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Collateral challenges in England and Wales:

More questions than answers

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A. Introduction

In England and Wales, judicial review is one means by which the legality of the exercise of public powers, duties, and functions can be challenged by individuals or organisations before the judiciary. Judicial review is concerned with the illegality of actions, decisions, or omissions undertaken by any public body with legally limited powers and jurisdiction. Illegality would include exceeding, abusing, or misunderstanding legal powers and violating rights protected by common law or statute. Ultimately, judicial review imposes legal accountability on public bodies by requiring them to justify the legality of their actions and decisions to the courts.[2]

In contrast to many jurisdictions in this volume, the "plea of illegality" and "indirect review" do not exist as such in England and Wales. However, there is the concept of a "collateral challenge", whereby a person seeks to invoke the illegality of a particular administrative act as a defence in criminal proceedings or to resist a particular penalty or decision in civil proceedings.[3] This is possible because English law, unlike its continental neighbours, recognises no "public-private divide" as such.[4] Therefore, it is possible to raise "public law" matters in otherwise "private law" proceedings. The principle of collateral challenge has been recognised in English law for more than 300 years.[5] Until the 1980s, it was accepted without much controversy.[6] The rule of law was understood to mean that, except where Parliament had required otherwise, an individual could invoke the illegality of a decision made against them at the first-instance in order that they could avoid the consequences of that unlawful decision.[7] In 1987, a case disturbed this quiet acceptance,[8] leaving matters unsettled until the principle was confirmed in 1998.[9]

There is limited systematic research in England and Wales on collateral challenges for at least four reasons. First is that data on the specific reasons for decisions in lower courts can be difficult to access. While data

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[1] University of Essex (United Kingdom). We thank Richard Harwood QC for providing material on collateral challenges in planning law.

[2] Andrew Le Sueur, Maurice Sunkin and Jo Eric Khushal Murkens, *Public Law: Texts, Cases and Materials* (4th edn, Oxford University Press, 2019) p. 613.

[3] *Wandsworth London Borough Council v Winder* [1969] AC 461.

[4] Carol Harlow, '"Public" and "Private" Law: Definition Without Distinction' (1980) 43(3) Modern Law Review 241-265.

[5] Paul Craig, *Administrative Law* (8th edn Sweet & Maxwell 2016) para 24-002.

[6] Christopher Forsyth, 'Collateral challenge and the foundations of judicial review: orthodoxy vindicated and procedural exclusivity rejected' (1998) *Public Law* pp. 364-370, p. 365.

[7] *Boddington v British Transport Police* [1998] UKHL 13.

[8] *Plymouth City Council v Quietlynn* [1987] 2 All ER 1040 discussed in John Adler, 'Collateral Challenge in Criminal Proceedings' (1988) (51:1) *Modern Law Review* pp. 109-114 and Carl Emery, 'A High Constitutional Issue' (1988) (138) *New Law Journal* p. 270.

[9] *Boddington v British Transport Police* [1998] UKHL 13.

is published across the criminal and civil courts on matters such as case numbers and outcomes,[10] there are certain data gaps. For instance, a government review commissioned in 2017 made several recommendations which would have required first-tier criminal courts to collect and publish more granular data about the race and religion of defendants, the number and timing of guilty pleas, bail decisions, and the involvement of legal representatives.[11] These recommendations have yet to be implemented. In addition, there are very few publicly available judgments from the first-tier civil courts.[12] The number of collateral challenges issued in both criminal and civil lower courts is part of this data gap. Therefore, it is currently impossible to estimate the precise number as collateral challenges are not officially recorded or centrally published.

Second, in some contexts, a collateral challenge may be pursued entirely outside the courts, such as via the Planning Inspectorate, a quasi-judicial administrative body which considers appeals related to local government planning decisions.[13] These quasi-judicial bodies do not centrally publish collateral challenges either. Third, where a collateral challenge is successful, the tendency is that the public body simply withdraws the decision which it initially made. Again, this requires no transparent or central official recording.[14] Therefore, collateral challenges are something of a data black-box.

A fourth reason for the scarcity of research is likely because the collateral challenge sits messily at the frontier between different legal disciplines, especially the various facets of civil and criminal law on the one hand and administrative law on the other. Indeed, a recent decision on collateral challenge by the UK Supreme Court in *Dill v Secretary of State for Housing*,[15] is recorded on *Westlaw* as being a case about planning. This makes sense as the question of collateral challenge did arise in a planning context. However, as Richard Harwood QC, the lead counsel in *Dill*, has himself indicated, the consequence is that it has received limited attention by administrative lawyers. There is an artificial separation between planning lawyers and administrative lawyers, despite clear commonalities of interest.[16]

This lack of attention is important because, as Sunstein and Vermeule note in *Law & Leviathan*, modern governance across the Western world is typified by a large number of public bodies exercising broad administrative discretion across vast swathes of life.[17] The UK Government website, for instance, records 573 public bodies across the various departments.[18] Moreover, as of 2014, Ministers alone produced approximately 12,000 pages of delegated legislation annually.[19] While we do not criticise the expansion of

