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ERROR OF LAW AND FLAWED ADMINISTRATIVE ACTS

DAVID FELDMAN*

ABSTRACT. *Section I shows that the idea, founded on the "principle of legality", that all legal flaws make a decision void as a matter of law is erroneous. Infringing a legal requirement may not affect validity, or may make a decision only voidable. Section II shows the significance of distinctions between various stages of decision-making processes, and between different types of issues for judges, and argues that case law shows that seven guiding principles operate alongside the "principle of legality". Section III concludes that these common-law principles reflect professional practice and provide a realistic basis for predictable, normatively legitimate administrative law.*

I. THE PROBLEM

A. Three Flawed Propositions

Over the last half century, English administrative law and theory have increasingly paid lip service to three propositions.

(1) All errors in the course of making a decision or rule are to be regarded as errors of law.
(2) All errors of law make the decisions to which they relate null and void.
(3) If a "decision" is a nullity, it can have no legal effect.

Yet it would be extremely inconvenient if every error which infringed a legal requirement in the making or implementation of a rule or decision were to deprive it of legal effect. The error might be minor, or do no harm to anyone. It might not make the decision (and hereafter, unless the context otherwise requires, "decision" includes "rule") inappropriate or deprive it of social and political legitimacy. The damage caused by refusing

* Q.C., F.B.A. Rouse Ball Professor of English Law, University of Cambridge, and Fellow of Downing College, Cambridge. I am grateful to Mark Elliott, Christopher Forsyth, Hannah Metcalfe, Philip Murray, Jason Varuhas and participants in a Centre for Public Law seminar in the University of Cambridge for illuminating discussions, and to John Bell, Imogen Galilee, Tom Hickman, Ciju Puthuppally, Sir Philip Sales, Gretel Scott and Maurice Sunkin for reading and providing detailed comments on earlier versions of the article. None of them should be taken to agree with views expressed here. Errors and idiosyncrasies are my own.

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all legal effect to it might then be out of all proportion to the seriousness of the error. However, the three propositions make it difficult to provide a principled explanation or justification for those outcomes, and therefore to predict what effect a flawed decision will have. This article argues that the true position is that all errors *may* be regarded as errors of law, which *may* make decisions void and without legal effect. This allows courts to avoid adverse consequences, in the process making the law both more complex and more sensible. This section argues that the propositions are based on a misleading interpretation of *Anisminic Ltd. v Foreign Compensation Commission*[1] which has cloaked the creativity of administrative lawyers for 40 years. Section II builds an alternative set of principles from the practice of courts. Section III suggests that these principles provide a basis for a realistic, predictable and principled understanding of administrative law.

B. "Error of Law" and "Jurisdiction"

1. Decisions

Until the 1960s, judges had at their disposal a number of techniques for identifying those flawed decisions which were to have legal effects. They distinguished between issues of fact, which were within the decision-making power of officials unless an erroneous conclusion deprived the official of jurisdiction, and issues of law, which engaged the High Court's supervisory jurisdiction. They distinguished between errors of law which deprived an official of jurisdiction and those which did not; the latter were not subject to the High Court's supervisory jurisdiction unless they were apparent on the face of the record of the challenged decision. This allowed them to say that some erroneous or allegedly erroneous decisions were void (i.e. had never had legal effect) while others were voidable (i.e. valid and effective until successfully challenged).[2] Such flexibility lay at the heart of administrative law. To some extent, it has been preserved. Judicial review of alleged errors of law is sometimes considered to be unnecessary or inappropriate.[3]

In some directions, flexibility has expanded. The doctrinal distinction between questions of law, which were judicially reviewable, and questions of fact, which were not (unless the fact in issue is essential to the decision-maker's having power to act, sometimes called a "jurisdictional" or "collateral" fact), has been eroded as courts have started to treat acknowledged

[1] [1969] 2 A.C. 147, H.L.

[2] Exceptionally, High Court judges' decisions are never void or ineffective. They are legally effective unless and until set aside on appeal. If no appeal is available, the decision is effective and unchallengeable (*In re Racal Communications Ltd* [1981] A.C. 374, H.L.). Statutory provisions excluding an appeal are interpreted as allowing an appeal when the judge has done something which he had no power to do, such as imposing an unauthorised sentence: *R. v Cain* [1985] A.C. 46, H.L., at 55-56 per Lord Scarman.

[3] See e.g. *R. v Hull University Visitor, ex parte Page* [1993] A.C. 682, H.L.; *R. v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd* [1993] 1 W.L.R. 23, H.L.

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errors as to "non-jurisdictional" facts as having equivalent effect to errors of law.[4] This may have a statutory basis, as where a statute imposes on the decision-maker a legal duty to make a correct factual decision. Sometimes, by contrast, officials have a duty only to establish and follow a reasonably reliable system for deciding the facts, accepting that some errors are bound to slip through.[5] The Supreme Court has threatened to undermine the doctrinal distinction between fact and law, by suggesting that some questions are issues of law for the purpose of tribunals with appellate jurisdiction on questions of law but not fact, and issues of fact for the purpose of the High Court when deciding whether it is proper to exercise its supervisory jurisdiction over a decision of the tribunal.[6] This allows tribunals potentially to make errors of law without its leading inescapably to the decision's being subject to judicial review. Litigants can have their disputes determined by an independent and appropriately expert tribunal, without imposing excessive burdens on the judiciary or interfering with the efforts of specialist appellate tribunals to secure a consistent approach among first-tier tribunals. The question, as Lady Hale J.S.C. said in *R. (Cart) v Upper Tribunal (Public Law Project and another intervening)*, is "what level of independent scrutiny … is required by the rule of law".[7] But it also deprives the law of conceptual and analytical coherence.

In other directions, flexibility has been significantly limited since the judgment of the House of Lords in *Ridge v Baldwin*.[8] It was established there that a breach of the common-law requirement for a fair hearing would usually make a decision void. After *Anisminic*, and particularly following the interpretation which the House put on *Anisminic* in *R. v Hull University Visitor, ex parte Page*,[9] it became commonplace to treat a breach of any statutory or common-law requirement for administrative action as making it ultra vires, a term which is often confusingly treated as being synonymous with "without jurisdiction",[10] and as making the rule or decision "void" or "a nullity". But the grounds for review are not all issues of law, except in the trivial sense that anything done in breach of a legal

[4] See e.g. *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] Q.B. 1044, C.A.

[5] *R. (AA (Afghanistan)) v Secretary of State for the Home Department* [2013] UKSC 49, [2013] 1 W.L.R. 2224, S.C., on the interpretation of s. 55 of the Borders, Citizenship and Immigration Act 2009.

[6] *R. (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19, [2013] 2 A.C. 48, S.C., especially per Lord Carnwath at [41]–[46]. In *Eclipse Film Partners v H.M.R.C.* [2013] UKUT 639, [2014] B.T.C. 503, UT, at [41]–[46], Sales J. held that *Jones* did not justify an unusually critical approach by an appellate tribunal to questions which would normally be classified as issues of fact.

[7] [2011] UKSC 28, [2012] 1 A.C. 663, S.C., at [59]. For discussion, see Mark Elliott and Robert Thomas, "Tribunal justice, *Cart*, and proportionate dispute resolution" [2012] C.L.J. 297–324.

[8] [1964] A.C. 40, H.L.

[9] [1993] A.C. 682, H.L.

[10] In *Anisminic* [1969] 2 A.C. 147, at 171B-C, Lord Reid warned against this, saying, "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question."

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rule involves an error of law. *Anisminic* was a true, indeed paradigm, "error of law": misinterpreting the statutory instruments which conferred power to act. By contrast, taking account of irrelevant considerations, acting with an improper purpose, reaching an unreasonable decision, and a fortiori reviewable errors of fact, are acts which courts treat as erroneous, but they are not "errors of law", any more than a driver who negligently runs down a pedestrian commits an "error of law".

This deprives administrative lawyers of a useful tool for reaching sensible results, and it further reduces the law's coherence. By expanding the notion of "error of law", we have deprived it of analytical coherence and usefulness. It debases the notion of "error of law" to say that taking account of an irrelevant consideration, or acting when biased, or failing to allow a person a fair opportunity to put his or her case, is an error of law. They are simply examples of procedural steps which fail to meet legal requirements. At the same time, it has deprived the concept of "jurisdiction" of any useful, analytical function. If any error deprives a body of jurisdiction, the notion of a "jurisdictional error" is redundant. In addition, by undermining the technical distinction between "void" and "voidable" rules and decisions, it has deprived judges of a key tool for achieving sensible results.

Despite saying that all errors of law make decisions invalid, courts usually manage to get sensible results. Orthodox theory misrepresents what judges do, and so fails to offer a reliable guide to what they will decide. In reality, legal rules are designed and applied to allow courts sometimes to give legal effect to a flawed decision. For example, the distinction between "mandatory" requirements, breach of which would deprive a decision-maker of power to act, and "directory" requirements, breach of which does not have that effect, requires judges to consider the importance of the requirement and the harm done by its breach in the context of the objects of the statutory scheme of which it forms part.[11] Sometimes, substantial rather than full compliance with a requirement will suffice, if the person affected has not been prejudiced significantly.[12]

[11] See e.g. *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] N.I. 390, H.L.; *Wang v Commissioners of Inland Revenue* [1994] 1 W.L.R. 1286, 1296, P.C., per Lord Slynn of Hadley.

