

Partial Codification of Administrative Law: What are the Rule of Law Opportunities and Risks of the IRAL's Remit? Part One

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The Independent Review of Administrative Law (IRAL), which is holding a short, seven-week [consultation](#) that will close on 26 October 2020, has a remit to consider whether parts of UK administrative law should be codified.

Codification usually presents both opportunities and risks for the Rule of Law. The opportunity arises from the fact that codifying legislation seeks to consolidate and/or reform an area of law. This offers potential gains in legal certainty and accessibility of the law, and may also bring other benefits, for example if codifying reforms lead to specific improvements in access to justice, equality or the protection of other human rights. By the same token, however, ill-conceived reforms could damage the Rule of Law. This is clearly a risk in the area of administrative law, which underpins the legal accountability of the Executive and other public bodies.

In this two-part post, we examine what lessons can be drawn for the IRAL from the partial codification of administrative law in three other leading common law jurisdictions:

- US federal law, where the Administrative Procedure Act 1946 responded to the growth of federal agencies in the New Deal era by providing default procedures for certain types of decisions and setting out grounds of review, which had previously been common law terrain.
- Australian federal (Commonwealth) law, where the 1968-1971 [Kerr Committee inquiry](#) into administrative justice reform led over the following decade to a series of codifying Acts.
- South African law, where the [Promotion of Administrative Justice Act 2000](#) was enacted to give effect to a constitutional right to administrative justice in a legal system that had previously been founded on English public and administrative law.

All of these codifications have been partial in their results - as we will see, they have not led to the cessation of judicial decisions developing the law.

However, codifications can also be partial from the outset - in the sense of being selective about which parts of administrative law they set out to codify. In this respect, we will see that the remit of the IRAL is significantly narrower than the codifications undertaken in the US, Australia or South Africa. The IRAL's [terms of reference](#) focus on judicial review and [omit the rest of administrative law](#). At the same time, it has the potential to [cut deeper, constitutionally](#), than the other codifications because of the UK's lack of an entrenched written constitution.

Comparing the remit of the IRAL with the scope of other codifications helps us to see the extent to which beneficial Rule of Law opportunities and risks are in play here. We discuss these under the headings of different Rule of Law elements that may be affected: in Part One, we discuss access to justice and legal certainty and accessibility; and in Part Two, we discuss government under law.

Access to Justice

Access to justice, in administrative law, encompasses not only judicial review but also a host of other mechanisms: statutory appeals and reviews within the administration, tribunals, ombuds, and alternative dispute resolution. As [Konstadinides, Marsons and Sunkin note](#), despite the words 'administrative law' in its title, the IRAL's terms of reference confine it to judicial review. They point out that this is an 'artificially narrow approach' since 'judicial review is a remedy of last resort and its use is intimately connected to the availability of other routes of redress'.

In our view, this is a huge missed opportunity to strengthen the Rule of Law. Other codifications have addressed access to administrative justice much more widely. For example, tribunal and ombud mechanisms were an important part of Australia's codifying reforms in the 1970s. The Administrative Appeals Tribunal Act 1975 established a general tribunal with capacity to conduct merits review (as opposed to judicial review) of the administrative decisions. The Ombudsman Act 1976 also belongs to this package of reforms. The UK has institutions performing some of these functions, as we discuss further below, but in a joined-up review of administrative law one would expect some consideration of their effectiveness.

Access to administrative justice can also be strengthened by reforming decision-making processes in ways that improve accountability and procedural fairness to affected persons. While the availability of a right to reasons remains highly variable in UK law, both the Australian and the South African codifications provided a default right to reasons in certain circumstances. In the US, the Administrative Procedure Act 1946 (APA) sets default procedures for a number of different types of decisions. For those of an 'adjudicatory' character, court-like safeguards, such as the right to hearing and right to be represented by a counsel, are specified. In the area of rule-making, the [APA provides](#) two default options which have become known in the literature as 'informal' and 'formal' rule-making. For informal rule-making, a federal agency must publish 'a general notice of proposed rule making', and provide interested persons 'an opportunity to participate in the rule making' with a specified time period. A more stringent process of formal rulemaking has to be followed when the statute establishing an agency requires that the rules shall be made 'on the record after opportunity for an agency hearing'. To satisfy the conditions of formal rule-making, the agencies are required to conduct a hearing on the record, at which evidence could be presented by affected parties. South Africa's codifying legislation also sets out default notice and comment procedures for decisions affecting the public.

