individual's well-being to those causing direct financial loss. If, however, the notion encompasses non-pecuniary detriment, where is the line to be drawn? How, for example, should the diffuse interest of city-dwellers in low levels of pollution be treated?

For much of the twentieth century, the approach to standing was essentially two-pronged.[101] First, reflecting and reinforcing the 'protection of the individual' view of the courts' role, applicants were required to show a private interest which had been directly adversely affected. For example, when in *Gregory v Camden LBC*[102] the plaintiff sought to challenge a decision to build a school close by his property, the court accepted that the decision was unlawful but denied standing on the ground that his legal rights as landowner had not been infringed. Secondly it was the Attorney-General who represented the 'public interest' before the courts and possessed public advocacy functions, having automatic standing to initiate or intervene in litigation. The 'relator action' allowed the Attorney-General to authorise a private party to litigate, acting in his name. The Attorney-General's powers then served as a reason why individuals could vindicate only personal, material interests. The public interest, it was said, had been entrusted by the electorate to the Government and was therefore appropriately represented in the courts by the chief Law Officer of the Crown who was directly accountable to Parliament.[103]

Following the reinvigoration of judicial review in the 1960s, criticism of this procedural model became intense. Restrictive standing rules contradicted the idea of a general judicial responsibility to control abuse of power. The

[100] Stewart, 'The reformation of American administrative law'.

[101] From time to time, there were glimpses of an alternative, more liberal, approach: Lord Woolf, Jowell and Le Sueur, *Judicial Review*, Ch. 15.

[102] [1966] 1 WLR 899. The dominant test for the prerogative orders was a 'person aggrieved'.

[103] J. Edwards, *The Attorney-General, Politics and the Public Interest* (Sweet & Maxwell, 1984). And see *Gouriet v Union of Post Office Workers* [1978] AC 435.

twin-pronged approach also contradicted the (then) emergent idea in administrative law of interest representation (see Chapter 4). Today such trust in the doings of the Attorney-General appears somewhat quaint!

A liberalising trend developed in the 1970s, largely under the influence of Lord Denning.[104] Environmental campaigners began to win access, as in *Turner*,[105] where an amenity group seeking to challenge the inspector's decision was held to have standing because it had been allowed to appear at the inquiry. Inspiration for change also came from across the Atlantic, where – experimenting in the direction of 'the freeway' model – the US Supreme Court appeared increasingly willing to open up the judicial system to a broad spectrum of interests.[106] When AJR procedure was introduced in 1978, an American-style test of 'sufficient interest' was included on the advice of the Law Commission.[107] Set out in s. 31(3) of the Supreme Court Act 1981, the test is mandatory: the court 'shall not grant leave . . . unless it considers that the applicant has a sufficient interest in the matter to which the application relates'. But what is a 'sufficient interest'? Narrowly construed it could mean financial or proprietary interest; generously, it could comprise at least some forms of intangible or ideological interest. Absent any statutory guidance about relevant criteria and purpose, the judiciary was effectively free to stage a small but significant procedural revolution.

In the famous case of *IRC v National Federation of Self-Employed and Small Businesses*,[108] the Federation sought to challenge a tax amnesty negotiated between the Revenue and interested trade unions and granted to certain part-time workers in the newspaper industry. While in the event the legality of the amnesty was upheld, the House of Lords recommended a relaxed approach to standing at the leave stage. Lord Diplock's speech would prove particularly influential:

> At the threshold stage, for the federation to make out a prima facie case of reasonable suspicion that the Board in showing a discriminatory leniency to a substantial class of taxpayers had done so for ulterior reasons extraneous to good management, and thereby deprived the national exchequer of considerable sums of money, constituted . . . reason enough for the Divisional Court to consider that the federation, or for that matter, any taxpayer, had a sufficient interest to apply to have the question whether the Board were acting ultra vires reviewed by the court. The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage . . .

[104] *A-G (ex rel. McWhirter) v Independent Broadcasting Authority* [1973] QB 629; *R v Greater London Council, ex p. Blackburn* [1976] 1 WLR 550.

[105] *Turner v Environment Secretary* (1973) 28 P and CR 123.

[106] *Sierra Club v Morton* 405 US 727 (1972). *Lujan v Defenders of Wildlife* 504 US 555 (1992) illustrates the subsequent retrenchment. And see C. Sunstein, 'What's standing after *Lujan*? Of citizen suits, "injuries", and Article III' (1992) 91 *Michigan L. Rev.* 163.

[107] *Report on Remedies in Administrative Law* [48].

[108] [1982] AC 617.

> It would . . . be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of [standing] from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

The *Federation* case was an important milestone in the elaboration of a model of judicial review encompassing the public interest in administrative legality. From 'drainpipe' to 'funnel', it thus denoted the shift away from an individualist system, grounded in private interest, towards a collection of 'private Attorneys-General', where anyone could challenge anything claimed to be unlawful.[109] The latter is the pure 'citizen action', the ideal type of a pluralist system of law enforcement. The *Federation* case itself stood for a weakened version of this, representing a judicial willingness to consider some, but not all, instances of administrative illegality.