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[10] House of Commons Library, 'Court statistics for England and Wales' (22 December 2020) <https://commonslibrary.parliament.uk/research-briefings/cbp-8372/>, accessed 28 February 2021.
[11] The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf>, accessed 28 February 2021.
[12] <https://www.bailii.org/ew/cases/Misc/>, accessed 28 February 2021.
[13] *Dill v Secretary of State for Housing* [2020] UKSC 20.
[14] Thank you to Richard Harwood QC for alerting us to this.
[15] [2020] UKSC 20.
[16] Richard Harwood QC, 'An advocate for judicial review' (2020) 2041 Estates Gazette 44-47.
[17] Cass Sunstein and Adrian Vermeule, *Law & Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020).
[18] <https://www.gov.uk/government/organisations>, accessed 28 February 2021.
[19] Ruth Fox and Jowell Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society, 2014).

the administrative state *per se* (it may simply be an inevitable feature of electoral expectations of government and the expertise of these executive bodies when compared to legislators), the lack of attention on collateral challenge means that an important option for the early challenge to unlawful administrative acts is rarely systematically described or evaluated. This chapter is a modest corrective to that.

We begin with an overview of the legal framework for judicial review in England and Wales (B), before turning specifically to collateral challenges and their limitations in (C). In (D), we suggest that the approach of the senior courts has been an attempt to balance multiple competing objectives: protecting the right of individuals to resist unlawful decisions at the earliest opportunity; subjecting public bodies to the rule of law; ensuring that court processes are not abused by readily circumventing the procedural requirements of judicial review; and ensuring that Parliament's intention as expressed in a statute is respected. The chapter concludes with a possible future research agenda and highlights some potential reforms (E).

B. The judicial review of administrative action

I. Basic framework

In England and Wales, administrative law refers to the body of law governing the composition, procedures, powers, duties, liabilities, and rights of administrative and executive bodies normally carrying on statutory functions.[20] Judicial review is only one facet of English administrative law, albeit a constitutionally important and politically controversial facet.[21] Public bodies take at least tens of millions of decisions each year and numerically very few of these will be challenged by judicial review.[22] Indeed, for the last twenty years, excluding immigration cases which are dealt with via a separate tribunal system, the number of judicial review applications has stayed broadly steady at around 2000 per year.[23] Consequently, Harlow and Rawlings have noted that the number of judicial reviews in the context of the number of administrative decisions is 'infinitesimal'.[24] Instead, the vast majority of challenges to administrative decisions will start and end with: complaints to public bodies requiring a different decision-maker within the same institution to reconsider the decision ('administrative review'); statutory appeals to tribunals; or complaints to ombuds.[25] Therefore, at least quantitatively, judicial review is a fringe activity pursued by very few people.

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[20] Anthony Wilfred Bradley and Keith Ewing, *Constitutional and Administrative Law* (14th edn Pearson Longman, 2007) 657-658

[21] See, for instance, the recent judicial reviews in relation to the UK's withdrawal from the EU: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; *R (Miller and Cherry) v Prime Minister* [2019] UKSC 41.

[22] Robert Thomas and Joe Tomlinson, 'Mapping current issues in administrative justice: austerity and the 'more bureaucratic rationality' approach' (2017) 39(3) Journal of Social Welfare and Family Law 380, 381.

[23] Andrew Le Sueur, Maurice Sunkin and Jo Eric Khushal Murkins, *Public Law: Texts, Cases and Materials* (Oxford University Press, 2019) 622.

[24] Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, Cambridge University Press, 2009) 712.

[25] Andrew Le Sueur, Maurice Sunkin and Eric Kushal Murkens, *Public Law: Texts, Cases and Materials* (4th edn Oxford University Press, 2019) 559.

The law governing judicial review is a patchwork of statutory provisions, procedure rules, and case law. The key statute is the *Senior Courts Act 1981* and pertinent procedure rules include *Part 54 of the Civil Procedure Rules*.[26] The process by which an application must be brought, time limits, and remedies available, are primarily contained in statute and procedure rules, and the grounds of review have been developed by judges over time in cases. Section 31(1) of the *Senior Courts Act 1981* requires that an application for judicial review must be pursued in the High Court. The High Court is the first-tier appeal court for low-level criminal matters and the first instance court for certain civil claims of particularly high complexity or financial value. Specifically, judicial review applications are heard in the Administrative Court, which is a specialist administrative law division of the High Court. The Administrative Court currently sits in London, Cardiff, Birmingham, Manchester, and Leeds.[27] Since 2013, immigration and asylum judicial reviews have been dealt with by a specialist tribunal known as the Upper Tribunal,[28] which, according to s.31A of the 1981 Act, must decide cases according to the same principles as the Administrative Court and may grant the same forms of relief.[29]

There is no right as such to pursue a judicial review in England and Wales. Section 31(3) of the *Senior Courts Act 1981* provides that no application may be made unless the permission of the High Court has been obtained, with the court being of the view that the claimant has a "sufficient interest in the matter to which the application relates". This is referred to as the "permission stage", whereby the claimant must demonstrate that they have "standing" (or *locus standi*) to bring a claim.[30] Because s.31(3) does not limit judicial review to persons with a direct interest, courts have long accepted that associational or public interest organisations may pursue proceedings on behalf of others to enable the court to vindicate the rule of law.[31]

According to Part 54.5(1)(a)-(b) of the *Civil Procedure Rules*, an application for judicial review must be brought 'promptly' and 'in any event no later than three months after the grounds to make the claim first arose.' Part 54(2) makes clear that this time limit cannot be extended by the agreement of the parties and the court itself has no discretion to extend the time limit.[32] A court may consider a judicial review unless there is an "ouster clause", that is, a statutory provision which prevents the court from considering a case.