[12] S. H. Bailey, "Grounds for judicial review: due process, natural justice, and fairness", in David Feldman (ed.), *English Public Law* 2nd ed. (Oxford 2009), ch. 15, at 711, para. 15.96; *Howard v Boddington* (1877) L.R. 2 P.D. 203 at 210–11 per Lord Penzance; *R. v Soneji* [2005] UKHL 49, [2006] 1 A.C. 340, H.L. (delay did not invalidate confiscation order, although the European Court of Human Rights later held that it violated the right to a hearing within a reasonable time under ECHR Art. 6.1: *Bullen and Soneji v United Kingdom* (Application no. 3383/06), Judgment of 8 January 2009); *Director of Public Prosecutions of the Virgin Islands v Penn* [2008] UKPC 29 per Lord Mance at [18]. See also *London & Clydeside Estates v Aberdeen District Council* [1980] 1 W.L.R. 182, H.L., at 189–90 per Lord Hailsham L.C., and *R. (Dulai) v Chelmsford Magistrates' Court* [2012] EWHC 1055 (Admin), [2013] 1 W.L.R. 220, DC, at [54]–[59] per Stanley Burnton L.J., with whom Treacy J. agreed.

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The effect depends on the circumstances of the case. Where a claimant challenges a decision directly determining his or her position as an individual, rather than a rule of general application, and the duty was owed to that claimant personally, the breach will make the decision both unlawful and ineffective. Take, for instance, procedural fairness. In *R. v Secretary of State for the Home Department, ex parte Doody*, the Home Secretary's refusal to allow a life prisoner to make representations, or know what factors the Home Secretary would consider relevant or what the judicial recommendation was, before deciding on the period to be served before the prisoner could be eligible for release on licence, or to give reasons for departing from the judicial recommendation, was unlawful and ineffective, and the House of Lords set out the Home Secretary's obligations in declarations.[13]

2. Rules

Rules are sometimes treated differently from individualised decisions. We need to be able to discover reasonably easily what our legal obligations are, and that is possible only if legislation is reliably published and predictably given effect. Despite the well-known mantra that ignorance of the law is no excuse, we might expect the rule of law to generate a constitutional principle (akin to that established in relation to individualised decisions in *Anufrijeva*[14]) that people are not bound by legal rules which they could not have discovered with due diligence. Statute provides such a rule in relation to bye-laws made by a local authority. They do not have effect until confirmed by the responsible "confirming authority" (a central government body). The local authority must give notice of its intention to apply for confirmation in at least one local newspaper, and, for at least a month before applying for confirmation, must deposit a copy of the bye-law at its offices and make it available for public inspection at all reasonable times without payment.[15] If these requirements are not fulfilled, the bye-law is not invalid, but is ineffective.

The position regarding statutory instruments is different. The Statutory Instruments Act 1946, s. 2(1), requires each statutory instrument to be numbered by the Queen's Printer and, unless a subsequent statute has provided otherwise, to be printed and sold. The general principle, however, is that printing and sale are not preconditions to the effective operation of a

[13] [1994] 1 A.C. 531, H.L. See also *R. v Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All E.R. 310, C.A. (decision a nullity when no reasons given); *R. (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 A.C. 604, H.L. (unlawful to enforce consequences of decision against person before informing her of the decision); *R. v Lancashire County Council, ex parte Huddleston* [1986] 2 All E.R. 941, C.A. (authority ought to explain reasons for decision when challenged by judicial review, but applicant lost on merits).

[14] [2003] UKHL 36, [2004] 1 A.C. 604.

[15] Local Government Act 1972, s. 236(3), (4), (5). The "confirming authority", if not specified in the enabling Act, is the Secretary of State in England: ibid., subs. (11).

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statutory instrument. Where a statute provides for a statutory instrument to take effect when made (subject to the possibility of later disallowance), it is operative despite a subsequent procedural failure (for example, omitting to publish it). The Act offers limited protection against legal uncertainty by providing that a person charged with contravening a statutory instrument has a defence if he or she can prove that the instrument had not been issued when the alleged offence occurred, unless the prosecution proves that reasonable steps had been taken to bring the purport of the statutory instrument to the attention of the public generally, or those people likely to be affected by it, or the defendant personally.[16] Otherwise, however, there is no rule that unpublished subordinate legislation is ineffective.

These examples show that the rules of administrative law do not treat all errors as errors of law, or treat them as making a decision or rule invalid. Legal rules are inconsistent with the propositions with which the article opened. It is a matter of law, not discretion at the remedial stage. Can the propositions be saved?

C. Attempted rationalisations

One way of rationalising the legal effect given to supposedly void decisions and rules was advanced by H. W. R. Wade, and is sometimes described as "relativity". Writing two years or so after the House of Lords had decided *Anisminic*,[17] he noted that a number of errors unrelated to *vires* had artificially come to be regarded as leading to an excess of jurisdiction.[18] He did not suggest, however, that this undermined the distinction between errors of law which made a decision ultra vires and those which were intra vires and reviewable only if they appeared on the face of the record. Nor did he consider that *Anisminic* meant that error of law on the face of the record was a ground of review. Instead, he regarded *Anisminic* as one of those cases in which "fine points of law, alleged to 'go to jurisdiction', are sometimes put forward in support of what is a thinly disguised appeal on the merits".[19] In his view, the "voidness" or "validity" of a flawed rule or decision depended not on theoretical considerations but on whether a court could or would grant relief which deprived it of any legal effect.

> Although action which is adjudged to be *ultra vires* is properly described as void or a nullity, this voidness necessarily depends upon the right remedy being sought successfully by the right person. … For as against third parties, whose rights are not infringed, a "void" act may well be valid if they have no legal title to challenge it. Even the injured party may be refused relief, e.g. by an exercise of discretion or because of some waiver. The meaning of "void" is thus

[16] Statutory Instruments Act 1946, s. 3(2), (3).
[17] [1969] 2 A.C. 147.
[18] H. W. R. Wade, *Administrative Law*, 3rd ed. (Oxford 1971), 94–98, 104.
[19] Ibid., at p. 54.

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> relative rather than absolute; and the court may in effect turn void acts into valid ones by refusing to grant remedies. There is no absurdity in this. The absurdity lies rather in supposing that "void" has an absolute meaning independently of the court's willingness to intervene.[20]

Wade's 1971 assessment is a salutary warning against treating labels as if they allowed us to predict the consequences of different kinds of unlawfulness. Wade offered an ex post facto, descriptive explanation which could be consistent with a normative justification, but did not help to guide decision-makers.

Professor Paul Craig starts from "the foundational proposition that invalid acts are retrospectively void", but reaches a similar conclusion to Wade's by way of judicial discretion in relation to remedies; a court may in its discretion refuse a remedy for an unlawful and void act, although that, in his view, does not make the act valid.[21] Focusing on judicial discretion separates the juristic status of a decision from its legal consequence. On this view, "voidness" is merely a threshold condition for the grant of a remedy. It does not guide courts as to how they should exercise their remedial discretion. Discretion is not arbitrariness. It is circumscribed by rules and guided by principles, which we need to articulate. Yet English law lacks clear guidance to ensure that courts give appropriate weight to competing interests when exercising remedial discretion.[22] Furthermore, as we have seen, legal rules, rather than discretion, often require that a flawed rule or decision should have legal effects. Lastly, cases arising outside the judicial review procedure, for example in criminal proceedings or civil litigation seeking damages, are not discretionary. In any case, discretion is not arbitrariness.

Professor Christopher Forsyth tries to offer both a normative justification and a descriptive explanation to reconcile judges' decisions with the same "foundational proposition" as Craig's. Forsyth argues that a "void" decision has legal effect if a "second actor" has independent power to act notwithstanding the unlawfulness of the earlier act.[23] In that case, the second

[20] Ibid., at pp. 105–106 (footnotes omitted).

[21] Paul Craig, *Administrative Law*, 7th ed. (London 2012), ch. 24. The quotation is at p. 743. See also Sir Thomas Bingham, "Should public law remedies be discretionary?" [1991] P.L. 64–75.

[22] Those we have are often inappropriate. For example, the suggestion that relief will be withheld for a not insignificant error only where the same decision would inevitably have been reached without it (e.g. *Simplex G.E. (Holdings) v Secretary of State for the Environment* (1989) 57 P. & C. R. 306, C.A.) does not allow adequate weight to be given to countervailing considerations. Compare *R. (Catt) v Brighton and Hove City Council* [2007] EWCA Civ 298, [2007] 2 P. & C.R. 11, C.A., at [39]–[49] per Pill L.J.; *R. (Gibson) v Harrow District Council* [2013] EWHC 3449 (Admin) at [39] per Sales J., and see Senior Courts Act 1981, s. 31(6) in relation to the effect of delay on good administration.

[23] Christopher Forsyth, "'The metaphysic of nullity' – invalidity, conceptual reasoning and the rule of law", in Christopher Forsyth and Ivan Hare (eds.), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (Oxford 1998), 141–60; Christopher Forsyth, "Collateral challenge and the rule of law" [1999] J.R. 165–69; id., "The legal effect of unlawful administrative acts: the theory of the second actor explained and developed" (2001) 35 *Amicus Curiae* 20–23.

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actor's independent legal authority makes the decision's flaw irrelevant; the second act is lawful whatever the juridical status of the earlier decision. In practice, there might be multiple acts by the same actor, so we should think in terms of independent authority for first, second and subsequent acts, rather than second actors. Often, many actors exercise different functions at different times in a long-drawn-out process, for example when a person is compulsorily detained for treatment for mental illness. More problematically, statutes are usually silent as to whether the "second actor" has authority to act notwithstanding the invalidity of the earlier decision. We cannot then know whether the official's statutory power will be interpreted as covering the case until after the event, when a court gets to rule on it. It may then be inappropriate to allow the lawfulness of an earlier decision to determine the outcome of a later dispute directed to a different objective. Professor Forsyth suggests that some principles help to interpret such legislation: opportunity for statutory appeal or review of the earlier decision militates in favour of allowing later action on the strength of an unchallenged decision; certainty is valuable; public bodies should comply with human rights.[24] These are helpful, although it is argued below that these (and other) principles are not merely interpretative, but form part of the bedrock of administrative law doctrine.

