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Edited by Marc Hertogh and Simon Halliday

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INTRODUCTION

MARC HERTOUGH AND SIMON HALLIDAY

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This collection of essays concerns the relationship between judicial and bureaucratic decision-making. It considers the impact of the courts on bureaucracy. Its focus, then, is on a particular aspect of a broader field of enquiry which is often called ‘judicial impact studies’ – the social scientific exploration of the significance of the courts to social change.

The impact of court decisions has to date been the focus of two intellectual traditions, each with its own specific characteristics and perspectives. The first tradition is within political science (largely in the United States), within the law and courts sub-field. The second tradition is somewhat younger and has grown out of (largely Commonwealth and European) socio-legal studies generally and administrative law in particular. Political scientists have been concerned broadly with the significance of courts to social and political change in society. For socio-legal studies/administrative law, the concern has been to test the efficacy of the court’s supervision of executive action, or (relatedly) its power to protect the rights of citizens as the subjects of the state. Whereas the political science project has been concerned with social change and the dynamics of power within the polity, the socio-legal/administrative law project has been more specifically focused on testing the widespread assumption within the legal academy and doctrine that law has power over government. While political science has been concerned very generally with court decisions of any type (so long as they required or

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suggested social change), the socio-legal/administrative law project has been concerned quite specifically with the judicial review of administrative action. Whereas political science has generally considered major policy shifts at quite a macro level, the socio-legal/administrative law project has focused more on micro social change in relation to small and particular aspects of public law. Finally, whereas studies in political science usually have taken a 'top-down' strategy, focusing on the impact of a particular decision, the socio-legal approach usually employs a 'bottom-up' perspective, focusing on how public officials and the general public interact with the law.

Thus far, both projects have developed separately. This collection, however, aims to combine both approaches for the first time. Despite their many differences, both approaches share a deep concern with *bureaucracy*. Bureaucracies are an important vehicle by which the policy choices of the courts are translated into social change on the ground, regardless of whether one takes a macro or micro perspective. Whether the bureaucracies be schools, prisons, workplaces, health authorities, tribunals, welfare agencies or the centralised civil service, a common and vital concern for the two projects is how bureaucratic decisions are socially produced and the significance of law to these processes. This collection of essays uses the study of judicial review's impact on bureaucracies to bring the two projects together, to take stock of the different disciplinary insights, and to put forward a research agenda which benefits from this synergy.

A shortcoming of much of the early judicial impact research, that is also reflected in many contemporary analyses, is its strong local or national focus. Traditionally, most studies focused exclusively on the United States with little reference to the situation in other jurisdictions. More recent studies elsewhere have been similarly introspective in thinking about judicial review and bureaucratic impact. It is interesting to note, however, that many impact scholars make the point that, within their respective jurisdictions, there is a substantial lack of empirical data concerning judicial review's impact on bureaucracies. Although it has become almost trite to complain that there is only a small amount of empirical evidence concerning this issue (at least in most jurisdictions), the claim is probably still a powerful one in general. This problem can be alleviated to an extent by drawing on research from different parts of the world, and it is in this vein that the research for this volume of essays has been collected. Although judicial review's impact should be researched in a context-specific and jurisdictionally

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sensitive way,¹ there is still much to be gained by looking at other countries and their research traditions, particularly, as Richardson observes in Chapter 4, in relation to front-line bureaucratic decision-making. Comparative insights can shed some light on the research gaps in relation to one's home country and inspire hypotheses to be tested in comparative perspective. It is hoped that this collection of essays can begin the process of gathering pertinent material from different countries and encourage this approach to the overall research project of studying judicial impact.

OVERVIEW OF THE BOOK

The book has been divided into three parts. Part 1 considers conceptual and methodological issues pertaining to the study of judicial impact and bureaucracies. Part 2 presents empirical research from a number of different countries. Part 3 considers the future of judicial review and bureaucratic impact.

Part 1: conceptual and methodological issues

The first part of this volume of essays takes a conceptual approach to the question of judicial review and bureaucratic impact. Indeed, one of the main aims here is to unpack exactly what is meant by 'judicial impact'. The chapters in this part of the book engage with a number of the important and preliminary questions which must be considered in orienting one's enquiry into the relationship between judicial decisions and bureaucratic behaviour. In addition (and connected) to such conceptual issues, the question of methods is also focused on, both in terms of basic methodological approaches, and in more specific terms of which research techniques are appropriate for particular questions of impact.