Further however, the *Federation* case can today be seen inaugurating the current era of rampant judicial discretion. As against the traditional focus on standing as a preliminary issue or 'cap' on entry to the process, the notion of 'sufficient interest' permeating and being permeated by questions of substance and remedy thus sent out a powerful message of less precedent, more freedom of manoeuvre.[110] Transaction-type considerations of the legal and factual context of powers and duties, and of the nature of the alleged breach, were grounded by the formula 'in the matter to which the application relates'. In what would be advertised as 'the proper practical test to apply',[111] Lord Donaldson subsequently recast the place of 'interest' across the procedure as a whole:

> The first stage test which is applied on the application for leave will lead to a refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddlesome busybody. If, however, the application appears to be otherwise arguable and there is no other discretionary bar, the applicant may expect to get leave to apply, leaving the test of interest or standing to be reapplied as a matter of discretion on the hearing of the substantive application. At this stage, the strength of the applicant's interest is one of the factors to be weighed in the balance.[112]

Case law in the 1980s and 1990s generally maintained the liberal trend.[113] In *Leigh*, a journalist was given standing as 'public-spirited citizen' and 'guardian of the public interest in . . . open justice' to challenge a decision of local

[109] Sir K. Schiemann, 'Locus standi' [1990] *PL* 342. One consequence was that relator actions in judicial review withered on the vine.

[110] P. Cane, 'Standing, legality and the limits of public law' [1981] *PL* 303.

[111] *R v Somerset CC, ex p. Dixon* [1998] Env. LR 111. And see Sir S. Sedley, 'The last 10 years' development of English public law' (2004) 12 *Aust. J. of Administrative Law* 9.

[112] In *R v Monopolies and Mergers Commission, ex p. Argyll Group plc* [1986] 1 WLR 763.

[113] Endorsed in turn by the Law Commission, *Administrative Law: Judicial review and statutory appeals*, and by Bowman.

justices that they should have anonymity.[114] Lord Rees-Mogg, a dissident journalist peer, was allowed to challenge the Government's decision to ratify the Maastricht Treaty on European Union 'because of his sincere concern for constitutional issues'.[115] Significantly, he did not win! In a parallel development, public-advocacy functions extending to judicial review proceedings were increasingly granted to statutory agencies along the lines of those given to local authorities to take legal action in the interests of their inhabitants.[116]

As other pressure groups claiming to represent 'the public interest' seized on the *Federation* case, the concept of 'representative proceedings' took over. Collective forms of participation in the legal process were no longer so dependent on finding a 'front-man' with the requisite personal interest. Elite forms of 'test-case litigation' by repeat players thus became a familiar feature of judicial review proceedings, with pressure increasingly being exerted to extend 'the freeway' model. The talk now was not only of 'associational plaintiffs' (organisations suing on behalf of their own members), but also of 'surrogate plaintiffs' (groups claiming to represent the interests of others), and of 'public-interest standing' (groups claiming to stand up for the wider public interest). Notably, the courts showed little interest in testing for the adequacy of representation (what happens, for example, when the view of the public interest presented is hotly contested?).[117]

Presenting representative proceedings in a most favourable light, one case[118] saw the Child Poverty Action Group (CPAG) seek a declaration that the department was under a continuing duty to identify a number of welfare claimants from whom (unbeknown to themselves) benefits had been wrongfully deducted. As a leading provider of public-advocacy services to poor and disadvantaged people, and so in the words of the judge 'very much a body designed . . . to serve their interests in matters of this sort', the group was held to have sufficient interest. The challenge in a second CPAG case[119] was even more wide-ranging, exception being taken to the delays experienced by many people in the handling of benefit claims. Standing was again afforded this surrogate plaintiff. The issues raised were 'not ones which individual claimants for . . . benefit could be expected to raise'.

Environmental litigation was an obvious beneficiary. *R v Inspectorate of Pollution, ex p Greenpeace (No. 2)*[120] saw the group challenge the decision

[114] *R v Felixstowe Justices, ex p. Leigh* [1987] QB 582.

[115] *R v Foreign Secretary, ex p. Rees-Mogg* [1994] 1 All ER 457.

[116] For a striking illustration, see *R v Employment Secretary, ex p. EOC and Day* [1994] 2 WLR 409.

[117] P. Cane, 'Standing up for the public' [1995] *PL* 376, and 'Standing, representation, and the environment' in Loveland (ed.), *A Special Relationship? American influences on public law in the UK*.

[118] *R v Social Services Secretary, ex p. Child Poverty Action Group and GLC,* The Times, 16 August 1984.

[119] *R v Social Services Secretary, ex p. Child Poverty Action Group* [1990] 2 QB 540. The challenge failed on the merits.

[120] [1994] 4 All ER 329.

to allow British Nuclear Fuels (BNFL) to test its new reprocessing plant at Sellafield. Greenpeace claimed to represent both the interests of its local members and the wider public interest in preventing radioactive pollution. Notably however, the decision to grant standing was, in part, premised on the idea of interest representation being more efficient and effective for the court than individual proceedings. 'Greenpeace with its particular experience in environmental matters, its access to experts in the relevant realms of science and technology (not to mention the law) is able to mount a carefully selected, focused, relevant and well-argued challenge.' Values of pluralism, in other words, were now to be harnessed in the judicial service.

