DOES ADMINISTRATIVE LAW INHIBIT GOOD GOVERNMENT?

A. INTRODUCTION

Administrative law, it might be said, suffers from both an image problem and an identity crisis. From the perspective of members of the public, the prospect of relying upon administrative law may seem remote and expensive,[1] frequently turning out to be little more than a "hollow hope" in terms of its capacity to produce meaningful change.[2] Meanwhile, from the perspective of government actors, administrative law–and the censorious judge peering over one's shoulder[3]–is often said to seem too proximate, burdensome, and, increasingly, an impediment to good and effective government. At times, it seems the only people with something positive to say about administrative law are the administrative lawyers.

Both critiques of administrative law deserve serious attention from the academic community. Yet hitherto, the balance of the research endeavour has been weighted towards the claimant side of the critique. In this vein, work on legal mobilisation and funding may be seen as responses to fears around access to justice,[4] research on the impact of judicial review on continuing governmental action may be read as a testing of the claim that courts lack the power to effectively influence government,[5] and so on. But what of the fear that administrative law actually may be inhibiting the state from doing what it needs to do by contributing to a form of "institutional sclerosis"?[6] This is an important charge. If true, or becomes to be widely

[1] J Tomlinson, "Beyond the end of ouster clause history?", in L Stirton, T T Arvind, R Kirkham, & D Mac Síthigh (eds), *Executive Decision-making and the Courts* (2021) 191.
[2] G Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991).
[3] Government Legal Department, *Judge Over Your Shoulder: A Guide to the Legal Environment in which Decisions are Made*, 6th edn (2022).
[4] See, for example, S Guy "Mobilising the market: an empirical analysis of crowdfunding for judicial review litigation" (2023) *Modern Law Review* (forthcoming).
[5] See, for example, G Richardson, "Impact Studies in the UK", in M Hertogh and S Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004) 103.
[6] The term "institutional sclerosis" is taken from the famous text M Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* (1984), which builds upon M Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1974). There are many similarities between Olson's arguments on the effect of interest group representation in economics and the critique of administrative law being discussed here.

perceived to be true, it could potentially prove catastrophic for those invested in the project of contemporary administrative law.

The present Conservative Government, in its various iterations, appears to be amongst those who think this critique of administrative law is, at least to some more than minimal extent, true. Often operating under the political mantra of "getting things done", there have been numerous expressions of this outlook in recent years. It is evident, for instance, in how the Conservative Party Manifesto for the December 2019 general election included a commitment to ensure that judicial review is not used "to create needless delays",[7] and in how the Judicial Review and Courts Act 2022 appears to suggest a tension between the courts providing a remedy for unlawful administrative action and "good administration".[8] Governmental frustrations with administrative law—and the courts in particular—are of course not new, nor are they the sole province of right-leaning politics, but the expressions of frustration appear to have transformed from irritation into a deeper, more fundamental critique of administrative law in recent years.

Arguably, the clearest legislative expression to date of this seemingly increasingly influential view of administrative law can be seen in the Advanced Research and Invention Agency (ARIA) Act 2022—an Act which received almost no attention from administrative lawyers, not least because its passage through Parliament coincided with controversial reforms to the judicial review system.[9] Ostensibly a statute to create a new and relatively small public research funding body, we show in this article how the ethos underpinning the construction of this new Agency positions administrative law as almost antithetical to effective public organisation. We argue this wider charge—too often dismissed simply as a species of illiberalism at play—must be taken seriously on its own terms and, in particular, as an empirical claim. Doing so requires administrative law research to embrace an empirical agenda that investigates the impacts of law on public administration but also the perceived legitimacy of administrative law both inside and outside of government.

B. THE ARIA ACT AND ITS GENESIS

[7] The Conservative and Unionist Party, *Get Brexit Done: Unleash Britain's Potential* (2019) 48.
[8] Judicial Review and Courts Bill cl 1(8)(b).
[9] Ibid, see also: *Independent Review of Administrative Law* (CP 407: 2021).