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[26] Part 54 of the Civil Procedure Rules can be found here: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54>, accessed 11 November 2020.
[27] Andrew Le Sueur, Maurice Sunkin and Jo Eric Kushal Murkens, *Public Law: Texts, Cases and Materials,* p. 613.
[28] Direction by the Lord Chief Justice transfers to the Tribunal certain immigration and asylum judicial reviews from the High Court from the 1st of November (29 August 2013). <https://www.ein.org.uk/news/most-immigration-judicial-review-applications-move-upper-tribunal-november>, accessed 10 November 2020.
[29] Inserted by sections 15-21 of the Tribunals, Courts and Enforcement Act 2007.
[30] Andrew Le Sueur, Maurice Sunkin and Eric Jo Kushal Murkens, *Public Law: Texts, Cases and Materials*, p. 632.
[31] *Walton v Scottish Ministers* [2012] UKSC 44; *R (World Development Movement) v Secretary of State for Foreign Affairs* [1994] EWHC 1 (Admin); *R (National Federation of Self-Employed and Small Businesses) v Inland Revenue Commissioners* [1982] AC 617.
[32] <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54>, accessed 28 February 2021.

Ouster clauses are traditionally interpreted restrictively by the courts given the importance placed on judicial supervision of the legality of public decisions.[33]

II. Amenability to review

A judicial review is limited to challenging the legality of the exercise of "public functions".[34] A body exercising a public function is described as being *amenable* to review.[35] For a decision to be amenable, the decision-maker must be empowered by public law not merely a private law obligation to make that decision.[36] This would include the use of statutory powers;[37] common law powers;[38] the royal prerogative;[39] Orders in Council;[40] and delegated legislation,[41] by any public body of limited jurisdiction, including ministers in the central government; officials, administrators, and decision-makers within government departments, agencies, ombudsmen, and regulators; local and regional authorities; and courts and tribunals.[42]

This would also include otherwise independent bodies on whom statutory functions or duties have been expressly conferred;[43] private bodies which are an integral part of a system of governmental control; or private bodies which operate as a surrogate of government.[44] This has been described as having a 'sufficient public element, flavour or character to bring it within the purview of public law.'[45] However, this would not include private bodies who merely have a contractual obligation with a public body to carry on a public function otherwise conferred on that public body.[46]

III. Grounds of review

The grounds of judicial review have largely been developed through judge-made law. This has been by virtue of the so-called 'supervisory jurisdiction' of the High Court to ensure that public bodies act in conformity with the rule of law.[47] However, in July 2020, the government commissioned an Independent

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[33] *Anisminic Limited v Foreign Compensation Commission* [1969] 2 AC 147; *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.
[34] Part 54.1 of the Civil Procedure Rules.
[35] Andrew Le Sueur, Maurice Sunkin and Jo Eric Khushal Murkens, *Public Law: Texts, Cases and Materials* (Oxford University Press, 2019) 629.
[36] *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.
[37] *Padfield v Minister for Agriculture, Fisheries and Food* [1968] UKHL 1.
[38] *R (Guardian News and Media Limited) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420.
[39] *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.
[40] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No 2) [2008] UKHL 61.
[41] *R (Javed) v Secretary of State for Home Department* [2001] EWCA Civ 789.
[42] Andrew Le Sueur, Maurice Sunkin and Jo Eric Kushal Murkens, *Public Law: Texts, Cases and Materials* (Oxford University Press, 2019) p. 613.
[43] *R v Panel on Takeovers and Mergers ex parte Datafin* [1987] QB 815.
[44] *R v Jockey Club ex parte Aga Khan* [1993] 1 WLR 909.
[45] *R (Beer) v Hampshire County Council* [2003] EWCA Civ 1056.
[46] *R (Holmcroft Properties Limited) v KPMG LLP* [2016] EWHC 323 (Admin).
[47] *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46.

Review of Administrative Law ('IRAL'), one of whose terms of reference was the desirability of the codification of the grounds of judicial review in statutory form.[48] At the time of writing, the IRAL has submitted its response to Ministers but the recommendations have not been made public and the government has issued no official response.[49]

In *Council of Civil Service Unions v Minister for the Civil Service*,[50] Lord Diplock identified three primary grounds of review, namely illegality, irrationality, and procedural impropriety. By 'illegality', he meant that the decision-maker had exceeded their lawful powers or jurisdiction, had misunderstood the law that regulates the decision-making power and/or had failed to give effect to that law correctly.[51] For instance, by virtue of *R (Padfield) v Minister for Agriculture*, to lawfully exercise their statutory authority, public bodies may only use their discretion in a way that furthers the objectives of the statute.[52] By 'irrationality', Lord Diplock meant a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person could have arrived at the decision.[53] This has come to be known as *Wednesbury* unreasonableness.[54] Finally, by 'procedural impropriety', Lord Diplock meant that decision-makers should abide by procedural requirements expressed in statute or as produced by the courts at common law under the doctrine of natural justice.[55]