The 'Pergau dam' case[121] in 1995 saw the funnel forced wide open. The Foreign Secretary had authorised aid to the Malaysian government to help finance construction of the dam, a major infrastructure project opposed by environmentalists as destructive of natural resources. The World Development Movement (WDM) successfully challenged the decision on the ground that the disbursement was not within the statutory purpose. WDM was described by the court as 'a non-partisan pressure group' and in receipt of funds 'from all the main UK development charities, the churches, the EC and a range of other trusts'. Nobody suggested however that WDM members were affected by the decision or that the WDM was 'representative' of persons affected; like any group or individual in a democracy, it was merely voicing a complaint or opinion. In dealing with standing, Rose LJ established a liberal orthodoxy:

> There [are] a number of factors of significance in the present case: the importance of the issue raised . . . the likely absence of any other responsible challenger . . . the nature of the breach of duty against which the relief is sought . . . and the prominent role of these applicants in giving advice, guidance and assistance with regard to aid. All, in my judgment, point in the present case to the conclusion that the applicants here do have a sufficient interest in the matter to which the application relates.

But is this too liberal? Is it wholly old-fashioned to see in the distinctiveness of courts a set of values which frequent bouts of litigation carried on as a political tactic threaten to undermine? If we allow the campaigning style of politics to invade the legal process, might we end by undermining the very qualities of certainty, finality and especially independence for which the legal process is esteemed, and thereby undercut its legitimacy?[122]

Today, there is in fact a major procedural dichotomy in terms of standing requirements. On the one hand, standing as a rationing device scarcely features in reported cases involving domestic law principles. The House of Lords case of *R (Quintavelle) v Human Fertilisation and Embryology Authority*[123] is

[121] *R v Foreign Secretary, ex p. World Development Movement* [1995] 1 All ER 611. A single decision, *R v Environment Secretary, ex p. Rose Theatre Trust Co* [1990] 1 QB 504, exhibited a different judicial attitude.

[122] C. Harlow, 'public law and popular justice' (2002) 65 *MLR* 1. And see further below.

[123] [2005] 1 WLR 1061.

a suitably striking example.[124] Self-styled as a public-interest group for which 'absolute respect for the human embryo is a principal tenet', an organisation called Comment on Reproductive Ethics (Core) challenged the HFEA's decision to expand the range of licensed IVF treatment on grounds of ultra vires. The agency had been prompted to act by the sad plight of a child desperately needing a bone-marrow transplant whose parents had tried unsuccessfully for a matching sibling. 'Sufficient interest' never seriously featured even though, from the viewpoint of the family, Core surely was 'a meddlesome busybody'. The practical effect of the (ultimately unsuccessful) judicial review proceedings was to leave them in limbo.

EC law in judicial review is treated in the same way. The 'spaghetti junction' model thus illustrates how sufficient interest operates across these first two sources of the multi-streamed jurisdiction. As regards the domestic courts functioning as European Community courts, the liberal approach to standing at national level has a further connotation. The preliminary reference procedure (Art. 234) can be more easily triggered in public law cases, so mediating the effect of the strict standing requirements imposed on direct actions before the ECJ.[125]

On the other hand, as 'spaghetti junction' also points up, s. 7(1) of the HRA imposes a special cap on the added potentials of Convention rights challenge. Mirroring the standing rule in ECHR Art. 34, the public law ground of illegality established by s. 6 of the HRA – acting incompatibly with Convention Rights – can thus be relied upon only by a 'victim'.[126] Ministers were firm that judicial review's traditional role of protection of the individual should not be impeded or obscured by abstract and experimental claims of human rights violations.[127] The ECHR's own jurisprudence, traditionally cast in terms of a person directly affected and so hostile to claims to represent the general public interest,[128] was here seen as a valuable reference point.[129]

This particular rationing device has been much criticised,[130] partly for an excessive individualisation of rights, and partly by reason of the procedural dichotomy itself ('inconsistencies'). In light of the continuing public controversy over the HRA, s. 7 may however be accounted a wise precaution. Another illustration of the many complex dynamics associated with the multi-streamed jurisdiction, it is in fact an incentive for a reworking of Convention rights in

[124] Alternatively, see *R (Hasan) v Trade and Industry Secretary* [2007] EWHC 2630.

[125] See J. Miles, 'Standing in a multi-layered constitution'.

[126] S. 7(3), where 'sufficient interest' is said to incorporate the victim test in relevant proceedings, rams home the message.

[127] J. Miles, 'Standing under the Human Rights Act 1998: Theories of rights enforcement and the nature of public law adjudication' (2000) *CLJ* 133.

[128] See e.g. *Klass v Germany* (1978) 2 EHRR 214.

[129] There is as yet little domestic case law, though see *R (City of Westminster and Others) v Mayor of London* [2002] EWHC 244.