The ARIA Act was the pet project of Dominic Cummings. Controversial and eccentric leader of the Vote Leave campaign during the Brexit referendum and then Chief Adviser to Prime Minister Boris Johnson, Cummings left Downing Street in November 2020 and subsequently became a vocal critic of the government he once served. The myths and the reality surrounding Cummings are difficult to separate, but he has clearly exerted great influence on the politics of the last decade, even if the precise extent of that influence—and whether it was a welcome one—is disputed.

There are at least two consistent themes that Cummings has espoused for many years, long before the word "Brexit" was even part of the mainstream lexicon. The first is that the UK should seek to become the world leader in scientific research and innovation. The second is that the machinery of government in the UK does not work and is incapable of tackling the pressing problems facing society. He sought to develop both of these argument at length in a lecture at the Institute for Public Policy Research in 2014, entitled *The Hollow Men*.[10]

In this lecture, Cummings claimed that there has been sustained and disastrous failure in UK government decision-making since the 1860s: "those at the apex of British politics made colossal error after error". He provides harsh and wide-ranging criticism. Baroness Thatcher is fleetingly praised for dealing with "some of the worst excesses of accumulated errors and weakness" but is still assessed to have failed on a number of fronts, including "monetary policy, Europe, health, education, and welfare". Ahead of the 2015 election, Cummings suggested it did not matter if voters chose Ed Miliband, then Leader of the Labour Party, or David Cameron, the incumbent Prime Minister. To Cummings, the result made no real difference, as those leaders and those surrounding them were "hollow men"—a reference to the opening phrase of the T S Eliot poem of the same name. According to Cummings, these "hollow men", from across the political spectrum, fail to "develop political institutions able to think wisely about the biggest problems in order to pre-empt some crises". He concludes that future reforms should be underpinned by "a new national goal and organising principle" to "focus on making

[10] The text of the lecture was published in two parts on a blog that Dominic Cummings previously maintained: D Cummings, "Gesture without motion from the hollow men in the bubble, and a free simple idea to improve things a lot which could be implemented in one day (Part I)" (June 16 2014, *Dominic Cummings's Blog*), available at https://dominiccummings.com/2014/06/16/gesture-without-motion-from-the-hollow-men-in-the-bubble-and-a-free-simple-idea-to-improve-things-a-lot-which-could-be-implemented-in-one-day-part-i/ (accessed 22 March 2022); D Cummings, "The Hollow Men II: Some reflections on Westminster and Whitehall dysfunction" (October 30 2014, *Dominic Cummings's Blog*), available at https://dominiccummings.com/2014/10/30/the-hollow-men-ii-some-reflections-on-westminster-and-whitehall-dysfunction/ (accessed 22 March 2022).

ourselves the leading country for education and science". This goal, he claims, should shape the entire policy agenda and determine resource allocation, as well as providing a frame through which to approach the reconstruction of state institutions.

In *The Hollow Men*, the role of administrative law may be said to arise surprisingly often for a policy lecture. Law, lawyers, and courts are positioned by Cummings as a sustaining feature of what he perceives to be the failure of our system of government. There are broad, abstract references to the need to reform administrative law, international law, the constitution, and the machinery of government. For instance, Cummings claims that the "new national goal and organising principle" ("making ourselves the leading country for education and science") would "require and enable fundamental changes to how the constitution, Parliament, and Whitehall work". In support of his sweeping demands for reform, Cummings provides various personal anecdotes of frustration from his time as a Special Adviser in the Department for Education, working under the then Education Secretary Michael Gove. For instance, he provides this example of an exchange about procurement with an official:

> **Official:** Err, Dom, you know that contract we were talking about yesterday?
> **Me:** Don't tell me the tests have gone haywire.
> **Official:** Yes, they have but that's not what I mean – I mean that Academy procurement process.
> **Me:** Yes.
> **Official:** Well, the legal advice says – if we go ahead, we'll get JRd [judicially reviewed] and lose but if we stop and reboot we'll also get JRd and lose.
> **Me:** So we're screwed whatever we do.
> **Official:** Seems like it.