There is not one discrete ground of review dealing with infringements of human rights. Because in England and Wales, rights can variously be contained in statute or developed at common law or both, claims involving rights can overlap among the grounds. For example, in terms of illegality, s.6 of the *Human Rights Act 1998* imposes an obligation on public bodies to act in a way that is compatible with the rights contained in Schedule 1 of the Act. Schedule 1 outlines many of the rights protected in the *European Convention on Human Rights*. Because domestic courts also have an obligation under s.2 of the Act to take into account jurisprudence from the European Court of Human Rights, domestic courts would use the test of proportionality to determine legality under s.6.[56] Furthermore, to attack an administrative decision on the basis of procedural unfairness, an English claimant need not invoke Article 6 of the Convention, which deals with the right to a fair trial. A doctrine of natural justice has long been developed, which can impose additional procedural rights not expressly contained in a statute.[57] Moreover, for review based on irrationality, the courts have developed a so-called "anxious scrutiny" doctrine, whereby an administrative

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[48] <https://www.gov.uk/government/groups/independent-review-of-administrative-law>, accessed 10 November 2020.
[49] Monidipa Fouzder, 'Faulks hands in his findings on judicial review' (*Law Gazette*, 1 February 2021). Available at <https://www.lawgazette.co.uk/news/faulks-hands-in-his-findings-on-judicial-review/5107254.article>, accessed 28 February 2021.
[50] [1984] UKHL 9.
[51] *ibid*.
[52] [1968] UKHL 1.
[53] [1984] UKHL 9.
[54] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.
[55] [1984] UKHL 9.
[56] *R v Secretary of State for Home Department ex parte Daly* [2001] UKHL 26.
[57] *Ridge v Baldwin* [1964] UKHL 2.

interference with rights recognised at common law will be treated with less deference and greater scrutiny than would otherwise be the case.[58]

IV. Justiciability and non-justiciability

Over time, the range of public decisions considered to be justiciable in the courts has increased steadily.[59] It has long been a principle of English administrative law that any exercise of a statutory power is justiciable, given that the meaning and effect of statutory language is by necessity a matter of law for the court.[60] In *Council of Civil Service Unions v Minister for the Civil Service*,[61] the House of Lords also determined that the royal prerogative could be justiciable, depending on the circumstances of the case.[62] The royal prerogative is that residue of non-statutory discretionary power left in the hands of the Crown, normally exercised by Ministers. It includes the right to make and unmake treaties, appoint ministers, declare war, issue passports, and grant pardons.[63] This was on the basis that, if ministerial acts carried on under the prerogative could not be reviewed, that would create a significant lacuna of redress for the individual affected.[64]

Nevertheless, Lord Roskill did envisage that some exercises of the prerogative might remain non-justiciable:

> But I do not think that that right of challenge can be unqualified. It must…depend upon the subject matter of the prerogative power which is exercised...Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers…are not…susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.[65]

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[58] *R v Secretary of State for Home Department ex parte Bugdaycay* [1987] AC 514; *Kennedy v Charity Commission* [2014] UKSC 20; *Pham v Secretary of State for Home Department* [2015] UKSC 19.
[59] Andrew Le Sueur, Maurice Sunkin and Jo Eric Kushal Murkens, *Public Law: Texts, Cases and Materials* (5th edn, Oxford University Press, 2019) 303.
[60] Lord Sumption at [41]-[43] in *Bank Mellat v Her Majesty's Treasury* (No 2) [2013] UKSC 39.
[61] [1984] UKHL 9.
[62] *ibid*.
[63] <https://publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/42204.htm> accessed 28 February 2021.
[64] [1984] UKHL 9.
[65] *ibid*.

Lord Diplock considered the same in relation to foreign policy and national security matters.[66] In early 2021, the Supreme Court reiterated that certain national security questions, whether decided under the prerogative or statutory powers, would not be justiciable.[67]

However, equally, in *R (Miller) v Prime Minister*,[68] the Supreme Court determined that the prorogation of Parliament under the prerogative by the Prime Minister could be justiciable.[69] In addition, the courts have determined that a decision to refuse to issue a pardon may be justiciable,[70] as well as the refusal to issue a passport,[71] the failure to fund life-saving litigation for a citizen abroad,[72] and the refusal to make representations to a foreign government.[73] Similar decisions have been made in relation to Orders in Council, a type of primary legislation issued under the prerogative.[74] Moreover, in *R (Javed) v Secretary of State for Home Department*, the Court of Appeal determined that delegated legislation passed by a Minister under statutory powers and then authorised by Parliament could be subject to judicial review.[75]

Furthermore, sections 6 and 7 of the *Human Rights Act 1998* create an express statutory obligation on public bodies not to violate human rights and provide victims of a violation the right to pursue legal proceedings against a public body. As Lord Sumption put it at [29] in *R (Lord Carlile) v Secretary of State for Home Department*,[76] these obligations and rights make justiciable matters that would have otherwise been non-justiciable without the Act. In *Carlile*, this specifically involved an immigration decision touching on the area of foreign policy.[77] As Lord Hoffmann put it at [90] in *A v Secretary of State for Home Department*,[78] which related to national security and the internment without trial of potential Islamist terrorists: 'Until the Human Rights Act 1998, the question of whether the threat to the nation was sufficient to justify suspension of habeas corpus or the introduction of powers of detention could not have been the subject of judicial decision.'[79] Therefore, the justiciability of public decision-making has steadily increased and there are few, if any, complete "no-go areas" for the courts.