[130] See e.g. J. Marriott and D. Nicol, 'The Human Rights Act, representative standing and the victim culture' (1998) *EHRLR* 730.

the image of the common law. The advent of the Equality and Human Rights Commission slightly alters the procedural design giving a limited form of privileged access to the EHRC to 'act only if there is or would be one or more victims of the unlawful act' (Equality Act 2006, s. 30(3)).

(b) . . . and intervention

As an instrument of interest representation, the third party '*amicus* brief' can serve different purposes. Involving seductive ideas of 'enriching the process of deliberation'[131] is the informational or educative function, the court being presented by specialist bodies with materials otherwise unlikely to be gleaned in the adversarial, bipolar process. One variant, developed in America, is the so-called 'Brandeis brief', replete with socio-economic materials. Particularly fitting for this meeting place of a jurisdiction, another one is intervention as a vehicle for comparative legal information delivered via international networks.[132] A pluralist circumvention of the problem of testing for an interest group's 'representivity' is also on offer.[133]

Intervention then, like standing to sue, is not simply a technical matter. Viewed in a positive light, it may be said to enhance the legitimacy of judicial decision-making, precisely because of the wider participation and deeper analytical and evidential base. This may be thought particularly valuable in judicial review, not least when significant constitutional or human rights points arise.[134] Put another way, the informational function may encourage judicial assertiveness and creativity (thus illustrating the mutually reinforcing effect of expansionary dynamics in substance and procedure). Sedley LJ for example has hailed intervention as a way to 'escape the pincers closing in on us': 'The pressures, which cannot be wholly resisted, towards omnicompetent adjudication, and the want of any corresponding expansion in the data and culture with and within which we carry it out.'[135]

As a litigation tactic, intervention has considerable potential as a cost-effective method for targeting likely precedent-setting cases in the higher courts, perhaps as part of a broader litigation strategy.[136] Emblematic of 'the freeway' model, such briefs may serve a discrete lobbying function, the aim being to suggest that the views expressed reflect the attitudes of a wide segment

[131] S. Fredman, 'Judging democracy: The role of the judiciary under the Human Rights Act 1998' (2000) 53 *Current Legal Problems* 99. See also M. Arshi and C. O'Cinneide, 'Third-party interventions: The public interest reaffirmed' [2004] *PL* 69.

[132] So building on long-standing practice at supranational level: Harlow and Rawlings, *Pressure Through Law*, Ch. 6.

[133] R. Rawlings, 'Courts and interests'.

[134] Compare however in the private law field the celebrated 'Siamese twins' case: *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] 2 WLR 480.

[135] S. Sedley, 'Human rights: A twenty-first century agenda' [1995] *PL* 386.

[136] As long experience across the Atlantic teaches: S. Krislov, 'The *Amicus Curiae Brief: From friendship to advocacy*' (1963) 72 *Yale LJ* 694; P. Bryden, 'Public interest intervention in the courts' (1987) 66 *Canadian Bar Rev*. 490.

of public opinion. The technique can also be used to mitigate the problem of adequacy of representation by allowing for the protection of interests that might otherwise be unrepresented in the litigation ('surrogate intervenor').

The classical design of adversarial, bipolar procedure was by definition antithetical to such interventions, whether in oral or written form. Participation was restricted to an official *amicus curiae*, typically a legal representative of the Crown appointed at the request of the court to assist it with legal argument. Order 53 made provision for intervention only where a party was 'directly affected' (a formula narrowly defined)[137] or where the court considered that a person desiring to be heard in *opposition* to an application was a 'proper person to be heard'. Yet once the drainpipe model had been successfully challenged in terms of standing to sue, pressure to allow interventions was bound to intensify. In facilitating collective or public-interest representation at one stage of the lawsuit and not at others, the pattern of legal procedure in the then funnel model was unbalanced. How could it be that, when a particular individual was allowed to venture the illegality of contraception for young girls, the Children's Legal Centre was denied permission to intervene on behalf of the directly affected class of persons?[138]

The first bodies to make headway had official status and statutory powers: the Equal Opportunities Commission and the Commission for Racial Equality respectively,[139] in the difficult area of discrimination law. Then, in the 1988 case of *Sivakumaran*,[140] the UN Commissioner was permitted to comment through counsel on interpretation of the 1951 Refugee Convention. Pressure groups were not far behind. In *Phoenix Aviation* in 1995,[141] the organisation Compassion in World Farming was allowed to file evidence relating to the treatment of live animals exported for slaughter, and to make legal submissions. A whole new area of legal practice in this country was beginning to materialise in the form of 'public-interest intervention'.

Today, CPR 54 sends out a strong positive signal. As well as providing for service on persons directly affected by the claim, the court is afforded powers to hear 'any person' in support or in opposition.[142] The HRA provides a major catalyst, with the restrictive 'victim' test undercutting a more explicit and broader dimension to rights adjudication and pushing public interest groups towards intervention. Over time we have seen the bipolar format of much important public law litigation reordered.

[137] *R v Rent Officer Service, ex p. Muldoon* [1996] 1 WLR 1103.