A second example is part of a broad critique of "bureaucracies" that "cannot reliably do the simplest things". Included in a string of complaints—alongside the claim that "spreadsheet skills were so lacking that financial models and budgets could never be trusted and almost every figure released to the media or Parliament was wrong"—is that "[l]egal advice was unreliable and government lawyers are also given the wrong incentive (they are told to prioritise never going to court, which is stupid)". According to Cummings, the wide array of competency issues within bureaucracies are:

> [C]ompounded by a combination of the growth of public law, judicial review, EU regulation, and the ECHR/HRA, which have added cost, complexity, and uncertainty. There is no objective view of 'what the law is' in many circumstances, so management decisions are undermined many times per day by advice to do things 'to avoid losing a judicial review', the risks of which are impossible to analyse clearly. Legal advice is offered, saying that both doing X and not doing X could be 'illegal' leading to Kafka-esque discussions and pseudo-'fair processes' (like 'consultations') designed only to be evidence in

> court. Internal legal advice makes discussion of regulatory trade-offs tortuous and wasteful; it is always easier to urge 'caution' and 'we'll lose a JR' is an easy way across Whitehall to delay or block change.

This is contemporary administrative law cast in the role of undermining the way government ought to work and prohibiting it from taking on the problems that it should be tackling.

Given Cummings's views on the importance of science and innovation to UK policy, as well as his outlook on the operation of law and government, it should be no surprise that he told the Science and Technology Select Committee, on the topic of being asked to join the No. 10 team by Mr Johnson, that his response was:

> Yes, if, first, you are deadly serious about getting Brexit done and avoiding a second referendum; secondly, double the science budget; thirdly, create some ARPA-like entity; and, fourthly, support me in trying to change how Whitehall works and the Cabinet Office works, because it is a disaster zone.[11]

He then went on to spend a significant amount of his time in No 10, in the role of Chief Adviser to the Prime Minister, working on establishing ARIA through new legislation.[12] Significantly for present purposes, what resulted was informed not only by a view on science and innovation policy and how effective research and innovation organisations can provide a template for better public organisations, but also a perception of the problems that administrative law creates for effective government.

The ARIA Act establishes a new research funding agency, with a focus on providing long-term support for "high-risk, high-pay off" research.[13] Its aim is to promote research which may not have obvious, immediate application but has the potential to be transformative over time. As part of the March 2020 Budget, a commitment was made to invest "at least £800 million" in ARIA, part of a strategy of raising broader investment in public funding for research and development to £22bn by 2024/2025.[14]

The Statement of Policy Intent published alongside the Bill stressed that ARIA should have certain distinctive organisational features.[15] First, ARIA will exclusively focus on projects

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[11] Science and Technology Committee, Oral evidence: A new UK research funding agency (Wednesday 17 March 2021) (Q170).
[12] Ibid (Q209).
[13] This was a manifesto pledge: The Conservative and Unionist Party, *Get Brexit Done: Unleash Britain's Potential* (2019) 40.
[14] HM Treasury, *Budget 2020: Delivering on our promises to the British people* (HC 121: 2020) 6.
[15] Department for Business, Energy & Industrial Strategy, "Advanced Research and Invention Agency (ARIA): statement of policy intent" (19 March 2021), available at https://www.gov.uk/government/publications/advanced-research-and-invention-agency-aria-