V. Remedies

Sections 29, 30, and 31 of the *Senior Courts Act 1981* list the various forms of relief that are available to successful claimants. Section 31(1)(a)-(c) grants the High Court the power to issue a mandatory order, a prohibiting order, a quashing order, a declaration, or an injunction. When deciding whether to grant a

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[66] *ibid*.
[67] *R (Begum) v Secretary of State for Home Department* [2021] UKSC 7.
[68] [2019] UKSC 41.
[69] *ibid*.
[70] *R v Secretary of State for Home Department ex p. Bentley* (1994) QB 349.
[71] *R v Secretary of State for Home Department ex p. Everett* (1989) QB 811.
[72] *R (Sandiford) v Secretary of State for Home Department* [2014] UKSC 44.
[73] *R (Abassi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598.
[74] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No 2) [2008] UKHL 61.
[75] [2001] EWCA Civ 789.
[76] [2014] UKSC 60.
[77] *ibid*.
[78] [2004] UKHL 56.
[79] *ibid*.

declaration or injunction, s.31(2)(a)-(c) requires the court to have regard to all the circumstances of the case, the nature of the subject-matter, and the nature of the public bodies in issue. Under s.31(4), the High Court further has the jurisdiction to award damages, restitution, or a sum of money. In addition, where the High Court considers that there has been undue delay in making an application for judicial review, s.31(6) permits the court to refuse to grant relief where it considers that this would cause substantial hardship to any person or would be detrimental to good administration.

These various forms of relief are helpfully set out in *The Administrative Court Judicial Review Guide*. A declaration is when the High Court makes an official statement that an act taken by a public body is unlawful. A declaration has no coercive effect on the public body, though a public body is always expected to comply with the declaration issued by the court. A prohibiting order is an order that prohibits a public body from taking an action that the public body has indicated that it wishes to take but has not yet taken. A mandatory order is an order which compels a public body to act in a particular way. A quashing order is when a court sets aside a decision, rendering it a nullity with no legal effect. Finally, injunctions can come in two varieties: positive injunctions which require a public body to act in a particular way, and negative injunctions which prohibit a public body from acting in a particular way.[80]

With this general overview of the judicial review system, we will turn to addressing collateral challenges specifically and their relationship with this system.

C. Collateral challenges on public law grounds

There is no principle of "indirect judicial review" or the "plea of illegality" as such in England and Wales. Instead, there is the doctrine of "collateral challenge". *De Smith,* one of the most authoritative scholarly works on judicial review in England, summarises the principle in two main points:

> • There is a strong presumption, based on the rule of law, that an individual should be able to rely on any invalidity of an official decision or delegated legislation as a defence in collateral proceedings unless raising the defence is an abuse of process or has no reasonable prospect of success. This is so whether or not the source of invalidity is alleged to arise out of a jurisdictional or non-jurisdictional error, whether the decision or instrument is void or voidable, or whether the challenge is based on substantive or procedural grounds.
> • Where possible, that challenge should take place in the first-instance forum, without having to adjourn the proceedings in order to enable a claim for judicial review to be lodged in the Administrative Court.[81]

From these general points, this section will address the following specific questions: first, which authorities are competent to decide on a collateral challenge; second, the type of defect that can be invoked in collateral proceedings; and third, the potential limitations on, and disadvantages associated with, these challenges.

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80 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/825753/HMCTS_Admin_Court_JRG_2019_WEB.PDF>, accessed 10 November 2020.

81 *De Smith's Judicial Review*, para. 3-132.

As to the first question, it is important to clarify how collateral challenges interrelate with the scheme of procedural requirements set out in (B). In *O'Reilly v Mackman*,[82] the House of Lords set a major milestone by creating a rule of "procedural exclusivity". Essentially, the rule is that challenges to an administrative act on public law grounds must normally follow the judicial review process in the Administrative Court. Judicial review includes protections favourable to the public body e.g. the requirement for leave to pursue a case ("permission stage") and the time limit of three months. Therefore, the House ruled that, to pursue public law arguments via a more generous route, would be an abuse of the process of the court.[83]

However, as Lord Steyn put it in *Boddington v British Transport Police*:

> The *general* rule of procedural exclusivity...was at its birth recognised to be subject to exceptions, notably...where the invalidity of the decision arises as a collateral matter in a claim for infringement of private rights. The purpose of the rule was stated to be prevention of an abuse of the process of the court...It does not apply in a civil case when an individual seeks to establish private law rights which cannot be determined without an examination of the validity of a public law decision. Nor does it apply where a defendant in a civil case simply seeks to defend himself by questioning the validity of a public law decision...One would expect a defendant in a criminal case, where the liberty of the subject is at stake, to have no lesser rights.[84]

Therefore, to the extent that collateral challenge is permitted (and its exclusion will be developed in due course), in both criminal and civil proceedings it is recognised as an exception to the ordinary judicial review procedural controls outlined in (B). That said, the courts remain alert to ensure that claimants do not raise public law issues in collateral proceedings that could have realistically been raised earlier via judicial review but were not.[85]

In principle, a collateral challenge may be heard by any public authority which becomes involved in the enforcement of the impugned decision or in the appeal against the decision. While this might often be a lower court as in *Boddington*, the Supreme Court decided that a planning inspector was able to hear a collateral challenge as to the validity of a local authority planning decision by way of the appeal process in *Dill v Secretary of State for Housing*.[86] As we note in (D), the courts are alive to the need to permit collateral challenges to be heard only by bodies which can realistically understand and resolve the legal issue.