As a matter of legal doctrine rather than discretion, there are decisions which are neither valid (in the sense of being untouched by unlawfulness) nor void. Decisions touched by unlawfulness may be valid unless quashed, and some kinds of unlawfulness will not normally lead to their quashing. The next section identifies the principles which allow us to identify those decisions.

II. What Courts Actually Do

Where it is alleged in the course of legal proceedings that a decision or rule is legally flawed, the tribunal must answer one or more of three questions. Should a court or tribunal (particularly that court or tribunal) determine the issue? If the answer is "Yes", has anything gone wrong? If the answer is once again "Yes", what should the court or tribunal do about it? In relation to each of these questions, different legal factors come into play, affected by the continuing responsibility of the original decision-maker as well as the powers of the court. In English law, for example, a decision-maker who discovers that a discretion was exercised on the basis of a factual error may have a duty to revoke the decision, but where the erroneous decision gave rise to a vested right, rather than to a discretion, the decision-maker cannot rescind the decision. The only effective remedy may then be a

[24] C.F. Forsyth, *Wade and Forsyth's Administrative Law*, 11th ed. (Oxford 2014), forthcoming. I am grateful to Professor Forsyth for generously sharing this passage with me before its publication.

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quashing order.[25] In French law, by contrast, the decision-maker would have a legal duty to withdraw the flawed decision, so the role of the court is to decide whether to enforce that duty or award compensation.[26]

A. Should a Court Decide Whether Something Has Gone Wrong?

The answer depends on a number of factors. The first concerns the powers of the court or tribunal in which the question is raised.

1. The High Court on an application for judicial review

The High Court, with its inherent supervisory jurisdiction over all "inferior courts and tribunals", always has jurisdiction to decide whether another decision-maker has made an error, unless that has been expressly or by necessary implication excluded by statute.[27] Statutory jurisdictions require more care. For example, an employment tribunal in a claim for unfair dismissal does not have power to decide whether a public-sector employer succeeded in its attempt to dismiss an employee, but only whether dismissal was unfair. Where the employee challenges the lawfulness of the employer's decision to dismiss the employee, that issue must be resolved in other proceedings, for example by applying for judicial review.[28] Similarly, the Court of Appeal does not have power to determine the lawfulness of a lower court's decision if no statutory appeal lies to the Court of Appeal in respect of that sort of decision.[29]

If the court or tribunal has power to decide the matter, the next issue is whether it should exercise it. The High Court usually intervenes only if the claimant has exhausted other reasonably available means of seeking redress. As Lord Donaldson M.R. explained in *Guinness*:

> The rationale for this is twofold. First, the point usually arises in the context of statutory schemes and if Parliament directly or indirectly has provided for an appeals procedure it is not for the court to usurp the functions of the appellate body. Second, the public interest normally dictates that, if the judicial review jurisdiction is to be exercised, it should be exercised very speedily and, given the constraints imposed by limited judicial resources, this necessarily involves limiting the number of cases in which leave to apply should be given.[30]

[25] *Livingstone v Westminster Corporation* [1904] 2 K.B. 109; *Rootkin v Kent County Council* [1981] 1 W.L.R. 1186, C.A., at 1195 per Lawton L.J.

[26] I am grateful to Professor John Bell for pointing this out to me.

[27] *Anisminic Ltd v Foreign Compensation Commission*, [1969] 2 A.C. 147; *R. v Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] Q.B. 815, C.A.; *R. (Cart) v Upper Tribunal (Public Law Project and another intervening)* [2011] UKSC 28, [2012] 1 A.C. 663.

[28] *R. (Shoesmith) v Ofsted* [2011] EWCA Civ 642, [2011] P.T.S.R. 1459, C.A.

[29] *In re Racal Communications Ltd* [1981] A.C. 374, per Lord Diplock, with whom Lord Keith agreed, at pp. 380-81, 391 respectively.

[30] *R. v Panel on Takeovers and Mergers, ex parte Guinness plc* [1990] 1 Q.B. 146 at 177, [1989] 1 All E.R. 509 at 526, C.A., per Lord Donaldson M.R. See also *R. v Secretary of State for the Home Department, ex parte Swati and Butt* [1986] 1 W.L.R. 477, [1986] 1 All E.R. 717, C.A.; *R. (Shoesmith) v Ofsted* [2011] EWCA Civ 642, [2011] P.T.S.R. 1459, C.A.

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The Supreme Court has underlined the importance of deploying limited judicial resources only where they are really needed to protect the rule of law.[31] The issue was when, if ever, judicial review of unappealable decisions of the Upper Tribunal should be permitted. Rejecting the idea that it should always be available on points of law, Baroness Hale said, "It is not difficult to dress up an argument as a point of law when in truth it is no more than an attack upon the factual conclusions of the tribunal."[32] She continued, "The real question, as all agree, is what level of independent scrutiny outside the tribunal structure is required by the rule of law. … There must be a principled but proportionate approach."[33] Lord Dyson considered, for several reasons, that the rule of law did not require unrestricted judicial review of the Upper Tribunal: the status of the Upper Tribunal; the multiple checks between the First-tier Tribunal and the Upper Tribunal; and conserving resources.[34]

Tying availability of judicial review to the rule of law generates two rules. First, litigants must exhaust other means of redress. Secondly, use of judicial resources must be proportionate to the significance of the issue. Those rules are subject to a condition based on fairness under the rule of law: overall, the claimant must have had a fair opportunity to have the lawfulness of his or her treatment adjudicated on by an independent and impartial tribunal.

2. Other forums

If the lawfulness of a decision or rule is raised outside the High Court (for example, in the context of an action in the county court for damages for tort, or a criminal prosecution), the tribunal must be satisfied that it is an appropriate body to determine a question of that kind. Here, four principles are in play. The first, effectiveness of judicial protection, applies as in the High Court, although its implications may be different. For example, in criminal proceedings, the court might have to consider whether an application for judicial review, rather than a statutory appeal, was a reasonably available remedy which should have been pursued before contesting the criminal proceedings. Where a defendant seeks to challenge the validity of a bye-law under which the charge is brought, there will usually have been no reason to foresee the risk of prosecution under the bye-law; the defendant might even have been ignorant of it before being charged. It would therefore not be disproportionate to allow the defendant to consume judicial

[31] *R. (Cart) v Upper Tribunal (Public Law Project and another intervening)* [2011] UKSC 28, [2012] 1 A.C. 663.
[32] Ibid., at [47]. This echoes Wade's point in *Administrative Law*, note 18 above, at p. 54.
[33] [2011] UKSC 28, [2012] 1 A.C. 663 at [59]. See also Lord Phillips of Worth Matravers P.S.C. at [123]–[135].
[34] Ibid., at [123]–[125].

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resources by contesting the lawfulness of the bye-law in criminal proceedings.

This is reinforced by the second principle, that of legality, which requires that public bodies have a basis in positive law to justify their actions.[35] It is unacceptable in principle for a person to suffer coercion or penalty without a lawful justification. If the coercive action is in respect of breach of a rule which is itself unlawful, coercive action will usually be unjustified. This principle may, of course, be overridden by statute.

The third and fourth principles are certainty and finality. Legal certainty requires that people, including both public bodies and those with whom they deal, generally be able to assume that a rule, order or decision which has not been challenged is lawful, and act accordingly. In *Secretary of State for the Home Department v Draga*,[36] a Kosovan national, who had been recognised as a refugee and given indefinite leave to remain in the UK, was convicted of various criminal offences. After his release from prison, the Home Office gave notice of intention to make a deportation order against him, on the basis of a 2004 statutory instrument which provided that one of the offences of which Mr Draga had been convicted was sufficiently serious to merit deportation. He appealed, but in 2007 the First-tier Tribunal upheld the notice. The Home Secretary made a deportation order, and Draga was detained pending deportation. In an unrelated case in June 2009, the Court of Appeal held that the 2004 statutory instrument was invalid.[37] The Home Secretary thereupon made an order ending Mr Draga's refugee status, which meant that he became liable to deportation on a ground independent of the 2004 Order. The First-tier Tribunal and, on appeal, the Court of Appeal decided that this had been a mere device to circumvent the invalidity of the 2004 Order. The deportation order was therefore unlawful, and Mr Draga was entitled to damages for false imprisonment from the point at which the Home Secretary should have revoked the deportation order in the light of the Court of Appeal's 2009 judgment.

As the 2004 statutory instrument had been invalid ab initio, had the Home Secretary been acting tortiously in detaining Mr Draga between 2007 and 2009? The Court of Appeal thought not. Whilst the Home Secretary had made an error of law when relying on the 2004 Order to detain him, and the error was material to the decision to detain him and so

[35] The term is sometimes misleadingly and confusingly used to mean that legal or constitutional rights must be respected. That is a narrower meaning than "legality", being limited to one possible ground of unlawfulness, namely violating people's rights. The principle of legality in my sense goes beyond not doing anything that violates rights, and is also different from not doing anything that breaches principles of public law. It involves having good, lawful authority for action.

[36] [2012] EWCA Civ 842, C.A.

[37] *EN (Serbia) v Secretary of State for the Home Department* [2009] EWCA Civ 630, C.A.

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could give rise to liability for false imprisonment,[38] the Home Secretary was not liable for the period until June 2009, when the 2004 Order had been held to be invalid. This was because the Home Secretary had been entitled to rely and act on the First-tier Tribunal's 2007 judgment upholding her notice of intention to make a deportation order. There was a need for finality once the appeal was determined and the time allowed for appealing had passed.