Peter Cane addresses two principal questions in the opening chapter: (1) what is judicial review? and (2) why should we be interested in its impact? The link between the two questions is that both raise the issue of what judicial review is for. Cane sets out the argument that the task of researching judicial review's impact must be driven by a contextualised understanding of judicial review's function in society. He demonstrates the contingency of judicial review's function by reference to a sample of constitutional contexts – England, the United States,

¹ See the essay by Cane in Chapter 1 of this volume.

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Australia and India. He sets out four corresponding models of judicial review, each with its own set of assumptions and ambitions: a rule of law model (England); an institutional design model (United States); a hybrid model combining the features of the previous two models (Australia); and a social justice model (India). Additionally, Cane suggests that the enterprise of researching judicial review's impact sits most comfortably within an instrumentalist view of law – the view that law and legal institutions should be understood and assessed by reference to their (likely) effects on human behaviour. Provocatively (at least for a volume such as this), he questions whether judicial impact scholars will ever be able to collect sufficient empirical data to be able to think comprehensively about judicial review and bureaucratic impact, or to make instrumentally based policy choices. In light of this scepticism, he suggests that we might pay more attention to the non-instrumentalist or 'expressive' functions of judicial review.

Maurice Sunkin in his chapter surveys some of the main conceptual issues raised when seeking to identify what research into judicial review and bureaucratic impact might be about. He considers two main sets of conceptual issues. The first concerns what might be described as issues of territory: what ground is to be covered in research on the impact of judicial review and bureaucracy? This involves identifying the terrain to be explored in the research and the principal features of the landscape. In this context, the two basic questions are: (a) the impact of what? and (b) the impact on what? In relation to the 'of what?' question, he notes that judicial review may be regarded as a process of litigation, as judgments of the court, and as a set of legal norms, values and principles. In relation to the 'on what?' question, he observes that there are a number of further questions to be answered in thinking about the impact of judicial review in research terms: what bureaucratic sectors? which organisational context? and what kinds of impact? Sunkin's careful mapping of the conceptual terrain of judicial impact research is illustrated (and so made more accessible) by drawing from his own research on the impact of judicial review on social welfare administration in the United Kingdom. The second part of his essay is concerned with what he describes as 'evaluative and analytical' issues. He looks at the different methodological approaches of positivism and interpretivism and considers the implications for the framing of research questions and the design of research strategies. In this section, he also looks closely at the problems associated with the meaning of 'impacts' in this context and the related issue of causation.

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In his chapter, Bradley Canon draws on a relatively long history of judicial impact studies in the United States (including his own research) to develop a conceptual model of agency reactions to judicial decisions. His model is designed to guide research into the bureaucratic implementation of judicial policies. He focuses on agencies which are hostile or indifferent to judicial decisions and sets out an analysis of the three steps undertaken by agencies when considering how to implement a judicially mandated change. Step 1 is called ‘interpretation’. Here the agency interprets how a court decision applies to its own actions. Canon demonstrates that this is not always as straightforward as it might at first appear. Interpretations may be coloured by the agency’s attitude to the court and the decision, and what the court proclaims may not be the same as what the agency understands. Step 2 involves the agency searching for a behavioural response. The agency search can be influenced by a number of factors, including the presumed reactions of agency clients and funders, and agency resources. Canon suggests that most agencies engage in a rough cost–benefit analysis, though he notes that this must also consider what he terms ‘psychic costs’ – for example, the effect of agency responses on its commitment to law-abidingness. Step 3 is called ‘implementation of behavioural response’. This can range from full compliance to doing nothing at all. Again, Canon sets out a variety of factors which influence this process. These include the attitude of the agency to the expertise of the courts, the closeness of the relationship between the court and the agency, the impact of compliance on resources, threats of sanctions and so forth. Canon concludes his chapter with a discussion of the methodological tradition of US judicial impact studies and a survey of the research techniques which have been used.

Part 2: international case studies

The second part of the book contains chapters from a number of authors who, while recognising the complexity of the enterprise, have conducted research which aims to understand the significance of judicial review to bureaucratic practices. These case studies come from a number of different countries: the United Kingdom, Canada, Australia, Israel and the United States. The aim here is to offer a brief (and inevitably limited) snapshot of the research that is being conducted in different jurisdictions concerning judicial review and bureaucratic impact. In addition to presenting substantive empirical data, the authors also helpfully situate their work within the research traditions

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of their own countries and thereby point readers to other research which should be of interest.