As to the second question of the type of defect which may be invoked, the answer is that, subject to the statutory language in issue, *any* public law defect could be available in a collateral challenge. This would

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[82] [1983] 2 AC 237.
[83] This judgment led to a series of satellite cases seeking to interpret and apply this rule, including *Roy v Kensington Family Practitioner Committee* [1992] 1 AC 624; *Chief Adjudication Officer v Foster* [1993] AC 754; and *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 WLR 48.
[84] [1998] UKHL 13 (italics in original judgment).
[85] *Trim v North Dorset District Council* [2010] EWCA Civ 1466, where the claimant was not permitted to raise the illegality of a planning notice in an ordinary civil appeal because he had ample opportunity to pursue a judicial review.
[86] [2020] UKSC 20.

include all the grounds of review identified in (B).[87] In *Bugg v Director of Public Prosecutions*, Woolf LJ suggested that there was distinction between *procedural* and *substantive* invalidity, with a collateral challenge able to decide obvious substantive invalidity but not procedural invalidity.[88] Given the rejection of this distinction in judicial review some twenty years earlier,[89] this was always a problematic distinction and, indeed, the House of Lords overruled *Bugg* in *Boddington*. As Lord Steyn put it: 'The rule of law requires a clear distinction to be made between what is lawful and what is unlawful. The distinction put forward in *Bugg*'s case undermines this axiom of constitutional principle.'[90] That said, in some situations, the courts have been cautious about permitting all grounds of judicial review to be invoked in collateral challenges. In *Dilieto v Ealing Borough Council*, for instance, it was held that ordinarily questions of irrationality should not be left to magistrates in a collateral attack related to planning law.[91]

This neatly brings us to the limitations on, and disadvantages associated with, collateral challenges. The first limitation from the claimant's perspective is that it is for the claimant asserting illegality to prove it to the civil standard ("more likely than not"). Given that, despite becoming a classic case on collateral challenge, the claimant lost in *Boddington* as he was unable to establish the requisite standard of illegality, this may be no easy task.[92] The second limitation, differentiating the collateral challenge from the position in judicial review as outlined in (B), is that a collateral challenge is limited to the individual facing direct criminal or civil proceedings. There is no explicit associational or public interest standing to pursue a collateral attack on behalf of others.

The third limitation concerns the remedies available after a successful collateral challenge. As outlined in (B), only the High Court may issue remedies such as quashing orders. Moreover, there is a principle that administrative decisions are valid until they are set aside by a competent court.[93] Combined, this means that, at most, a claimant may successfully avoid a conviction or civil decision based on public law grounds, but cannot obtain any general coercive relief against, say, the delegated legislation as a whole. A fourth limitation is that in a collateral challenge the public body whose order is being impugned may not be party to the proceedings. Therefore, the public body will have no, or at most a limited, opportunity to put forward relevant factual and legal submissions, which may place the court at an epistemic disadvantage. A fifth limitation, especially in light of the data black-box explained previously, is that collateral challenges may be prone to produce inconsistent decisions, with different local courts or decision-makers producing different decisions in different places without realising it.[94]

The sixth more significant limitation is based on the specific statutory scheme in issue and whether the courts regard collateral challenges to have been excluded expressly or by necessary implication by Parliament in the statutory language. As Lord Irvine put it in *Boddington*:

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[87] For instance: *Sunman v Environment Agency* [2019] EWHC 3564 (Admin) related to the potential for an irrationality challenge; *Dill v Secretary of State for Housing* [2020] UKSC 20 to an illegality challenge; and *London Borough of Camden v Parking Adjudicator* [2011] EWHC 295 (Admin) to procedural impropriety.
[88] [1993] QB 473.
[89] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.
[90] [1998] UKHL 13.
[91] [1998] EWHC 389 (Admin).
[92] [1998] UKHL 13.
[93] *Hoffman-La Roche v Secretary of State for Trade and Industry* [1975] AC 195.
[94] These limitations were noted in *R v Wicks* [1997] UKHL 21.

> [I]n every case it will be necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based on arguments of invalidity of subordinate legislation or an administrative act under it. These are situations in which Parliament may legislate to preclude challenges being made, in the interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely.[95]

That said, Lord Steyn insisted that the courts would not readily reach this conclusion:

> [I]n approaching the issue of statutory construction, the courts proceed from a strong appreciation that ours is a country subject to the rule of law. This means that...individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings. There is a strong presumption that Parliament will not legislate to prevent individuals from doing so.[96]

Despite this, it is very common for courts to decide that collateral challenges have been excluded by necessary implication, normally because the statutory scheme has already provided explicit appeal rights which should not be extended by allowing additional challenges on public law grounds. A public law challenge would only be permissible inasmuch as it fits into the language provided by the statute and any residual public law grounds should normally be cured via judicial review instead.[97] As Burnett J. put it in *London Borough of Camden v Parking Adjudicator* at [52]:

> The...powers of Parking Adjudicators in the Appeals Regulations show public law issues do fall to be considered in the appeals process but only in so far as the regulations themselves allow it. There is no independent roving commission to identify public law failings with consequent power to allow appeals outside the relevant regulations.[98]

According to Burnett J. at [48], the statutory scheme:

> denies the Adjudicator the power to direct the cancellation of the charge in circumstances where he considers an earlier refusal of the enforcing authority to do so wrong in law...This is a clear example of the statutory scheme denying an Adjudicator a general power to intervene by way of collateral challenge, but instead carefully carving out the parameters of the appellate jurisdiction and