> The law, particularly in this field, is constantly evolving, as shown by the number of reported cases. The fact that a decision by the Court of Appeal or the Supreme Court in a later case, perhaps many years later, may, with the benefit of hindsight, make it clear that a Tribunal's decision in an earlier case to allow or dismiss an appeal against a decision to make a deportation order was made on an erroneous legal basis is not a ground for re-opening the earlier decision by the Tribunal. It would frustrate the operation of the statutory scheme if the Secretary of State was not able to rely upon the Tribunal's decision, dismissing an appeal, once time for applying for permission to appeal against the decision had expired, as a lawful basis for making a deportation order.[39]

The 2009 Court of Appeal decision gave grounds for applying to the Home Secretary to revoke the deportation order against Mr Draga, "but it would not invalidate either the Tribunal's decision finally determining the appeal, or the deportation order made in reliance on that final determination".[40] In effect, following the Tribunal's 2007 decision, the matter had been res judicata as between the parties.

The principles of finality and certainty are subject, however, to two conditions based on fairness. First, the person affected must have had a reasonable opportunity to challenge the rule, order or decision. Secondly, it must not be unfair to expect him or her to have done so. As already noted, a person aggrieved by a decision addressed to him or her individually can be expected to test its lawfulness by way of a convenient statutory procedure. If the person does not do so, it will not be unfair to treat the order or decision as lawful in subsequent enforcement proceedings.[41] Where no statutory procedure is conveniently available, people should usually apply for judicial review rather than resort to a procedure less well adapted for a public-law challenge.[42] But a person has no particular reason to undertake such a challenge before he or she is personally affected. A bye-law does not affect one person more than another, so there is no reason to expect a

[38] See *R. (Lumba) v Secretary of State for the Home Department (JUSTICE and others intervening)* [2011] UKSC 12, [2012] 1 A.C. 245, S.C., discussed below.
[39] [2012] EWCA Civ 842 at [62] per Sullivan L.J.
[40] Ibid. at para. [64].
[41] *R. v Wicks* [1998] A.C. 92, H.L.
[42] *O'Reilly v Mackman* [1983] 2 A.C. 237, H.L.; *Cocks v Thanet District Council* [1983] 2 A.C. 286, H.L. On what counts as a public law challenge, see Craig, *Administrative Law*, note 21 above, pp. 836–45.

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particular person to have brought proceedings to challenge it, incurring expense and perhaps requiring travel to the High Court to apply for judicial review.[43] For this reason, on a prosecution for breaching a bye-law, a magistrates' court has always been regarded as having jurisdiction to decide whether the bye-law is valid, whether the challenge is brought on the basis of patent or latent, or substantive or procedural, errors of law.[44]

In intermediate cases, there is a degree of flexibility. For instance, where a local authority imposes a general increase in the rent for its social housing, the general character of the decision brings it closer to a rule or bye-law than an individualised decision. Tenants may not have the knowledge or means to seek judicial review. It would therefore be unfair to prevent them from alleging the unlawfulness of the decision as a defence when the council seeks possession for non-payment of rent.[45] In this area, as Lord Nicholls said in *R. v Wicks*, convenience is an important consideration – both convenience for the parties and convenience for the courts – when deciding which court should take responsibility for determining an issue and when. It is an aspect of our first principle, the need for effective judicial protection. Lord Nicholls correctly said that rigid rules are therefore out of place; judges should not seek to rely on a sharp boundary between public and private matters, or between different grounds of public-law unlawfulness.[46]

A fifth principle is that courts do not act in vain. They do not normally determine moot points, or issues raised by someone who has nothing to lose or gain from the case. Sometimes an issue of constitutional importance arises which affects no person more than anyone else. This is the case, for example, in relation to matters concerning overseas aid or international relations.[47] The importance of the issues might make it appropriate for a court to hear the case. Conversely, if the matter is of limited general importance, a relatively high level of personal interest may be required to justify devoting judicial resources to it.[48] The ultimate question is whether the claimant alleges that something has "gone wrong of a nature and degree

[43] The same applies in relation to steps taken by a planning authority when deciding whether to grant planning permission: *R. (Gibson) v Harrow District Council* [2013] EWHC 3449 (Admin), at [33] per Sales J.

[44] *R. v Wicks* [1998] A.C. 92, H.L., at 106–107 per Lord Nicholls of Birkenhead, 116–117 per Lord Hoffmann; *Boddington v British Transport Police* [1999] 2 A.C. 143, H.L., disapproving *Bugg v Director of Public Prosecutions* [1993] Q.B. 473, D.C.

[45] *Wandsworth L.B.C. v Winder* [1985] A.C. 461, H.L.

[46] *R. v Wicks* [1998] A.C. 92, H.L., at 106–107.

[47] See e.g. *Blackburn v Attorney General* [1971] 1 W.L.R. 1037, C.A.; *McWhirter v Attorney General* [1972] C.M.L.R. 882, C.A.; *R. v Secretary of State for Foreign and Commonwealth Affairs, ex parte Lord Rees-Mogg* [1994] Q.B. 552, D.C.; *R. v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 W.L.R. 386, D.C.; *McWhirter and Gouriet v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWCA Civ 384; *R. (Wheeler) v Office of the Prime Minister* [2008] EWHC 936 (Admin), [2008] 2 C.M.L.R. 57, Admin. Ct., and [2008] EWHC 1409 (Admin), [2008] A.C.D. 70, D.C.

[48] *R. v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] A.C. 617, H.L.

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which require[s] the intervention of the court and, if so, what form that intervention should take".[49] This applies to claimants seeking a declaration of incompatibility under section 4 of the Human Rights Act 1998 as it does to those seeking other remedies.[50] It relates back to our first principle, that judicial resources should be used to make judicial protection as effective as possible by using it where it is most needed.

B. Has Anything Gone Wrong? A Four-stage Classification of Decision-making Flaws and their Effects

Legal flaws can arise at four different stages in a decision-making process. The nature of the flaw and the stage at which it arises both affect the legal effect of the flawed decision.

1. Errors when first embarking on an inquiry

A decision made by an unauthorised person (such as one who does not satisfy statutory criteria, or to whom there has been an improper delegation, or who is biased) cannot impose obligations on a person who is the subject of it. Such flaws prevent the decision-maker from lawfully embarking on its deliberation, and logically ought to make any purported decision null and void. Nevertheless, administrative realism sometimes demands that this should be relaxed. For example, courts are increasingly willing to countenance delegation or sharing of administrative functions, particularly if the designated decision-maker retains political and legal responsibility for the decision. Originally established in relation to central government,[51] this has spread to some other public bodies in the light of practical reasonableness and organisational necessity.[52] Alternatively, if the unauthorised decision-maker appears to have authority, he or she may be viewed as the agent rather than the delegate of the authorised decision-maker, and so as standing in that person's shoes, at least when the act would have been within the legal competence of the designated person.[53] If an appropriate person is acting but statutory conditions are not met, judges have again given themselves room for manoeuvre by distinguishing between

[49] *R. v Panel on Take-overs and Mergers, ex parte Guinness plc* [1990] 1 Q.B. 146 at 159–60 per Lord Donaldson M.R.

[50] *R. (Rusbridger) v Attorney General* [2003] UKHL 38, [2004] 1 A.C. 357, H.L.; *R. (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2013] 3 W.L.R. 1076, S.C.

[51] *Carltona Ltd v Commissioners of Works* [1943] 2 All E.R. 560, C.A.; *R. v Secretary of State for the Home Department, ex parte Oladehinde* [1991] 1 A.C. 254, H.L.

[52] *R. (Chief Constable of the West Midlands) v Birmingham Justices* [2002] EWHC 1087 (Admin); *D.P.P. v Haw* [2007] EWHC 1931 (Admin), [2008] 1 W.L.R. 379, D.C.; *R (Raphael) v Highbury Corner Magistrates' Court* [2011] EWCA Civ 462, [2012] P.T.S.R. 427, C.A.

[53] See, e.g., *Robertson v Ministry of Pensions* [1949] 1 K.B. 227; *Lewisham L.B.C. v Roberts* [1949] 2 K.B. 608, C.A.; *Howell v Falmouth Boat Construction Co. Ltd.* [1951] A.C. 837, H.L.; *Lever (Finance) Ltd v Westminster LBC* [1971] 1 Q.B. 222, C.A.; *Western Fish Products Ltd v Penwith District Council* [1981] 2 All E.R. 204, C.A. This continues now that the doctrine of legitimate expectation has superseded public-law estoppel.

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"mandatory" preconditions, breach of which make a decision-maker's actions unlawful, and "directory" preconditions, which do not, or by assessing the relative importance of the requirement and the harm done by its breach in the context of the objects of the statutory scheme of which it forms part. In this way, we can treat some unlawful acts as not invalidating decisions.[54]

2. Errors during the process of inquiring

Flaws which may arise in the course of the proper decision-maker's deliberation include failure to comply with a statutory duty to consult or a legitimate expectation of being consulted, or with the common law's requirements of fairness. The decision-maker might consider itself bound to reach a particular conclusion on account of a policy, or pursue an improper purpose, or act fraudulently, or take account of a consideration which is later thought to be irrelevant. As these flaws might not affect the outcome, judges have been reluctant to say that they must always invalidate decisions. In relation to mixed purposes and irrelevant considerations, much depends on whether there are proper grounds which on their own would justify the decision. The effect of failing to comply with statutory procedural requirements depends on the significance of the requirement. A court has considerable leeway in deciding whether it is appropriate to treat an outcome as unlawful.[55] Requirements to notify and consult people are particularly likely to be treated as central to the decision-making scheme. Nevertheless, people who are not prejudiced by failure to notify or consult, or who were notified or consulted, will not subsequently be able to challenge the decision or rule on the basis that someone else suffered prejudice through not being notified or consulted.[56]

Some legal conditions do not stem from the statute establishing the scheme. The common-law principle of fairness applies generally, but its application depends on the context in which decision-making is taking place. There are, however, two qualifications. First, it does not apply to rule-making activities in the absence of statutory provision or an act of the rule-maker which has given rise to a legitimate expectation that a particular procedure will be followed. Secondly, the notion that "justice delayed is justice denied" does not generally apply to the duty of fairness

[54] See e.g. *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] N.I. 390, H.L.; *Wang v Commissioners of Inland Revenue* [1994] 1 W.L.R. 1286, 1296, P.C., per Lord Slynn of Hadley.