[138] *Gillick v West Norfolk and Wisbech AHA* [1985] 1 All ER 533.

[139] *Shields v E Coomes (Holdings) Ltd* [1978] 1 WLR 1408; *Science Research Council v Nassé, Leyland Cars v Vyas* [1980] AC 1028.

[140] *R v Home Secretary, ex p. Sivakumaran* [1988] AC 958.

[141] *R v Coventry Airport, ex p. Phoenix Aviation* [1995] 3All ER 37. See also in the House of Lords, *R v Home Secretary, ex p. Venables* [1997] 3 All ER 97 (intervention by JUSTICE).

[142] 'Any person may apply for permission to file evidence or make representations at the hearing of the judicial review'; such an application 'should be made promptly' (CPR 54.17). See further, Public Law Project, *Third-party Intervention: A practical guide* (2008).

Since 2000, there has been a significant increase in the use of intervention, most obviously in the House of Lords, where groups such as Liberty and JUSTICE have effectively acquired elite repeat-player status.[143] We see clearly here how moving closer to 'the freeway' model multiplies both the opportunities for, and potential scale of the argument in, test cases. The case of *A (No. 2)*, concerning the admissibility of evidence possibly obtained by foreign torturers (see p. 131 above), featured two interventions, the first from a wide array of domestic groups and organisations including Amnesty and the Law Society, the second from transnational legal organisations such as the International Bar Association.

The development is again the product of unfettered judicial discretion. Promptness aside, CPR 54 is silent about the relevant criteria. Judicial failure to explain when, why, by whom and in what form intervention will be permitted, is however a major point of criticism.[144] The courts have effectively adopted a policy of drift.[145]

How far can the use of intervention in judicial review reasonably go? What, one might ask, of the practical considerations of cost and delay, and of the effective impingement on party autonomy? The idea that even with multiple interventions judicial procedure can properly match methodical and transparent processes of consultation, and indeed the flexibility and permeability of the political process at large, is simply an illusion. Intervention as a lobbying tactic also raises concerns for the integrity of the adjudicative process and separate identity of courts.[146] A single case, *R (Burke) v General Medical Council*,[147] shows senior judiciary attentive to the dangers. A terminally ill man with a degenerative condition having won a judgment requiring doctors to honour his wish for life-prolonging treatment, the subsequent Court of Appeal hearing attracted an array of interventions relating to the social, moral and religious dimensions of the matter. Adhering firmly to specific issues, the judges overturned the ruling. The litigation had 'expanded inappropriately to deal with issues which, whilst important, were not appropriately justiciable on the facts of the case'.

5. Fact-base

(a) More rationing

A general limitation of access to government information for the purpose of judicial review reflected and reinforced the traditional notion of a residual,

[143] S. Hannett, 'Third party intervention: In the public interest? [2003] *PL* 128.

[144] For an earlier, unsuccessful, attempt at structuring, see JUSTICE–Public Law Project, *A Matter of Public Interest* (1996).

[145] See Sir H. Brooke, 'Interventions in the Court of Appeal' [2007] *PL* 401; also, M. Fordham, '"Public interest" intervention: A practitioner's perspective' (2007) *PL* 410.

[146] As highlighted by the *Pinochet* case (see p. 654 above).

[147] [2005] EWCA Civ 1003.

supervisory jurisdiction: one concerned with review of, and not appeal from, administrative decision-making. Establishing it as a central component of the 'drainpipe' model, the restriction of proof likewise fitted the formula of judicial restraint – providing, at one level, a strong practical check on invasion of matters of public policy and, at another level, scarce encouragement to expansion of the grounds of review.

Standard information-gathering techniques in the adversarial common law system were then the more notable by their absence with the old prerogative orders. Discovery of documents was not available in applications for certiorari, mandamus and prohibition (one reason why applicants might seek a declaration or injunction). Disclosure of legal error was restricted to what would appear on the face of the record or could be deposed to by way of affidavit. Prerogative remedy procedure thus made no provision for interrogatories, while permission for cross-examination on the affidavits was almost never granted.[148]

Wednesbury itself shows the fit between procedure and substance (see p. 42 above). A chief feature of the case is the lack of evidence demanded by or provided to the court to explain and support the ban: as Taggart put this, 'the high threshold for judicial intervention, coupled with the lack of transparency and difficulties of proof, almost guaranteed' the result. Far from the need to justify, the corporation could proceed in the litigation much like the Sphinx:

> In 1947 the Wednesbury Corporation could have put forward a formidable case. A so-called 'Brandeis brief', containing sociological and economic evidence, could have included studies on the impact of the cinema on children . . . information about the church-going habits of the population . . . and the varying conditions imposed by other local authorities where Sunday cinema opening was allowed. The Corporation never had to do this. Indeed, it never had to give any reasons or provide any evidence at all as to why it did what it did. It was for the challenging cinema to discover and show legal error . . . The collectivity could sit tight-lipped.[149]

Also contributing to the distinctive British climate of official secrecy was 'Crown privilege', whereby ministers could refuse to produce documents by asserting either that disclosure of the contents would injure the public interest or that, for the proper workings of government, the relevant class of document merited protection. Effectively handed 'a blank cheque' by the judiciary,[150] it was in Wade's words 'not surprising that the Crown yielded to the temptation to overdraw'.[151] It would not be until *Conway v Rimmer*[152] in 1968 that,

[148] See *George v Environment Secretary* (1979) LGR 689.