Genevra Richardson in her chapter considers UK socio-legal research which has explored the impact of judicial review on bureaucracies. Most of the work in the United Kingdom has been undertaken by administrative law scholars and has considered the influence of judicial review on government agency decision-making practices. It should be noted, however, that this is different from its US administrative law counterpart. As Shapiro explains in Chapter 9, judicial review in the United Kingdom has focused much less on rule-making practices and much more on substantive ground-level decision-making. The focus in the UK research on the judicial review of administrative action, then, means also that it generally has a narrower focus than US judicial impact studies. Nevertheless, as Cane points out in Chapter 1, the UK 'administrative law' project may be regarded as one element of the wider enterprise exemplified currently by US political science. Richardson sets the scene by giving a précis of existing work in the United Kingdom, and usefully draws out some common themes. First, she notes that judicial review should be seen as a series of steps and not as a discrete event. Secondly, she describes the common scepticism about the ability of judicial review to positively influence government bureaucracies. Thirdly, she observes that a number of the studies describe the potentially negative effects of judicial review. Richardson also presents data from her own study (with Machin) concerning the impact of judicial review on tribunal decision-making. This research exemplifies the micro-sociological approach which much of the recent UK socio-legal research has adopted in approaching the question of judicial review's impact. Her findings cast doubt on a presumption of some of the literature that juridical process values have a greater chance of penetrating non-legal systems than do other types of legal norm. Richardson's study concerned a decision-making environment where a very strong competing value system existed – medicine. The tribunal under study was the Mental Health Review Tribunal which makes decision about the detention of patients in hospital for medical reasons. Her case study, then, presents a particularly stark – perhaps extreme – example of the common situation where competing value systems co-exist in the administrative arena, requiring law to compete with other systems for attention and influence.

Lorne Sossin's chapter focuses on Canada, and explores the hitherto neglected topic of 'soft law'. By 'soft law', Sossin refers principally

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(at least for his case studies) to the range of non-legislative guidelines, rules and administrative policies used to guide administrative decision-making practices. He observes insightfully that soft law constitutes a particularly significant window into the relationship between judicial review and bureaucratic decision-making. Soft law is the principal means by which judicial standards and requirements are communicated to front-line decision-makers. It constitutes, then, a conduit for communication between the judicial and executive branches of government in which both legal and administrative influences on discretionary authority may be articulated. As such it suggests itself as an obvious and rich site of enquiry for our understanding of the impact of judicial review on bureaucracies. However, as Sossin notes, soft law is also a means by which the judiciary may receive messages about the administrative context in which legal standards are operationalised. Soft law, then, closes the 'feedback loop' and re-focuses our attention on how the courts use and respond to administrative reactions to judicial mandates. Sossin presents three case studies of the recent use of soft law in response to important Canadian appellate court decisions and thereby illustrates the importance of soft law to our understanding of judicial impact, and also the potential of soft law for improving the dialogue between the courts and the executive. Sossin's chapter is also significant because it makes an important link between what we might call the political science and the administrative law projects concerning the impact of judicial review. He notes that, in Canada, scholarship has been dominated by the impact of the courts on the policy-making and legislative processes. He cautions against the enquiry stopping there, however, refuting the presumption that 'the court's decision is the end of the story of a legal challenge to government action, rather than the beginning of a complex new chapter'.

Robin Creyke and John McMillan report some findings of their research in Australia which was the first of its kind in that jurisdiction. Creyke and McMillan set out to test two (related) forms of popular scepticism within administrative law scholarship: first, that government agencies use the ability to remake a decision according to law simply to reproduce the same negative decision but within a judge-proof form – a kind of administrative law 'creative compliance';² and, secondly, that experiences of judicial review have little or no impact on future policy

² D. McBarnet and C. Whelan, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' (1991) 54 *Modern Law Review* 848–73.

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and routine work. They present the findings of survey research which sought data about the resolution of citizen–government disputes in the aftermath of judicial review decisions. The research is significant in that it covered a ten-year period of judicial review litigation and received a very high response rate. As such it represents an unusually authoritative picture of governmental reaction to judicial review. The survey asked three basic questions which are explored in the chapter: (1) was the citizen's case reconsidered in accordance with the order of the court? (2) If so, what was the final outcome? (3) Was there any change in the law or in the agency's practice that flowed from the decision? The data from the survey disturbs the popular scepticism mentioned above. Decisions were reconsidered in accordance with judicial rulings in virtually all cases. More significantly, however, these reconsiderations resulted in a favourable outcome for the citizen in approximately 60 per cent of cases. Further, the data in response to the third question suggests that experiences of judicial review had longer-term effects on administrative practices in approximately one-third of cases. Creyke and McMillan also provide a profile of the cases in the sample which reveals important data about the nature of litigants, the nature of disputes and the grounds used to challenge government decisions.