with the potential to produce transformative technological change, or a paradigm-shift in an area of science. While it is anticipated that most programmes may fail in achieving their ambitious aims, the theory is that those which succeed may have a profound and positive impact on society, and the losses will appear marginal over time. The bulk of the money awarded by this body is therefore not likely or expected to lead to the desired outcomes, and official decisions will be made within that framework. Second, ARIA will have extensive strategic, scientific, and cultural autonomy. This means it will have "maximum autonomy over its research and project choice; its procedures; and its institutional culture". Decisions on the programme portfolio will be set by ARIA, not ministers, and allocation of funding to research projects will be decided by those with relevant technical expertise. Third, ARIA will give freedom and control to a small number of the "highest-calibre" researchers, who will be taken from both the public and private spheres. These individuals, filling the "Programme Manager" position, will be "empowered to dynamically channel funding, shift project objectives and milestones, and manage risks, to keep their overall research programme focussed around a coherent but evolving vision". Fourth, ARIA will have extensive financial and operational freedom. This means there will be a focus on minimising hurdles across a typical project lifecycle to create an "agile" and efficient funding body. For instance, it will likely issue small grants rapidly without lengthy, open competitions.

ARIA is based on an organisational model where a small number of expert people have an enormous degree of operational freedom and discretion; "elite" judgement is elevated. The Act, which is relatively short, reflects this policy intent and organisational design. It establishes the Agency, sets out its functions as conducting and commissioning scientific research, sharing findings, and exploiting scientific knowledge.[16] It also explicitly states that ARIA is permitted to undertake "ambitious" research projects with a high tolerance for project failure:

> In exercising any of its functions under this Act, ARIA may give particular weight to the potential for significant benefits to be achieved or facilitated through scientific research, or the development and exploitation of scientific knowledge, that carries a high risk of failure.[17]

Amongst other provisions on the details of the structure of the Agency, the Bill seeks to "deliver…operational freedom in legislation"[18] for ARIA by excluding it from the

statement-of-policy-intent/advanced-research-and-invention-agency-aria-policy-statement (accessed 22 March 2022).

[16] Advanced Research and Invention Agency Act 2022 sections 1-2.

[17] Ibid section 3.

[18] ARIA statement of policy intent (n 15).

requirements of the Freedom of Information Act 2000 and the Public Contract Regulations 2015.[19] While the principle of further investment in research, science, and innovation was broadly welcomed across Parliament, concerns were expressed about the lack of accountability within ARIA and the concentration of power within just a few individuals.[20]

The model being adopted for ARIA reflects and is derived from the experiences of organisations responsible for effective and transformative innovation in science and technology in the USA. Two are particularly prominent. The first is Skunk Works—the nickname for Lockheed Martin's Advanced Development Programs, which was responsible for a series of transformative technological breakthroughs, particularly through their work in the field of aeronautical engineering.[21] Skunk Works has now become shorthand for a particular way of setting up an organisation: where a relatively small and loosely structured group of people, with a great degree of operational freedom, develop a project in the pursuit of radical innovation. Skunk Works founder, the famed engineer Kelly Johnson, is now widely credited with creating a new form of organisational management. Sometimes cited as the creator of the so-called KISS principle ("keep it simple, stupid"), amongst his "14 key rules" were: the Skunk Works manager must be delegated practically complete control of his work in all aspects; the number of people having any connection with the project must be restricted in an almost vicious manner, so use a small number of good people; and there must be a minimum number of reports required, but important work must be recorded thoroughly.[22]

The second model which, by far, exerted the most influence on the development of ARIA is the USA's Advanced Research Projects Agency (ARPA)—it has been heavily cited in the UK government policy papers around the creation of ARIA.[23] Established by President Eisenhower in 1958, ARPA's function was to make investments in breakthrough technologies for the purposes of national security (it later became DARPA, adding 'Defense' explicitly to its name). It has become famous for work that enabled innovations such as the internet, GPS, and self-driving cars.[24] Discussion around ARPA in the context of ARIA has often focused on