[55] Bailey, "Grounds for judicial review", note 12 above, at ch. 15, p. 711, para. 15.96; *Howard v Boddington* (1877) L.R. 2 P.D. 203 at pp. 210–211 per Lord Penzance; *Director of Public Prosecutions of the Virgin Islands v Penn* [2008] UKPC 29, per Lord Mance at [18]. See also *London & Clydeside Estates v Aberdeen District Council* [1980] 1 W.L.R. 182, H.L., at pp. 189–90 per Lord Hailsham L.C.

[56] *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms* [1972] 1 W.L.R. 190.

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at common law, although where Article 6.1 of the ECHR applies (i.e. to the determination of criminal charges and civil rights or obligations) there is a right to a fair hearing within a reasonable time.

If a decision-maker to whom the duty to act fairly applies adopts an unfair procedure, the resulting decision is usually unlawful and of no effect.[57] But there are five exceptions. First, only the party whose right to or expectation of a particular procedure was infringed may rely on the infringement to challenge the resulting decision. A rule or decision will not be set aside at the request of X solely on the ground that Y suffered a breach of a fairness-related duty to him or her if that breach did not adversely affect X.[58] Secondly, a failure of fairness at one stage in a decision-making process may be cured by a properly protective procedure being employed at a later stage, if the overall effect is that the person who was treated unfairly does not suffer prejudice.[59] Thirdly, a person may consent to what would otherwise be a breach of the duty of fairness, as long as this is done expressly, consciously, and with knowledge of the facts.[60] Fourthly, as the assessment of fairness is made retrospectively after the end of the process, a failure (for example, denying a person the right to make representations) may sometimes not make the proceedings unfair if the person suffered no prejudice as a result, for instance because the matter was too clear to admit of innocent explanation (though judges are rightly cautious about deploying this ground for upholding the lawfulness of decisions flawed by apparent unfairness).[61] Finally, when a procedure is required by a legitimate expectation, it may be permissible for the decision-maker to decline to follow that procedure if there is a good, public-interest reason for doing so, as long as the decision-maker has given due weight to the expectation as a relevant consideration in deciding on the procedure to adopt.[62]

3. Errors in the final deliberation and decision

At the end of the process of deliberation, one type of flaw arises when the decision-maker ends up making a decision or rule which lies outside the range of possibilities authorised by the legislation, or is inconsistent with someone's legally enforceable legitimate expectation, or is unreasonable as that term is understood in common law. These kinds of flaws

[57] *Ridge v Baldwin* [1964] A.C. 40, H.L.; *R. (Shoesmith) v Ofsted* [2011] EWCA Civ 642, [2011] P.T.S.R. 1459, C.A. The same applies to a legitimate expectation that one will have an opportunity to make representations: *Attorney General for Hong Kong v Ng Yuen Shiu* [1983] 2 A.C. 629, P.C.

[58] See e.g. *Aylesbury Mushrooms* [1972] 1 W.L.R. 190.

[59] *Calvin v Carr* [1980] A.C. 574, P.C.; *Lloyd v McMahon* [1987] A.C. 821, H.L.

[60] See e.g. *R. (Hill) v Institute of Chartered Accountants in England and Wales* [2013] EWCA Civ 555, [2014] 1 W.L.R. 86, C.A. I am grateful to Imogen Galilee for drawing this case to my attention.

[61] *Glynn v Keele University* [1971] 1 W.L.R. 487; *Cinnamond v British Airports Authority* [1980] 1 W.L.R. 582, C.A.; *Secretary of State for the Home Department v AF (No. 3)* [2008] EWCA Civ 1148, [2009] 2 W.L.R. 423, C.A., particularly Sedley L.J.'s dissent at [113]–[116]; [2009] UKHL 28, [2010] 2 A.C. 269, H.L.; *R. (Shoesmith) v Ofsted* [2011] EWCA Civ 642, [2011] P.T.S.R. 1459.

[62] *Council for Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374, H.L.

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invariably make the decision a nullity. Another type of flaw concerns the reasoning which leads to or supports the decision. The decision-maker may, when actually making the final decision, be swayed by irrelevant considerations, or fail to consider relevant matters, or make a serious error in deciding the relevant facts, or improperly regard its discretion as fettered by a policy, or be actuated by improper purposes, fraud or malice. This type may, but sometimes does not, make the decision a nullity. This type of error includes:

- taking account of an irrelevant consideration;
- failing to take account of a relevant consideration;
- making an error of fact which is sufficiently important to render the decision unlawful;
- exercising a power for an improper purpose;
- acting fraudulently;
- giving insufficient weight or effect to a person's legitimate expectation;
- making an unreasonable decision;
- making a decision or taking an action which is not authorised by law (because, for example, one has misunderstood or misinterpreted the relevant law, misapplied it to the relevant facts, or made a mistake as to the application of relevant principles);
- not making a decision or taking an action which is required by law.

In principle, any of these errors could make the decision unlawful. It is clear that a person who is adversely affected may obtain a quashing order, and that the quashed decision then has no further effect. Beyond that, however, the implications of unlawfulness are varied, and are considered below.

4. Errors after the decision has been made

After the decision or rule has been made, the decision-maker may fail to meet formal or procedural requirements, such as giving notice to people affected by it, laying a statutory instrument before Parliament, or providing reasons. Logically, this ought not to make the decision retroactively void, although it should limit its enforceability. Then people implementing, enforcing or reviewing the decision or rule may fail to comply with requirements as to the action they are allowed to take, and the manner and circumstances in which they may take it. As we shall see, the effect of these flaws on decisions depends on the circumstances of the case.

C. If the Tribunal Exercises its Jurisdiction and Finds an Error, What Should it Do about it?

In section I (*A*) above, we saw that rules of administrative law sometimes ensure that a decision affected by a legal flaw is not necessarily invalid

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or ineffective. We now examine circumstances in which a decision or rule may be valid and effective for some purposes but not others.

Factors include the kinds of remedies being sought, the relationships between various interested parties, the relationship between public and private law and the effect on important public or private interests of treating the impugned decision or rule as having, or not having, a particular effect. A sixth principle, akin to privity in contract, operates: courts should recognise that people have different legal interests and obligations, the effect of which should not be determined by legal relationships to which they are not parties.

1. The kinds of remedies being sought

A claimant may seek remedies for different purposes. An unlawful act may give rise to some remedies being available while others are not. Suppose, for example, that police officers, executing a search warrant, are occupying my business premises. I successfully challenge the validity of the warrant. The court will issue a quashing order or a declaration to the effect that the warrant is invalid. I then claim a mandatory injunction requiring the officers to leave the premises, and damages for trespass to land. My clients claim damages for trespass to goods in respect of their papers which the police have removed from the premises. There is little doubt that a court would grant an injunction to end the trespass. It does not necessarily follow, however, that I would succeed in my claim for damages, or that my clients would succeed in theirs. Merely reversing the immediate consequences of an unlawful act would raises different considerations from awarding compensation. In English law, there is no general right to compensation for acts which are unlawful in a public-law sense. Damages are available only if public-law unlawfulness also gives rise to a private-law claim. The relationship between public and private law is therefore crucial.

2. The precise interests of and legal relationships between the parties

Acts and orders, as a matter of law, are not simply either valid or void. They operate in and on an often complex web of *legal* relationships, and their effects depend crucially on the precise nature of the *legal* rights, powers and obligations of each actor towards each other or to the world. A person's legal rights and liabilities depend on the rules governing that person's relationships with other people, some of which apply to limited subject-matter, people, times or places. To say that something (such as a decision, or detention) is lawful or unlawful, valid or void, is to use a shorthand expression which expresses in general terms the effect of what may be a complicated network of rules and interests governing complex relationships. For example, requirements to notify and consult people, whether the public generally or particular groups or individuals, are particularly likely to be

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treated as central to the decision-making scheme. Nevertheless, people who are not prejudiced by failure to notify or consult, or who were notified or consulted, will not subsequently be able to challenge the decision or rule on the basis that someone else suffered prejudice through not being notified or consulted.[63] To this extent, the effect of such a flaw is directional; courts will protect only those who are prejudiced, and may fashion remedies accordingly, for example by treating the scheme as generally effective except in relation to those who suffered through not being notified or consulted.

Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd[64] illustrates the importance of distinguishing between the effect of a measure on people in respect of whom all necessary procedural steps had been taken and its effect on people who were wrongly omitted from those steps. The Minister for Labour wanted to establish a Training Board for the agricultural, horticultural and forestry industries under the terms of the Industrial Training Act 1964. Under the Act, the expenses of a Training Board were to be paid out of a levy on employers in the industry concerned. Section 1(4) of the Act required the Minister to "consult any organisation or association of organisations appearing to him to be representative of substantial numbers of employers engaging in the activities concerned . . .". The Minister prepared a draft Order to establish the Board and circulated it to a number of organisations, including the Mushroom Growers Association. The Association did not receive the invitation to advise, and did not become aware of it until long after the Order had come into effect. When the Mushroom Growers Association became aware of this and found out about the letter, it claimed that the Order had no application to mushroom growers because the Minister had failed to consult them before making the Order. The Board sought a declaration that the Order bound mushroom growers. The parties agreed that the requirement of consultation under section 1(4) of the Act was mandatory, and that people who should have been consulted would not be bound if they had not been consulted. Donaldson J. declared that the Minister had been required to consult the Mushroom Growers Association, having initially identified it as a body which he ought to consult and having written to it. Sending a letter inviting the Association to give advice was merely an attempt to consult; consultation occurs only if the intended consultee receives the invitation. He therefore declared that the Order did not apply to mushroom growers.