We stress that the procedural innovations we have mentioned are all defaults - they can be varied by the Australian, US or South African legislature when it confers functions on a particular public body. This will often be appropriate. For example, planning laws are usually tailored to enable the participation of local residents and environmental groups alongside property developers, and this is still the case in the UK at present. Nevertheless, default provisions are practically useful when the legislature does not wish to produce a bespoke procedure for each power it grants, and they also provide a benchmark when deliberating about how to craft such specific procedures. In the UK context, the current debates about scrutiny of delegated legislation - including for [Brexit](#) and the [Coronavirus response](#) - would clearly benefit from procedural benchmarks for rule making.

Why does the IRAL's remit fail to include non-judicial mechanisms of administrative justice or reform of decision-making procedures? For the Rule of Law values of access to justice and equality, these are crucial aspects of administrative law, since

judicial review is [prohibitively expensive for many potential claimants](#) who do not benefit from the increasingly narrow categories of case or personal income level for which legal aid is available.

One answer might be that the UK already has an extensive tribunal system, which was extensively reformed in 2007. The [Administrative Justice Council](#) keeps this and numerous other non-judicial mechanisms such as ombud bodies under review. However, excluding these matters from the IRAL is still a failure of joined-up thinking. Insofar as the IRAL reflects Government concern about an excessive volume of judicial review claims, wider administrative justice reforms clearly have the potential to reduce the demand for judicial review.

Perhaps the IRAL does offer a Rule of Law opportunity in the narrower area of reforming of judicial review procedure. The terms of reference require the panel to consider whether 'procedural reforms to judicial review are necessary, in general to "streamline the process",' and mention disclosure, costs, standing, timelines and appeals among other issues. In principle, there is scope here for the IRAL panel to recommend reforms that enhance access to justice. However, as [Konstadinides, Marson and Sunkin](#) have pointed out, the procedural remit of the IRAL seems to follow in the footsteps of a series of restrictive procedural changes which the Government has introduced since 2012. Moreover, [Joshua Rozenberg](#) has commented on how slanted the questions in the IRAL's [call for evidence](#) appear to be towards further procedural restrictions.

When the Ministry of Justice in the Grayling era was considering procedural reforms to judicial review between 2013 and 2015, our colleagues at the Bingham Centre launched an inquiry led by Michael Fordham QC, now a High Court judge, that produced a consolidated set of proposals on ['Streamlining Judicial Review in a Manner Consistent with the Rule of Law'](#). A total of 25 recommendations were made for reforming the judicial review process, ranging from the allocation and scheduling of cases to the format and filing of court papers, the permission stage, procedure for cases granted permission, appeal routes, and the costs regime at various stages.

The Bingham Centre, the Public Law Project and JUSTICE also published a [joint report](#) on the changes that were eventually introduced by the Part 4 of the Criminal Justice and Courts Act 2015, notably including a new requirement in certain circumstances for courts to refuse permission to proceed to judicial review, new cost rules for interveners, and new approaches to cost capping orders and the disclosure of litigants' funding. The report outlined how the legislative provisions could be interpreted to reduce the risk of adverse impacts on the Rule of Law, and in his foreword, Lord Woolf of Barnes, the former Lord Chief Justice, commented that if this approach to interpreting the Act prevailed, 'then my fears for damage to the rule of law will be substantially reduced'. It is difficult to assess the impact of the 2015 Act on judicial review in practice, particularly since post-legislative scrutiny of the Act has not yet taken place.