[19] Advanced Research and Invention Agency Act 2022 Schedule 3.
[20] HC Deb 24 March 2021, vol 691, col 819.
[21] S Pace, *The Projects of Skunk Works: 75 Years of Lockheed Martin's Advanced Development Programs* (2016).
[22] B R Rich, "Clarence Leonard (Kelly) Johnson: 1910-1990)" (1995) National Academy of Science 221.
[23] ARIA statement of policy intent (n 15).
[24] S Weinberger, *The Imagineers of War: The Untold Story of DARPA, the Pentagon Agency That Changed the World* (2018); W Boone Bonvillian, R Van Atta and P Windham (eds),

the period between 1962 and 1975, and the work of Joseph Licklider in The Information Processing Techniques Office (a sub-division of the agency).[25] During this period, ARPA is perceived to have been highly productive and this has been widely seen as a result of Licklider's organisational strategy, which was akin to that within Skunk Works. It included reducing process, recruiting a small group of exceptional people, and giving those people significant operational freedom and control.

It appears that, for Cummings, organisations such as (D)ARPA are not just models for research and innovation bodies, but they also hold more broadly applicable lessons for building effective public organisations that tackle the big problems and achieve outcomes. It is also a model which sits uncomfortably with key tenets of modern administrative law. Beyond the explicit exclusion of freedom of information and procurement laws, the institutional design of the Agency reflects heavily centralised executive control by "elite" individuals, and the minimisation of process requirements and record-keeping. Experts disagree on whether ARIA will be effective as a research funding body, and only time will tell. For administrative lawyers, however, the particulars of the model that underpins ARIA are less important than the worldview that the underpinning legislation reveals upon close inspection—it is one that juxtaposes modern administrative law and good government.

C. THE IMPACTS AND LEGITIMACY OF ADMINISTRATIVE LAW

It is tempting to dismiss the kind of attitudes expressed by Cummings as simply a variety of illiberalism. But that would be a mistake, in our view. The sceptical perspective on administrative law he consistently expresses—and is now partially fossilised in the ARIA Act—has increasingly found traction and must, therefore, be taken seriously.

The problem which immediately presents itself, however, is that existing administrative law research lacks the resources to respond meaningfully. Most research—particularly work focusing on judicial review—remains largely rooted in legal theory derived from various normative positions and ideological commitments. And whilst there is a clear empirical dimension to the question of judicial review's relationship to good and effective government, there is very little empirical analyses on which to develop legal theory. Beyond the studies of

The DARPA Model for Transformative Technologies: Perspectives on the U.S. Defense Advanced Research Projects Agency (2019).

[25] M Mitchell Waldrop, *J.C.R. Licklider and the Revolution That Made Computing Personal* (2002).

Bridges et al[26] and Platt et al[27] in relation to local government services, and Daintith and Page's work in relation to central government,[28] there is not much to find. The evidence base is very thin indeed—the most valuable study in recent years, which considered the communication of legal advice in government, emerged not from academic researchers but from a think tank.[29] The consequent danger is that legal theory continues to build on a foundation of empirical assumptions and anecdotal evidence. If the fundamental critique that administrative law inhibits good government is to be properly interrogated—and, equally, properly defended by those who advance it—the field must pursue an empirical research agenda. This agenda, we suggest, ought to pay particular attention to three dimensions of this critique.

Such an agenda should, first, seek to examine the impact of administrative law on policy development and innovation. Hitherto, empirical research on administrative impact in the UK has focused mainly on its capacity to encourage compliance with judicial review in entitlement decision-making,[30] or to improve claimants' broader welfare.[31] But as studies such as those by Bridges, Platt, and Daintith and Page show (all of which are now quite old), there is considerable scope for unpacking the roles that judicial review can play in the policy process, for better or worse. This is no small feat, of course. Government is complex. And as Thomas demonstrates in his recent work in the field of immigration, a proper understanding of administrative law's functioning within government requires an extended treatment.[32] Yet, how else might the insiders' claims of judicial review's pathological influence be responded to? This question, in our view, opens a horizon that administrative laws rarely consider.