Donaldson J. did not disagree with the parties' view that, if the Minister had treated the defendants unlawfully, the Order should still be regarded as valid and effective as against people whose representatives had

[63] *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 W.L.R. 190.
[64] [1972] 1 W.L.R. 190.

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been consulted. Had the mushroom growers argued that the Order as a whole was void or ineffective, he would probably have felt forced to find a way to uphold the validity of the Order, in order to avoid the collapse of the whole scheme on account of a single letter not having reached its intended recipient. There would have been no sensible justification for treating the Order as wholly void merely because of failure to consult representatives of one part of the industry.[65]

D.P.P. v Head offers a more complex example of the importance of identifying the particular legal relationship to which the challenge to a decision is relevant.[66] Mr Head was charged with an offence contrary to section 56(1) of the Mental Deficiency Act 1913, which provided, so far as relevant: "Any person – (a) who unlawfully and carnally knows … any woman or girl under care or treatment in an institution … or whilst placed out on licence therefrom … shall be guilty of a misdemeanour …". In 1947, the Home Secretary had made an order under the Act for Elfreda's detention as a "moral defective",[67] on the basis of certificates from two doctors who had not specified that Elfreda met the definition of "moral defective" as someone requiring "care, supervision and control for the protection of others". Nevertheless, the Home Secretary's order went unchallenged. In 1955 Elfreda was released on licence and had consensual intercourse with Head. The Crown had to prove that Elfreda Henderson, with whom Head had had sexual intercourse, was a "woman … placed out on licence from" an institution "under this Act".

The Crown argued that Elfreda's having been detained in, and released on licence from, a mental institution gave rise to a strong, factual inference that she was a mental defective, regardless of the validity of the original order for detention. The trial judge ruled that the order was conclusive as to facts stated in it, and Head was convicted. The Court of Criminal Appeal decided that the order, being unlawful, could not found an evidential inference, and quashed the conviction.[68] The Crown's appeal to the House of Lords was dismissed, on two grounds. First, a majority agreed with the Court of Criminal Appeal.

> [T]he foundation for the presumption … is the legality of the detention and the necessity for a licence to justify the patient's absence and if it is shown and admitted, as in the present case, that on the face of the

[65] See also *R. (Rahman) v Birmingham City Council* [2011] EWHC 944 (Admin), [2011] Eq. L.R. 705, Blake J. For examples of judges taking other evasive action, either by holding that a body has not acted unlawfully at all or by deciding to withhold a remedy where the body had substantially but not fully complied with its duty, see *R. v Paddington Valuation Officer, ex parte Peachey Property Corporation Ltd (No. 2)* [1965] 1 Q.B. 380, C.A.; *R. (Hurley and Moore) v Secretary of State for Innovation, Business and Skills* [2012] EWHC 201 (Admin), [2012] H.R.L.R. 374, D.C.

[66] [1958] Q.B. 132, C.C.A.; [1959] A.C. 83, H.L.

[67] "Moral defective" was one of four classes of persons suffering from "mental defectiveness", defined in section 1(2) of the 1913 Act as "a condition of arrested or incomplete development of mind existing before the age of eighteen years".

[68] *R. v Head* [1958] Q.B. 132, C.C.A.

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> documents produced and received in evidence without objection the detention was illegal, the whole basis of the subsection and the presumption of defectiveness goes and the prosecution must fail.[69]

The second ground responded to Lord Denning's dissent, in which he argued that the flaw in the original order had made it voidable, not void, allowing it to generate the evidential inference on which the Crown relied.[70] The majority held that the distinction between void and voidable orders was irrelevant in a criminal case where there was material available which, it had been conceded, would have led to the order being quashed.

> Is a man to be sent to prison on the basis that an order is a good order when the court knows it would be set aside if proper proceedings were taken? I doubt it . . . The distinction between void and voidable is by no means a clear one . . . I am not satisfied that the question whether a man should go or not go to prison should depend upon the distinction.[71]

Whether the order was void or merely voidable, therefore, Elfreda's detention could not give rise to a presumption that she had been a defective where the order which gave rise to it had been defective.

This is correct. There is no reason to allow the juristic status of the order against Elfreda to determine its effect as evidence in the trial of Head. The interests affected are different, though related, and should be distinguished accordingly. This would not necessarily lead to Head's acquittal; one might argue that Head should not be allowed to take advantage of a defect which had caused Elfreda, but not Head, to be treated unlawfully.[72] Lord Denning's use of the void/voidable distinction was driven by the multiplicity of interests in play: he wanted to protect people who had dealt with Elfreda in good faith against liability in damages; but he allowed their interests to govern the outcome of an entirely different issue. Elfreda could have sought habeas corpus successfully.[73] She could have claimed damages for false imprisonment from the Home Secretary, and from those who had detained her, unless they had statutory protection.[74] But those matters are irrelevant to the question whether Head was guilty

[69] [1959] A.C. 83 at 103 per Lord Tucker, with whom Lords Reid and Somervell agreed.

[70] Ibid., at 113–114. Nevertheless, Lord Denning would not have reinstated the conviction, because the role of the House of Lords was to answer the contested question of law, and only in exceptional circumstances should it set aside a verdict of acquittal by the Court of Criminal Appeal.

[71] Ibid., at 104 per Lord Somervell, with whom Lord Reid, Lord Tucker and, on this point, Viscount Simonds agreed.

[72] Ibid., at 97 per Viscount Simonds, dissenting.

[73] It is of no great moment whether she would have had to apply for certiorari as well; the likelihood is that she would not. See *R. v Secretary of State for the Home Department, ex part Khawaja* [1984] A.C. 74, H.L.; *R. (AA (Afghanistan)) v Secretary of State for the Home Department* [2013] UKSC 49, [2013] 1 W.L.R. 2224, at paras. [52]–[53] per Lord Toulson J.S.C.; compare Lord Carnwath J.S.C. at paras. [57]–[59].

[74] *R. v Governor of Brockhill Prison, ex parte Evans (No. 2)* [2001] 2 A.C. 19, H.L.; *R. (M) v Hackney London Borough Council* [2011] EWCA Civ 4, [2011] 1 W.L.R. 2873, C.A.

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of a criminal offence, which, as the majority of the House of Lords thought, should not depend on the lawfulness of the original order. Different legal relationships and issues affect different legal interests to which different rules and principles are applicable.

For example, in *Stellato v Ministry of Justice*[75] the claimant had been serving a ten-year prison sentence. After serving three-quarters of his sentence, he was entitled under section 33(3) of the Criminal Justice Act 1991 to be released unconditionally, but the governor purported to release him on a conditional licence. He applied for judicial review arguing that the "licence" was a nullity. Meanwhile he refused to comply with the conditions of his licence. The Home Secretary revoked his "licence" and recalled him to prison. The Court of Appeal declared that his recall to prison and his subsequent detention had been unlawful, but stayed implementation of its judgment to allow the Home Secretary to apply for leave to appeal. In the meantime, it granted conditional bail.[76]

The claimant was released but refused to comply with the bail conditions, arguing that he could not be on bail if he had not previously been on licence. Hughes L.J. ordered his arrest for breaching the conditions, revoked the grant of bail, and ordered that the claimant be detained in prison until the House of Lords decided the Home Secretary's application for leave to appeal. The House of Lords gave leave, but unanimously dismissed the Home Secretary's appeal.[77] The claimant was then released unconditionally.

He claimed common-law damages for false imprisonment, and damages under the Human Rights Act 1998 for a violation of his right to liberty under Article 5 of the ECHR. On the common-law claim, the Court of Appeal held that he was entitled to damages for the period between his arrest for breaching the "licence" conditions and his release on bail. His subsequent arrest for breaching bail conditions did not constitute false imprisonment, because Hughes L.J., who ordered it, was a court of unlimited jurisdiction. The order therefore was valid unless revoked or quashed on appeal, and at common law justified Mr Stellato's detention. But under the Human Rights Act 1998 he was entitled to statutory damages for this period, because he had been deprived of liberty contrary to Article 5.1 of the ECHR.[78] The Court of Appeal rejected the Home Secretary's argument that the detention had been justified under Article 5.1(b) to secure compliance with a lawful order of a court. When the Court of Appeal had

[75] [2010] EWCA Civ 1435, [2011] Q.B. 856, C.A.; application dismissed [2011] 1 W.L.R. 1138, S.C.
[76] *R. (Stellato) v Secretary of State for the Home Department* [2006] EWHC 608 (Admin), [2006] 2 Cr. App. R. (S.) 761, D.C.; [2006] EWCA Civ 1639, [2007] 1 W.L.R. 608, C.A.
[77] *R. (Stellato) v Secretary of State for the Home Department* [2007] UKHL 5, [2007] 2 A.C. 70, H.L.
[78] Article 5.5 of the ECHR requires that there be an enforceable right to compensation for deprivation of liberty which violates Art. 5, and Human Rights Act 1998, s. 9 makes provision for payment of damages where a court order gives rise to the unjustified deprivation of liberty.

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granted conditional bail, Mr Stellato had been entitled to his liberty even without a grant of bail. It could therefore not give authority to detain him for breach of a condition, because imposing the conditions had not been a lawful order.[79] It could not be said, therefore, that the claimant's detention was to secure compliance with a lawful order of a court.