It seems likely that many of the battles over judicial review procedure will be refought in the context of the IRAL. Resisting pressure to curtail access to justice will be an important challenge.

We do not say more about this here, because the IRAL's remit goes beyond procedural matters and contemplates substantive codification of judicial review, which raises a broader set of Rule of Law issues that we will now consider.

Legal Certainty and Accessibility

At first blush, codifying administrative law would appear to be an opportunity for legislation to advance Rule of Law values of certainty and accessibility. After all, codification can make some areas of law clearer, more precise and more coherent, as well as more accessible by replacing an assorted mix of common law and statutory provisions with a systematic statutory framework. Along with consolidating the law, the codifying statute may also reform it where appropriate. Paradigm examples of this are 19th

century Acts of Parliament on subjects such as the law of companies and bills of exchange, which were widely adopted across the British Empire and beyond, contributing to the globalisation of trade.

However, codifying administrative law presents a harder challenge than this. The IRAL terms of reference ask whether the grounds of judicial review ('grounds of public law illegality') should be codified. Mark Elliott has already pointed out why [legal clarity, precision and accessibility are almost certain to remain elusive](#) in this domain. Legislation could simply identify the grounds of review using terms found in case law, such as 'improper purpose', 'legitimate expectations' and so on. This would not, however, eliminate the need to refer to the common law. Any attempt to do so would require legislation 'so lengthy, detailed and technical as to make it far from clear and accessible to the average individual'. Elliott points out another fundamental obstacle, which is that 'many of the grounds of judicial review cannot be meaningfully understood and defined in the sort of abstract way that codifying legislation would necessarily adopt, because they interact with — and fully acquire shape and meaning only in relation to — the statutory framework that defines the powers whose exercise is under review in any given case.'

The experience with codified grounds of judicial review in Australia and South Africa bears this out. Australia's Administrative Decisions (Judicial Review) Act 1977 ('ADJRA') provides a fairly detailed list of grounds of judicial review (in [section 5](#)). Despite this fairly detailed treatment, the High Court of Australia concluded in [Kioa v West](#) that the common law had not been superseded since the provision was 'a reflection in summary form of the grounds on which administrative decisions are susceptible to challenge at common law. The section is therefore to be read in the light of the common law and it should not be understood as working a challenge to common law grounds of review, except in so far as the language of the section requires it'. In South Africa, the judicial review grounds set out in the Promotion of Administrative Justice Act 2000 have also stimulated judicial engagement with common law cases to interpret those grounds.

Intriguingly, the US, has seen [considerable judicial development](#) of some of its codified grounds of judicial review. In the early days of the APA, the ground of review for 'arbitrary and capricious' decisions was interpreted in a deferential manner where agencies were only required to show a minimally plausible connection between the facts adduced and the ultimate decision. In the 1960s, the courts began to develop a more stringent approach, sometimes known as 'hard look review', which enabled courts to consider whether policy outcomes were rational based on the 'whole record' of the decision-making process.

If the benefits of legal certainty and accessibility are destined to remain elusive, does codification of judicial review grounds offer any other opportunities to strengthen the Rule of Law? In a footnote, the IRAL's terms of reference pose the question whether codifying judicial review grounds would 'promote clarity and accessibility in the law and increase public trust and confidence in JR'.

The reference to 'public trust and confidence' is interesting. Even if codification of judicial review grounds is unlikely to improve the clarity and accessibility of administrative law for lawyers who practise it, as we have argued, perhaps the fact that Parliament has enacted a list of grounds will strengthen the legitimacy of judicial review in the eyes of the wider public?

There is something to this idea. However, if codifying legislation is to have a legitimating effect then it is essential that the message sent by the legislation is in fact supportive of judicial review, rather than undermining it. Alas, the framing of the IRAL's remit seems to envisage legislation that would send a very mixed message, as we will see in Part Two of this post.

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