A second dimension that empirical research ought to focus on is government "insiders" and their perceptions of legality. Here the research agenda takes us towards the topic of legal consciousness: what people think and do around legality.[33] This particular stream of socio-legal

[26] L Bridges. C Game, O Lomas, J McBride and S Ranson*, Legality and Local Politics* (1987).
[27] L Platt, M Sunkin and K Calvo, "Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales" 20(2) Journal of Public Administration Research and Theory 243.
[28] T Daintith and A Page, *The Executive in the Constitution: Structure, Autonomy and Internal Control* (1999).
[29] C Haddon, R Hogarth and A Nice, *Judicial review and policy making: The role of legal advice in government* (Institute for Government: 2021)
[30] See, for example, I Loveland, *Housing Homeless Persons* (1995); S Halliday, *Judicial Review and Compliance with Administrative Law* (2004).
[31] T Mullen, K Pick and T Prosser, *Judicial Review in Scotland* (1996).
[32] R Thomas, *Administrative Law in Action: Immigration Administration* (2022).
[33] L J Chua and D M Engel, "Legal Consciousness Reconsidered" (2019) 15(1) Annual Review of Law and Social Science 335.

research has become rather diverse and somewhat complex, but promising work is emerging that focuses on the legal consciousness of public officials.[34] The key point in this regard is that public officials' scepticism towards legality occurs within their broader normativity. In other words, a negative perspective on law is most likely part of their positive perspective about what they are attempting to achieve as public officials. As Thomas notes, "some, if not many, officials are influenced by their own normative orientation as to how they should best do their jobs".[35] Why is it, then, that law is, at least to some extent, regarded as a normative problem rather than a normative resource? When public officials frame administrative law as an impediment to good government, they are expressing the view that, in some respects at least, law's legitimacy within government is diminished. Researchers of administrative law ought to be anxious to investigate, understand, and analyse such perceptions wherever they arise.

Public officials are, of course, not the only constituency making legitimacy assessments with respect to administrative law. A key aspect of the concept of legitimacy in this context relates to the extent of alignment between the exercise of state power and the normative sensibilities of society more generally.[36] Thus, a third dimension that empirical research must address relates to society's normative orientations towards the standards of administrative law and their application in various contexts. The doctrines of judicial review have developed in the absence of any real understanding of what the public feels about its content and application. But to the extent that the content of administrative law is misaligned with public sensibilities, its legitimacy is harmed; and to the extent that it is developed in a way that is responsive to community sensibilities, its legitimacy is enhanced. Thus, we need to study public perceptions of procedural fairness, legality, rationality and so forth in various contexts. This must surely also be part of any broader attempt to respond to legal scepticism within government. As normatively-driven, public-oriented officials, a better understanding of the public's consciousness around administrative propriety would no doubt have significance for the legal consciousness of government actors.

D. CONCLUSION

Our central purpose in this short article has been to show how the ARIA Act represents the clearest legislative expression to date of a worldview that the nature of contemporary

[34] S Halliday, "After Hegemony? The Varieties of Legal Consciousness Research" (2019) 28(6) Social & Legal Studies 859.
[35] Thomas (n 32) 258.
[36] D Beetham, *The Legitimation of Power* (2013).

administrative law inhibits good government rather than facilitating it, and to suggest that those committed to administrative law's modern form ignore this fundamental critique at their peril. Effective engagement with this claim, we suggest, must go beyond just another ideological battle over different forms of administrative law. While we cannot hope to escape those, the best hope of serious intellectual progress is to treat this critique as what it is: an empirical claim as to the perceptions and effects of this body of law. This is no small proposal: it requires administrative law researchers to embrace an empirical research agenda that investigates the impacts of law on public administration but also the perceived legitimacy of administrative law both inside and outside of government. This is methodologically and practically difficult, but the current state of administrative law research is such that, in terms of responding to this fundamental critique, an ounce of meaningful evidence is worth a pound of speculative theory.

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