It underlines the significance of careful analysis of each separate relationship if we ask what the position would have been if Mr Stellato's right to liberty depended entirely on the grant of bail, and, having been released, was arrested by a constable in disregard of the grant of bail. If the claimant sued for false imprisonment, would the constable be allowed to argue that the grant of bail had been unlawful? Not if a High Court judge had granted bail, because of the special status of High Court judges. If, however, bail had been granted by a police officer or a magistrates' court, the question would be whether there is a good reason to allow the constable to disregard an apparently lawful grant of liberty by another official where the constable thinks that it was legally flawed. One might say that the principles of finality and legal certainty and the right to liberty are sufficiently important to require officials to respect apparently regular judicial decisions granting bail. On the other hand, there is no principled reason to impose liability in damages on an official who acts in the correct belief that a person has no legal right to be at large. The question is best analysed as being who should be required to show that a person is lawfully (or unlawfully) at large.

In relation to negligence liability, public interests and the availability of other remedies are significant when courts decide whether someone owes a duty of care to another. In *Mohammed v Home Office*,[80] the Court of Appeal struck out immigrants' claims against the Home Office for negligently delaying a decision on their applications for leave to remain in the UK. The court held that it would not be fair, just and reasonable to impose a duty of care in the discharge of a statutory function when the applicants could apply to the Parliamentary Commissioner for Administration to investigate allegations of injustice caused by maladministration. But administrative-law unlawfulness may still help a claimant to obtain damages by depriving a public body of a chance to justify its interference with a right. For example, in *Mohammed*'s case the claimants argued that the Home Office's delay had interfered with their right to respect for private and family life under Article 8.1 of the ECHR and was unlawful in an administrative-law sense. That unlawfulness would mean that an interference with the Article 8 right would not be "in accordance

[79] Breach of a condition would disentitle a person to further liberty if and only if his right to liberty had arisen from the grant of bail. For a case of that sort, see e.g. *R. v Secretary of State for the Home Department, ex parte Turkoglu* [1988] Q.B. 398, C.A., where the applicant had been released on bail after being lawfully detained as an illegal immigrant.

[80] [2011] EWCA Civ 351, [2011] 1 WLR 2862, C.A.

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with the law", so the Home Office would be unable to justify the interference under Article 8.2 and making the Home Office's conduct unlawful by virtue of section 6(1) of the Human Rights Act 1998, potentially giving rise to damages under section 7. The Court of Appeal accordingly allowed that claim to proceed to trial. A public-law flaw may thus incidentally assist a claimant for damages by restricting a private-law or public-law defence.

3. The relationship between public and private law

To sound in damages, an unlawful decision must authorise interference with a right, or amount to a private-law wrong. In principle, when the wrong is trespassory, the claimant has in principle a right to damages for trespass, unless the person who enters can point to a legal authorisation. Failing that, the wrong is automatically tortious, although statute may limit liability.[81] But the cases show that this principle is qualified, because not all errors in a decision-making process deprive a person implementing the decision of its protection for the purposes of private law. Three techniques may be used to protect a public body against private-law consequences of an unlawful act. One is to alter private law by limiting the scope of, or remedies for, the relevant tort. Another is to distinguish conceptually between unlawfulness in public law and in private law, so that a public-law wrong does not automatically translate into private-law liability. The third technique is to treat public officials as occupying a special position in private law.

The first two techniques were deployed in *R. (Lumba) v Secretary of State for the Home Department (JUSTICE and others intervening)*.[82] A foreign-national prisoner (FNP), having served his sentence, was detained pending deportation by order of the Home Secretary. She had power to do this, but she had published a policy of favouring release on bail when possible. Much later, she disclosed that she had really been applying a secret policy of virtually never releasing a FNP on bail, instead of her published policy. Lumba argued that the decision to detain him breached public-law requirements, and claimed damages for false imprisonment. It was accepted, however, that Lumba's circumstances were such that he would have been detained whichever policy had been followed.

The Supreme Court decided that the Home Secretary had acted unlawfully in public law when deciding to detain Lumba, because her secret policy had improperly fettered her discretion, and because she had a legal duty to apply the published policy, unless there were good reasons for not doing so.[83] But did this mean that Lumba was entitled to substantial,

[81] See e.g. Courts Act 2003, ss. 31 to 35.
[82] [2011] UKSC 12, [2012] 1 A.C. 245, S.C.
[83] Ibid., at [26], [34]–[35], [65] per Lord Dyson, with whom all the other justices save Lord Phillips agreed on these points.

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or indeed any, tortious damages? In tort, it was previously unchallenged orthodoxy that detaining a person without lawful authority amounted to false imprisonment, which was a trespass to the person for which the victim was entitled to damages at large without needing to prove special damage. Yet most of the justices baulked at awarding substantial damages to a violent criminal awaiting lawful deportation when he would have been detained even if the Home Secretary had applied the published policy. Six justices decided that Lumba was entitled to succeed in an action for false imprisonment,[84] but three (Lord Collins, Lord Kerr and Lord Dyson) thought it proper to award only nominal damages of £1. This left the rules governing liability intact, but changed the law of damages.

Lord Brown of Eaton-under-Heywood and Lord Rodger of Earlsferry JJ. S.C., by contrast, preferred to change the rules governing liability. They held that mere misuse of power to detain (i.e. unlawful acts in the course of pursuing a lawful course of action) would lead only to public-law remedies. Only if a decision-maker has no power to make the decision would the public-law unlawfulness make detention into false imprisonment.[85] Lord Dyson rejected this, commenting, "The importance of *Anisminic* is that it established that there was a single category of errors of law, all of which rendered a decision ultra vires", and adding that Lord Brown's approach would "would put the clock back to the pre-*Anisminic* era".[86] But, as Lord Walker pointed out, *Anisminic* was not concerned with the relationship between public and private law, and it was not clear that it should apply in the context of tort. He and Lord Hope considered that "where an extant statutory power to detain has been wrongly used there would be a private law claim only if the misuse amounted to an abuse of power".[87]

This implicitly distinguishes the conditions for unlawfulness in public law from those for liability in private law, and allows an order to be unlawful in public law but lawful in private law. Such a bifurcated notion of unlawfulness recognises that different interests and policies are in play in relation to different sorts of remedies. Even Lord Dyson did not think that every legal flaw in the process of authorising detention would lead to liability for false imprisonment. In his view, to have that effect an error would need to bear on and be relevant to the decision to detain (rather than another aspect of the detention such as the status of an official who makes the decision or the conditions of detention), and be capable of

[84] Lord Hope of Craighead D.P.S.C., Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Collins of Mapesbury, Lord Kerr of Tonaghmore and Lord Dyson JJ.S.C.

[85] [2011] UKSC 12, [2012] 1 A.C. 245, S.C., at [351]–[358]. Lord Kerr, at para. [249], also found the distinction between absence and misuse of power compelling; the latter should, he thought, give rise to private-law damages only if power was used for an unauthorised purpose.

[86] Ibid., at paras. [66] (citing *Boddington v British Transport Police* [1999] 2 A.C. 143, H.L., at 158D-E per Lord Irvine of Lairg L.C.) and [87].

[87] [2011] UKSC 12, [2012] 1 A.C. 245, at para. [193] per Lord Walker, and see Lord Hope at paras. [170], [176].

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affecting the result (which, as Baroness Hale said, "is not the same as saying that the result would have been different had there been no breach").[88] In addition, the flaw would have to be substantive rather than procedural;[89] having a decision made by an official of too low a grade would not make detention unlawful.[90] Some justices formulated other qualifications.[91]

It is unnecessary, for present purposes, to decide whether *Lumba* has a ratio decidendi and, if so, what it is. The significant point is that nobody thought that every public-law error in the course of authorising detention would result in the detention constituting false imprisonment. The ground on which detention is held to be unlawful and the relationship between the flaw and the decision to detain are crucial when deciding how public-law unlawfulness affects private-law liability. The problem is that it is not yet clear which public-law errors suffice to produce private-law liability. In *R. (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Deportees intervening)*,[92] for example, the claimant had been lawfully detained, but the Home Office failed to comply with its own policy that officials of a specified level of seniority should periodically review a detainee's detention to decide whether it continued to be justified. Had there been a review, Kambadzi would still have remained in detention. Lord Hope considered that, after *Lumba*, the issue was whether the review was "essential to the legality of the continued detention" in the sense that it "was an error which bore on and was relevant to the decision to detain throughout the period when the reviews should have been carried out . . .".[93]

Lord Brown, by contrast, thought that the majority in *Lumba* had decided that a public-law flaw would have to be substantive, rather than procedural, to give rise to a private-law right to damages for false imprisonment. Extending liability for false imprisonment to purely procedural matters could produce absurd results. For example, if a policy requires monthly reviews but reviews actually take place every two months, the detainee "alternates yo-yo like between lawful detention and false imprisonment".[94]

Kambadzi illustrates the uncertainty which now exists concerning the relationship between flawed administrative decisions concerning detention and tortious liability for false imprisonment. This is not surprising. We have seen that a range of public interests are in play which do not outweigh a person's claim to liberty but may outweigh a claim to damages for loss

[88] Ibid., at paras. [68] per Lord Dyson and [207] per Baroness Hale.
[89] Ibid., at paras. [60] per Lord Dyson and [198] per Baroness Hale.
[90] Ibid., at para. [68] per Lord Dyson.
[91] For example, that the flaw should involve a deliberate decision to continue an unlawful policy and cynical approach to the cases causing a serious breach of public law (ibid., at [220]–[221] per Lord Collins).
[92] [2011] UKSC 23, [2011] 1 W.L.R. 1299, S.C.
[93] Ibid., at paras. [36], [41], [42].
[94] *Lumba* [2011] UKSC 12, [2012] 1 A.C. 245, at para. [357] per Lord Brown, repeated in *Kambadzi* [2011] UKSC 23, [2011] 1 W.L.R. 1299, S.C., at para. [120].