Yoav Dotan focuses on Israel and investigates the impact of the court in relation to one of its most important functions – the protection of core human rights. He examines the responses of the Israeli Supreme Court to the use of torture against suspected terrorists during interrogations by the Israeli security services. As such, Dotan's focus spans the interests of some other chapters in Part 2: on the plight of the individual litigant, as per Creyke and McMillan's chapter; and on the values of decision-makers, as per, for example, Richardson. Dotan charts the approach of the Israeli Supreme Court to torture cases over a period of over thirty years (1970–2001). He divides this period into three eras of judicial attitudes: first, the court avoided looking at the matter in any depth; secondly, the court ostensibly sought to regulate the use of torture; and, thirdly, the court banned it completely. Dotan's study is revealing in demonstrating how the procedural realities of judicial review can undermine the ability of the courts to control the bureaucracy. He shows that during the 'regulation' era, the litigants had already been tortured by the time the matter could be heard by the court. In some cases, the courts were satisfied with the government's assurances that it was no longer using physical pressure in interrogation. In others, injunctions were granted, but only after the government was

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invited to respond, by which time it was too late. This gives a particularly clear illustration of the need to look beyond pyrrhic victories in the courtroom to the social realities on the ground in thinking about the significance of judicial review. Following the outright banning of torture, however, the practice ceased immediately, and Dotan sets out his explanatory hypothesis – that the terms of the court’s decision were unequivocal and left no room for legal or procedural manoeuvring on the government’s part, and that the political climate precluded senior government officials from turning a blind eye to illegal practices. Dotan’s chapter is important in exploring the issue of impact over time, picking up this theme of Sunkin’s chapter in Part 1. It is also a significant study by virtue of the importance of the function ascribed to the court and the extreme circumstances in which the question of impact is being tested.

Malcolm Feeley focuses on the United States in his chapter. He reverses the flow of much of the judicial impact studies by exploring (like Dotan, in part) stories of success rather than failure. By narrating the history of prison reform in three case studies, Feeley demonstrates how judges transformed themselves into administrative agencies, developing, overseeing and implementing structural reform. In each of the case studies – Arkansas, Texas and Santa Clara County, California – the judges appointed a special master to play the role of a multifaceted executive assistant. Feeley draws out from the case studies common functions played by the special masters which ensured the relative success of the judges’ reform programmes. They acted as the eyes and ears of the court, provided corrections expertise, floated trial balloons and took the heat for the judges. Feeley stops short of trying to assess the ‘impact’ of the court in any specific sense. However, his case studies demonstrate clearly that the courts, through their special masters, were highly significant actors in lengthy and complex periods of prison reform. His chapter is important because it focuses our attention on the judge as administrator as well as policy-maker, and because success stories such as these provide important sites of comparison in relation to much of the impact literature which stresses the limits of the courts’ influence on bureaucracy.

Part 3: the future of judicial review and bureaucratic impact

The final part of the book explores the future of judicial review and bureaucratic impact. The aim here is to consider both the direction

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which future research might take, and also the way in which it might be carried out.

Martin Shapiro considers the history of the development of US administrative law in order to reflect on the future of administrative law in the European Union. He sets out an argument that the regulatory politics of the EU will provoke the development of an EU administrative law of rule-making. The rise of the EU as a regulatory authority, he suggests, will push regulatory politics in Europe towards a legalism associated with the United States (when traditionally the European regulatory style was one of negotiated compliance). As the regulated population becomes less willing or able to rely on concessions at the national implementation stage (because implementation is varied across different national contexts in a single market), it will become more interested in shaping the content of the rules themselves. In parallel, pro-regulatory forces facing corporatist national implementation of EU rules will be inclined to seek tougher EU rules and to become participants in the administrative rule-making process. This alliance will push for an administrative law that ensures their participation. Unless the European Court of Justice defers to the technocratic expertise of those engaged in the comitology process (which he argues will not happen), then European administrative law will move in the same direction which US administrative law moved in the 1960s. However, having set out this prediction for European administrative law, Shapiro considers the implications for judicial review and bureaucratic impact. Here the comparative history of the US experience provides something of a paradox. On the one hand, the impact of judicial review on bureaucratic agency behaviour in the rule-making process was massive, obvious and uncontested – such that empirical investigation was not necessary. On the other hand, the attempts of the Supreme Court to rein in the excessive activism of the lower courts presented much more intractable questions of impact. The problem (discussed in a number of the chapters) of how to isolate the influence of the court amidst a complicated picture of social action re-emerges. Indeed, he suggests that in relation to the EU, although his prediction is that there will be an increase in agency behaviour towards greater transparency and participation, it will be similarly difficult to separate out the influence of the courts from the influence of the Parliament, the Council or the Commission.

Marc Hertogh and Simon Halliday conclude the collection by reflecting on the chapters, drawing out some themes and suggesting a research agenda for the study of judicial review and bureaucratic impact.