[149] M. Taggart, 'Reinventing administrative law' in Bamforth and Leyland (eds.), *Public Law in a Multi-Layered Constitution*, p. 329. The *Padfield* criterion of 'no evidence' would later offer some relief: see p. 101 above.

[150] In *Duncan v Cammell Laird & Co Ltd* [1942] AC 624.

[151] H. Wade and C. Forsyth, *Administrative Law* (Clarendon Press, 2004), p. 844. See *Ellis v Home Office* [1953] 2 QB 153.

[152] [1968] AC 910.

recasting the doctrine in the form of 'public interest immunity', the Law Lords would counter-assert the judicial power to determine disclosure by balancing the competing public interests (due administration of justice).[153]

At first sight the establishment of AJR procedure, with facilities for discovery of documents, interrogatories and cross-examination (RSC Ord. 53(8)), promised much. Yet these were quintessentially matters of judicial discretion: namely, part of the special 'safeguards' in public law litigation. Practical arguments now featured prominently. It was of course necessary to discourage lengthy 'fishing expeditions' but in vindicating managerial concerns of streamlined court process, and prompt and efficient despatch of public business, the judges went much further, insisting on a frugal diet of oral evidence, etc.

Lord Diplock's speech in *O'Reilly v Mackman* (see p. 680 above) was at the heart of this. Whereas the new-found power to allow standard evidential techniques was invoked to justify forcing cases down the route of AJR procedure:

> It will be only on rare occasions that the interests of justice will require that leave be given for cross-examination [[154]] in applications for judicial review. This is because of the nature of the issues that normally arise on judicial review. The facts, except where the claim [is] that a . . . public authority . . . failed to comply with the [statutory] procedure . . . or failed to observe . . . natural justice . . . can seldom be a matter of relevant dispute . . . since . . . the authority's findings of fact are [generally] not open to review.

This approach however carried the seeds of its own destruction. 'Catch 22': without the evidence leave could not be obtained ('insufficiently arguable'); without leave the evidence could not be secured (so that it could be well-nigh impossible to sustain allegations such as irrelevant considerations or improper purpose). Attempts to circumnavigate a rigid public/private dichotomy were inevitable.

(b) Degrees of frugality

Although the very restrictive attitude to proof held sway into the 1990s,[155] the stresses and strains associated with the unstable 'funnel' model became increasingly evident. In asylum for example, both *Bugdaycay* (see p. 116 above) and *M v Home Office* (see p. 10 above) demonstrated that the characterisation of disputes of law not fact did not always hold. Meanwhile, the rise of the duty

[153] Including by means of inspection. For later twists and turns, see *D v NSPCC* [1978] AC 171, *Burmah Oil v Bank of England* [1980] AC 1090, *R v Chief Constable of West Midlands Police, ex p. Wiley* [1995] 1 AC 27, and, in terms of ECHR Art. 6, *R v H and R v C* [2004] UKHL 3. Public-interest immunity was also central to the Scott Inquiry (see p. 590 above). And see *R (Binyam Mohamed) v Foreign Secretary* [2009] EWHC 152.

[154] Lord Scarman had earlier stated in the *Federation* case (see p. 696 above) that 'discovery should not be ordered unless and until the court is satisfied that the evidence reveals reasonable grounds for believing that there has been a breach of public duty'.

[155] See e.g. *R v Inland Revenue Commissioners, ex p. Taylor* [1989] 1 All ER 906.

to give reasons (see p. 630 above) both operated to circumvent, and cut across the rationale of, a highly constricted evidential base. Even Griffith, the leading advocate of judicial restraint, thought matters 'the worst of both worlds': 'We have an interventionist judiciary but a judiciary which is limited by procedures and practices designed to exclude certain sources of information and factual investigation without which the policy choices made by the courts – that is, their decisions – are inevitably less good than they could be.'[156]

How then might substance and procedure be brought into kilter, while maintaining a streamlined process? Lord Donaldson in *Huddleston*[157] proffered a doubled-edged sword: a limiting device or justification for the sparing use of formal disclosure orders, an alternative solution to the problem of fact-finding. This was the so-called 'duty of candour':

> [Judicial review is] a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands . . . When challenged [the defendant] should set out fully what they did and why, so far as it is necessary, fully and fairly to meet the challenge.

The duty was glossed up in some fine words about 'partnership' between the executive and the judiciary: 'a common aim [of] maintenance of the highest standards of public administration'. Later cases would claim it as a very high duty, one that ranges beyond making candid disclosure of the relevant facts to encompass, so far as this is not otherwise apparent, the reasoning behind the decision challenged.[158] As a matter of good professional practice, the discipline should build at every step of the way (beginning these days with the pre-action protocol). Note however the lack of enforcement method and sanction, other than adverse inferences by the court.[159] At best a partial solution, the duty of candour means trusting the authorities not to be economical with the truth.