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[95] [1998] UKHL 13.
[96] *ibid*.
[97] Examples of where collateral challenge was held to be excluded include: *Beadle v Her Majesty's Revenue and Customs* [2020] EWCA Civ 562; *R (Crudace) v Northumbria Police Authority* [2012] EWHC 112 (Admin); *R (London Borough of Camden) v Parking Adjudicator* [2011] EWHC 295 (Admin); *R (Laws) v Metropolitan Police Authority* [2010] EWCA Civ 1099; *Trim v North Dorset District Council* [2010] EWCA Civ 1446; *R (Noble Organisations) v Thanet Council* [2005] EWCA Civ 782; *R (Walmsley) v Lane* [2005] EWCA Civ 1540; *R (Westminster City Council) v Parking Adjudicator* [2002] EWHC 1007 (Admin); *Vale of White Horse District Council v Treble-Parker* [1996] EGCS 40.
[98] [2011] EWHC 295 (Admin).

> distributing responsibility for decision making between Parking Adjudicators and enforcing authorities.[99]

For this reason, collateral challenge can be regarded as an essentially residual form of redress. It is permissible only in so far as it has not been excluded expressly or by necessary implication via statute. The courts will not insist that first instance courts or other public bodies have a free-roving jurisdiction to consider any and all public law challenges to decisions or to subordinate legislation. This does not mean that collateral attacks are never permissible and the courts do find that some statutes have not excluded collateral challenge,[100] but it does mean that the extent and limits of collateral challenges tend to start and end as questions of statutory interpretation - what does *this* statutory language require and permit?[101] In (D), we consider the variety of competing interests considered by the senior courts when deciding whether a statute has excluded collateral challenges expressly or implicitly.

D. Factoring in multiple competing interests

In constructing the judicial approach to collateral challenges, the senior courts are engaged in an attempt to register and defend multiple interests which can be in tension. These include: subjecting public bodies to the rule of law; enabling individuals to have a fair chance to challenge unlawful executive conduct; preventing individuals from circumventing normal judicial review requirements without good reason; ensuring that the most suitable and competent public body deals with a legality issue; and giving effect to a statute as intended by Parliament. As Lord Irvine described the tension in *Boddington*, collateral challenge:

> requires consideration of...the promotion of the rule of law and fairness to defendants...in having a reasonable opportunity to defend themselves. However, sometimes the public interest in orderly administration means that the scope for challenging unlawful conduct by public bodies may have to be circumscribed. Where there is a tension between these competing interests and principles, the balance between them is ordinarily to be struck by Parliament. Thus whether a public law defence may be mounted...requires scrutiny of the particular statutory context...and of any other relevant statutory provisions.[102]

The starting point is, indeed, that: 'It would be a fundamental departure from the rule of law if an individual were liable to conviction for contravention of some rule which is itself liable to be set aside by a court as

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[99] *ibid*.

[100] Examples include: *Sunman v Environment Agency* [2019] EWHC 3564 (Admin); *Clockfair Ltd v Sandwell Metropolitan Borough Council* [2012] EWHC 1857 (Admin); *R (Haworth) v Northumbria Police Authority* [2012] EWHC 1225 (Admin); *Derwent Holdings v Liverpool City Council* [2008] EWHC 3023; *Chambers v Guildford Borough Council* [2008] EWHC 826 (Admin); *Earthline v Secretary of State for Transport* [2002] EWCA Civ 1599; *Dilieto v Ealing London Borough Council* [2000] QB 381; *Davenport v London Borough of Hammersmith* [1999] EWHC 248 (Admin); and *Newbury v Secretary of State for Environment* [1980] AC 578.

[101] According to O'Donnell, Australian courts at least are too ready to find that collateral challenges have been excluded by necessary implication: Jules O'Donnell, 'Re-evaluating the collateral challenge in the era of statutory interpretation' (2019) 48(1) Federal Law Review 69-91.

[102] [1998] UKHL 13.

unlawful.'[103] It is for this reason that, in *Dilieto v Ealing London Borough Council*, which related to a prosecution for violation of a planning condition, the High Court decided that express and clear statutory language would be needed to exclude a collateral challenge in the magistrates' court, particularly where the underlying planning decision leading to the prosecution appeared not to comply with the relevant statutory time requirements.[104]

However, equally, the senior courts have made clear that, if the procedural exclusivity rule in *O'Reilly v Mackman*[105] is to be sidestepped, it should only be sanctioned with good cause. As the Court of Appeal put it at [43] in *R (Noble Organisations) v Thanet District Council*, preventing a collateral challenge

> does not *remove* the possibility of challenge; rather, it allows for the regulation of challenge in respect of forum, standing and timing, all in the interest of efficient administrative decision-making. [This]...is of fundamental importance and is representative of a broader legal concern, that of legal certainty.[106]

In *Trim v North Dorset District Council*, for instance, the Court of Appeal concluded that the claimant could not seek a declaration in an ordinary civil appeal that a planning notice was unlawful. This was because the claimant had ample opportunity to pursue a judicial review but failed to do so.[107] A similar point was made in *R v Wicks*, where Lord Hoffmann concluded that the situation of a person facing a planning notice directly addressed and known to them is very different from a *Boddington*-situation where the person did not know about the byelaw but is being prosecuted under it. The former situation provides ample opportunity to use judicial review, whereas the latter does not.[108] At [47] in *Beadle v Her Majesty's Revenue and Customs*, Simler LJ made an identical argument:

> whether the impugned administrative act is specifically directed at the respondent to enforcement proceedings, who in consequence has had clear and ample opportunity to challenge the legality of that act before being pursued in enforcement proceedings, or is of a general character directed to the public at large where there has been no obvious or reasonable opportunity to challenge the validity of the underlying administrative act, is an important consideration.[109]

Therefore, where the courts believe that claimants have already been provided with a fair opportunity to challenge a public decision but have failed to do so, they will be slow to permit collateral attack. Likewise, where the courts believe that statutory grounds of appeal provide an ample opportunity for challenge, they also tend to be slow to permit collateral attack. As Lord Hoffmann put it in *R v Wicks*:

> I do not think that in practice hardship will be caused by requiring the residual grounds to be raised in judicial review proceedings. The statutory grounds of appeal are so wide that they include every

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[103] [1998] UKHL 13.
[104] [1998] EWHC 389 (Admin).
[105] [1983] UKHL 1.
[106] [2005] EWCA Civ 782.
[107] [2010] EWCA Civ 1446.
[108] [1997] UKHL 21.
[109] [2020] EWCA Civ 562.

> aspect of the merits of the decision to serve an enforcement notice. The residual grounds will in practice be needed only for the rare case in which enforcement is objectively justifiable but the decision...is vitiated by some impropriety.[110]

That said, even where there are already broad statutory grounds of appeal, if the court believes that the public body to hear the collateral challenge is in a better position than the High Court to resolve the dispute, they may nevertheless permit the collateral proceedings. At [22] in *Dill*, for instance, Lord Carnwath noted that a collateral challenge, while ostensibly a question of law, may nevertheless raise difficult issues of factual judgement, which are more appropriate for the planning inspector than for the High Court in judicial review.[111] A similar point was made in *R v Parking Adjudicator ex p. Bexley London Borough Council,* where Scott Baker J. noted at [41] that parking adjudicators were qualified professionals eminently able to consider collateral challenges.[112] Equally, where the public body is arguably less competent than the High Court, the courts tend to be slow to permit collateral proceedings, as in *Wicks* where Lord Nicholls noted that the specialist Administrative Court judges were better placed to consider the challenge than magistrates in a first-tier criminal court.[113]

That said, the courts are also alive to the problems associated with judicial review and factor this into their decisions. As Lord Steyn suggested in *Boddington*:

> The defendant may...be out of time before he becomes aware of the existence of the byelaw. He may lack the resources to defend his interests in two courts. He may not be able to obtain legal aid for an application for leave to apply for judicial review. Leave to apply for judicial review may be refused. At a substantive hearing his scope for demanding examination of witnesses in the [High] Court may be restricted. He may be denied a remedy on a discretionary basis.[114]

As to the mention of witnesses, while the High Court can hear and permit the cross-examination of witnesses, this is much rarer in judicial review than lower court hearings.[115] A similar point was made in *R v Reading Crown Court ex p. Hutchinson*:

> Coming to London to the High Court is inconvenient and expensive. Byelaws are generally local laws which have been made for local people to do with local concerns. Magistrates' courts are local courts and there is one in every town of any size in England. The cost of proceedings in a magistrates' court are far less than in the High Court. I believe this egalitarian aspect of seeking recourse to the law in a magistrates' court to be an important sign of the availability of justice for all.[116]

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[110] [1997] UKHL 21.
[111] [2020] UKSC 20.
[112] [1998] RTR 128.
[113] [1997] UKHL 21.
[114] [1988] UKHL 13.
[115] *R (Save Britain's Heritage) v Liverpool City Council* [2015] EWHC 48 (Admin).
[116] [1988] 1 QB 384.

Therefore, in making a decision as to whether a statutory scheme has excluded collateral challenge, a senior court will take into account a range of important interests and will seek to produce a respectable accommodation between depending on the facts of the case and the statutory context.

E. Future projects

The paradox of collateral challenge is that, at least in some contexts, it appears alive and well and it is reasonably possible to give a general outline of the factors considered by senior courts to determine whether a statutory scheme permits collateral attack. Yet, the concept remains very much under the radar in scholarly discussions, largely because of the so-called data black-box that obscures it from the eyes of administrative lawyers. Therefore, we can only concur with Maurice Sunkin when he argues, in the context of judicial review, that better data is needed to generate more targeted, specific, and searching questions about the system under study.[117] To this end, we have initiated a project via the UK Administrative Justice Institute in March 2021 that seeks to gather practical experiences from legal practitioners regarding collateral challenges, which will become the platform for possible reform proposals in due course.[118] A provisional conclusion, indeed; but such is the shadowy half-life of collateral challenge in England and Wales.

[117] Maurice Sunkin, 'The Use of Empirically Based Information when Reforming and Evaluating Judicial Review' in Andrew Higgins (ed) *The Civil Procedure Rules at 20* (Oxford University Press 2020) pp. 183-203.

[118] Lee Marsons and Yseult Marique, 'Collateral challenges - what is their place in the contemporary administrative justice landscape?' (9 March 2021, UKAJI). Available at <https://ukaji.org/2021/03/09/collateral-challenges-what-is-their-place-in-the-contemporary-administrative-justice-landscape/>, accessed 9 March 2021.