There is here a pervasive sense of 'hit and miss'. Take the *Pergau Dam* case (see p. 699 above). How, prior to the Freedom of Information Act, did this most striking of legal challenges to ministers, one that effectively required the court to read the word 'sound' into the statutory purpose of 'promoting . . . development', get off the ground? Although the respondent's affidavit evidence was criticised as being 'economical to the point of being parsimonious',[160] the court declined to order disclosure. Instead, the answer lies in the prior working of the political process, in the form of

[156] J. Griffith, 'Judicial decision-making in public law' [1985] *PL* 564, 580. And see JUSTICE–All Souls, *Administrative Justice: Some necessary reforms* (1988), pp. 166–7.

[157] *R v Lancashire CC, ex p. Huddleston* [1986] 2 All ER 941.

[158] *Foreign Secretary v Quark Fishing Ltd* [2002] EWCA Civ 1409 (Laws LJ); *Belize Alliance of Conservation NGOs v Department of the Environment* [2004] Env LR 761 (Lord Walker). The duty extends to all parties.

[159] See e.g. *R (Wandsworth LBC) v Transport Secretary* [2005] EWHC 20.

[160] S. Grosz, 'Pergau be damned' (1994) 144 *New Law Journal* 708, 710.

inquiry reports from select committees.[161] The Permanent Secretary, it was revealed, had criticised the proposal to allocate funds in the light of appraisals describing the economic viability of the project as 'marginal' and 'a very bad buy', and had ultimately demanded written authorisation from the minister before making payments. The 'public-interest advocate' had struck lucky.

Today, the CPR affords the judges ample powers of fact-finding in judicial review cases.[162] The standard disclosure order obliges the party to make a reasonable search for, and list, those documents relevant and helpful to both sides; the court can also order specific disclosure and specific inspection of materials (CPR 31).[163] But of course this is all a matter of judicial discretion: to probe or not to probe and the degree of probing. Under Part 54, 'disclosure is not required unless the court orders otherwise',[164] reflecting the original approach of overt access to documentation enforced only in cases of apparent lack of candour in the affidavit evidence.[165]

We note how, underwriting the move beyond the funnel model, the pressures and opportunities for expansion of the judicial review fact-base have continued to multiply. These liberalising factors range from freedom of information legislation (both general and specific)[166] to the proportionality-style review associated with a multi-streamed jurisdiction, Strasbourg's testing of judicial review capacities under ECHR Art. 6 (see Chapter 14) – and indeed mistake of fact as error of law (see p. 513 above). Perhaps then it is no surprise to learn of more cases in which carefully targeted applications for disclosure succeed.[167] Fuelled by 'a greater general awareness . . . of the types of material Government holds', the former Treasury Solicitor sees claimants' lawyers as 'becoming bolder in seeking disclosure',[168] and in the *Health Stores* case

[161] PAC, *Pergau Hydro-electric Project*, HC 155 (1994/5); and, suggesting an improper link between development aid and arms sales, Foreign Affairs Committee, *Public Expenditure: The Pergau Hydro-Electric Project, Malaysia, the aid and trade provision and related matters*, HC 271-1 (1994/5).

[162] Following the Scott Inquiry, ministers declared a more restrictive policy on claims to public interest immunity (a test of real damage or harm): see HC Deb., cols. 949–50, 18 December 1996.

[163] Orthodox informational techniques like cross-examination and expert evidence are part of the package: see e.g. *R (PG) v Ealing LBC* [2002] EWHC250 and *R(Lynch) v General Dental Council* [2004] 1 All ER 1159.

[164] CPR 54 Practice Direction [12.1]. Once permission is granted, the public body should provide the 'detailed grounds' particularising its case together with any written evidence and supporting documents (CPR 54.14).

[165] Reading across pre-CPR practice (*R v Environment Secretary, ex p. Islington LBC* [1992] COD 67): see O. Sanders, 'Disclosure of documents in claims for judicial review' (2006) 11 *Judicial Review* 194.

[166] For the linkage in terms of the Aarhus Convention (see p. 473 above), see R. Macrory, 'Environmental public law and judicial review' (2008) 13 *Judicial Review* 115.

[167] E.g. *JJ Gallagher Ltd v Transport Secretary* [2002] EWHC1195 and *R (Ministry of Defence) v HM Coroner for Wiltshire and Swindon* [2005] EWHC 889.

[168] Dame J. Wheldon, 'Judicial review from the government perspective' (Sweet & Maxwell lecture, 2005).

in 2005,[169] Sedley LJ expressed discomfiture with the 'Catch-22' dilemma. Ordering disclosure only exceptionally 'is unnecessarily protective of government, and of government alone, in public law proceedings brought not as of right but with permission'.

The touchstone is *Tweed*.[170] Invoking the Convention rights of assembly and free speech, T challenged restrictions placed on a parade in Northern Ireland as disproportionate. He sought disclosure of documents, including police reports, summarised in an affidavit sworn by the chairman of the Parades Commission (see p. 659 above). While emphasising that, given the predominance of legal issues, disclosure would generally be more limited in judicial review cases than in ordinary actions, the House found room, in Lord Carswell's words, for 'a more flexible and less prescriptive principle'. The House of Lords substituted for the test of a prima facie inaccurate or misleading affidavit, judicial discretion as to whether, in light of the facts and circumstances of the individual case, disclosure was required to resolve the matter 'fairly and justly'. Proportionality testing in particular required a leg-up. Disclosure orders in such cases should not be automatic, but equally the duty of candour might not be sufficient:

> *Lord Carswell:* The proportionality issue forms part of the context in which the court has to consider whether it is necessary for fairly disposing of the case to order disclosure of such documents . . . Whether disclosure should be ordered will depend on a balancing of the several factors, of which proportionality is only one, albeit one of some significance . . . When one takes into account the proportionality factor, the need for disclosure is greater than in judicial review applications where it does not apply. The duty of candour has been fulfilled by adduction of summaries. Counsel submitted, however, that it is not always possible to obtain the full flavour of the content of such documents from a summary, however carefully and faithfully compiled, and that there may be nuances of meaning or nuggets of information or expressions of opinion which do not fully emerge. I consider that there is force in this view and that in order to assess the difficult issues of proportionality in this case the court should have access as far as possible to the original documents from which the Commission received information and advice.[171]

Demonstrating the significance here of the variable intensity of review, Lord Carswell further stated that 'the degree of deference due is one of the issues which the court must take into account when considering the question of disclosure'. Alternatively, in Lord Brown's words, 'the courts may be expected to show a somewhat greater readiness than hitherto to order disclosure of the main documents underlying proportionality decisions, particularly in cases

[169] *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154. See however, on the dangers of overburdening the process, *R (Prokopp) v London Underground Ltd* [2004] Env LR 170.

[170] *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53.

[171] *Ibid.* [38–9]. Disclosure to the judge was ordered for the purpose of determining the 'value-added' of the documents and (if raised) the question of public interest immunity.

where only a comparatively narrow margin of discretion falls to be accorded to the decision-maker.' [172]

Tweed is an uneasy balancing act between managerial concern about the courts being flooded 'with needless paper'[173] and the judicial function of redress of a grievance rendered potentially 'non-justiciable' for lack of evidence. A powerful message is sent about the need generally in judicial review to retain rationing yet, in the spirit of *M v Home Office*, the analysis edges towards a mandatory model of judicial review less trustful of the public body. As elsewhere in the multi-streamed jurisdiction, divergent requirements have to be balanced.

6. Conclusion

Over the course of the last thirty years, the judicial review process has been substantially reshaped. Visualised in this chapter through a series of models, attention naturally focuses on the more generous contours of the system. These are represented in procedural terms by liberalised standing and intervention, greater fact-finding powers, and more elaborate legal remedies. We can see how the normative capacities of the elite machinery of the Administrative Court, further fuelled by a mutually supportive relationship with repeat players in public interest cases, have been substantially enhanced. As such, the substantive process of 'transforming' judicial review discussed in Chapter 3 is not only the chief driver but also a product of the new procedures; creative tension is in-built. The emergence of the multi-streamed jurisdiction, while in part operating to curb their autonomy, has also afforded to the national courts fresh opportunities of command and influence.

But it is also a story of double standards. The judiciary shows scant enthusiasm for the application to AJR machinery of the disciplines of structuring and confining discretion so avidly imposed on government since *Padfield*. A 'seedless grape'[174] – little substance at the core – is an apt description of much in AJR practice and procedure, especially at the permission stage. The whiff of judicial lottery is confirmed by empirical studies. Under the mantra of active case management, the CPR framework has facilitated the piling of discretion on the discretion of the individual judge. A series of rationing devices or 'safeguards' applied more or less rigorously at different times and in different situations has ensued, culminating in a basic reorientation of the judicial regulation of access to the system. No longer are there visibly strict standing rules or

[172] 'A fortiori the main documents underlying decisions challenged on the ground that they violate an *unqualified* Convention right': *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 [57]. See further, in relation to cross-examination, *R (N) v M* [2003] 1 WLR 562.

[173] *Ibid.* [56].

[174] A metaphor borrowed from E. Gellhorn and G. Robinson, 'Perspectives on Administrative Law' (1975) 75 *Col. Law Rev*. 771.

the threshold requirements of the drainpipe model; there is instead a sharper emphasis on the merits or quality of claim, as in the test of 'arguability' applied when granting or refusing permission. The loose terminology opens the door to enhanced judicial discretion.

In Chapter 3, we tried to show how demands for administrative rationality had stimulated demands for a more rational and principled judicial review. This is emphatically not the picture presented in this chapter. We would not wish to see Lord Hewart's picture[175] of a capricious executive 'unfettered and supreme' displaced by an elite and discretionary system of judicial review unregulated by any strong sense of a need for judicial restraint or accountability.

[175] Lord Hewart, *The New Despotism* (Benn, 1929), p. 17.