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of liberty. When well-established principles in private law pull in a different direction from equally well-established principles in public law, judges should decide which set of principles is most appropriately applicable in the case. There is no justification for twisting either public or private law (or both) in an attempt to make them harmonious. They serve different ends and have different, or at least differently weighted, values and principles. *Lumba* shows that blurring the distinction produces confusion in both fields.

It is possible that the effect of public-law unlawfulness on private-law liability depends also on whether the unlawfulness relates to an individualised act or a general, legislative one. A person will not normally be allowed to rely on an individualised decision which turns out to have a public-law flaw as a justification in tort. In *R. v Governor of Brockhill Prison, ex parte Evans (No. 2)*,[95] for example, the claimant had been sentenced to imprisonment for a criminal offence. The prison governor calculated the claimant's statutory release date in accordance with a recent Divisional Court decision on the effect of the legislation. Subsequently, a differently constituted Divisional Court held that the earlier case had been wrongly decided. On the new basis, the claimant had been detained for 59 days too long. She sought damages for false imprisonment. The prison governor argued that the detention had been justified, either by his obedience to an order of the sentencing court, or because the Divisional Court's decision to depart from its earlier ruling had not changed the law retrospectively. The House of Lords unanimously rejected these arguments. False imprisonment was a tort of strict liability. The sentence of the court did not protect the governor when statute entitled the claimant to release on a specified date. Her detention after the statutory release date constituted false imprisonment. The governor could not rely on his reasonable but mistaken understanding of the law to justify detaining the claimant beyond her statutory release date.

Where a public official acts on subordinate legislation, however, and it turns out to be legally flawed, it may still provide a common-law defence or excuse capable of depriving a claimant of damages. An example is *Percy v Hall*.[96] The HMS Forest Moor and Menwith Hill Station Bye-laws 1986, SI 1986/481, made it an offence to trespass on those sites. Peace protestors were regularly arrested for that offence. In criminal proceedings under the bye-laws, the Divisional Court held them to be void for uncertainty.[97] Protestors then sued the police for wrongful arrest and false imprisonment. The trial judge, Sir Peter Webster, accepting on authority that the bye-laws were void, none the less held that the constables had a legal justification for arresting the plaintiffs because, relying on the

[95] [2001] 2 A.C. 19, H.L.
[96] [1997] Q.B. 924, C.A.
[97] *Bugg v D.P.P., Percy v D.P.P.* [1993] Q.B 473, D.C.

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apparently valid bye-laws, they had reasonable grounds to suspect that the protestors were committing an offence. The Court of Appeal upheld his decision. Simon Brown L.J. (with whom Peter Gibson L.J. agreed on this point) started by observing that, although the bye-laws expressly authorised arrest only if a person was actually committing an offence, earlier authority had established that such a provision allowed an arrest to be justified if there was reasonable suspicion that the arrestee had committed an offence.[98] That case had concerned mistakes of fact, not law, but the issue had been whether a constable had a justification at common law in a tort action for false arrest. Simon Brown L.J. said:

> . . . [A]t the time of the events complained of . . . these bye-laws were apparently valid; they were in law to be presumed valid; in the public interest, moreover, they needed to be enforced. It seems to me one thing to accept, as readily I do, that a subsequent declaration as to their invalidity operates retrospectively to entitle a person convicted of their breach to have that conviction set aside; quite another to hold that it transforms what, judged at the time, was to be regarded as the lawful discharge of the constables' duty into what must later be found actionably tortious conduct.[99]

Any right to compensation should lie against the Secretary of State who made the impugned bye-laws, not against the police constables who enforced them. This may be seen as exemplifying a common-law defence based on the special status and responsibilities of constables. Like the cases discussed earlier, it depends on a bifurcation of the notion of unlawfulness between public and private law.

4. Statutory defences and relationships between parties

Our sixth principle, requiring separate consideration of different legal relationships and careful analysis of the different ways in which people may be legally affected by the same events, is particularly important where one party enjoys special statutory protection. In *R. (M) v Hackney London Borough Council*,[100] an approved medical health professional (AMHP), acting on the advice of two doctors as required by statute, applied in good faith to have the claimant compulsorily detained in hospital under section 3 of the Mental Health Act 1983. Section 11(1) provided that an AMHP might apply for someone to be admitted for treatment under the Act. On its face, the application appeared to be entirely regular, and the hospital's managers admitted the claimant. But the AMHP ought not to

[98] *Wills v Bowley* [1983] 1 A.C. 57, H.L.

[99] *Percy v Hall* [1997] Q.B. 924, 947. In *Tchenguiz and others v Director of the Serious Fraud Office* [2013] EWHC 1578 (QB) at [32]–[34] Eder J. accepted that the *Percy v Hall* defence might arguably be extended to those executing search warrants. (I am grateful to Tom Hickman for pointing this out to me.)

[100] [2011] EWCA Civ 4, [2011] 1 W.L.R. 2873, C.A.

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have made the application, as section 11(4) prohibited such an application if "the nearest relative of the patient has notified that professional, or the local social services authority on whose behalf the professional is acting, that he objects to the application being made . . .". The patient's nearest relative had informed the AMHP that he objected, and, although the AMHP thought that the relative had subsequently withdrawn the objection, he had not in fact done so. Burton J. granted habeas corpus on the ground that an application, unlawful under section 11(4) of the Act, had brought about the patient's detention. He was therefore entitled to be released.[101]

The claimant sought damages for false imprisonment and violation of Article 5 of the ECHR from both the AMHP's employers and the hospital's managers, arguing that the application had been unlawful on two grounds: first, because of section 11(4) of the Act; secondly, because section 12(2) provided that at least one of the two medical recommendations required to support an application "shall, if practicable, be given by a registered medical practitioner who has" previous acquaintance with the patient. Neither practitioner had been acquainted with the patient. Collins J. dismissed the claim, holding that the hospital's managers had been entitled to rely on the application by the AMHP, because section 6(3) of the Act provided:

> Any application for the admission of a patient under this Part of the Act which appears to be duly made and to be founded on the necessary medical recommendations may be acted upon without further proof of the signature or qualification of the person by whom the application or any such medical recommendation is made or given or of any matter of fact or opinion stated in it.

It followed, he thought, that the local authority could not be liable for bringing about the lawful detention.

On appeal, it was argued that the effect of section 6(3) was to protect the trust from the consequences of acting on an unlawful application, not to make the detention lawful. The Court of Appeal agreed. The AMHP had acted unlawfully in bringing about the claimant's detention. Section 6(3) protected the hospital trust against liability in damages, but not the local authority.[102] The hospital's managers were acting lawfully by virtue of section 6(3), but that did not make the AMHP's conduct lawful. It followed that the whole of the claimant's detention had been unlawful vis-à-vis the AMHP.[103] In the common law of false imprisonment, "lawful" or "unlawful" was a description of the conduct which caused loss

[101] *M v East London NHS Foundation Trust and London Borough of Hackney (interested party)* [2009] M.H.L.R. 154, Burton J.

[102] See *Davidson v Chief Constable of North Wales* [1994] 2 All ER 597, C.A., and *In re S-C* [1996] Q.B. 599, 612, C.A., per Sir Thomas Bingham M.R.

[103] *R. (M) v Hackney London Borough Council* [2011] EWCA Civ 4, [2011] 1 W.L.R. 2873, C.A., at [54] per Toulson L.J.

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of liberty.[104] The AMHP's conduct was unlawful and led directly to the patient's detention.[105] For the same reason, the patient's right to liberty under Article 5.1 of the ECHR had been infringed, so he had a right to compensation under Article 5.5 of the ECHR.

This shows the importance of examining separately each strand of the complex web of legal relationships between the AMHP and the claimant, the AMHP and the hospital's managers, and the hospital's managers and the claimant. If the hospital's managers had statutory authority to detain the patient, one might ask, why was that not a good return to the patient's writ of habeas corpus? Can detention be both lawful and unlawful at the same time? When the legal relationships are correctly analysed, however, this apparent conundrum evaporates. The behaviour of different people towards the claimant was lawful or unlawful, but to speak of "the detention" as if it could be either lawful or unlawful regardless of which interpersonal, legal relationship is being examined is a conceptual error which obscures the various interests and legal relationships.[106]

D. The Temporal Element

Time affects the impact of flawed or allegedly flawed decisions in three ways. First, the stage at which an error occurs may affect the time from which actions are treated as being unlawful. Secondly, the stage in legal proceedings at which the issue arises affects how the courts approach the provision of remedial measures. Thirdly, it might be possible to alter the legal effect of flawed decisions by adjusting the time from which any remedy takes effect.

1. When the error occurs

Does an error in the middle of a decision-making process relate back to prevent any part of the process from having legal effect? In *N v Secretary of State for the Home Department*,[107] the Home Secretary made a control order under the Prevention of Terrorism Act 2005 imposing requirements on a person. The order was subject to review by the High Court. After the order was made, the House of Lords held that the Home Secretary had to provide the controlee with enough information about allegations against him to allow him to present his case effectively to the court. In *N*'s case, the Home Secretary decided years after first making the order that she could not provide the information which the High Court considered to be needed. The Court of Appeal therefore did not uphold the order. The question was whether the order was valid until the Home Secretary decided

[104] Ibid., at para. [56].
[105] Ibid., at para. [58].
[106] Ibid., at paras. [39], [56].
[107] [2010] EWCA Civ 869, C.A.

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not to provide the information required by the court, or whether her refusal rendered the order retrospectively void ab initio. The Court of Appeal decided that the order had been unlawful from the time when it was made. One reason for this was that N faced prosecution for breaching requirements of the (now quashed) order. Invalidating the order ab initio was a convenient way of avoiding the risk of a conviction which the Court of Appeal clearly regarded as unfair. Why would it have been unfair? Perhaps because the Home Secretary's refusal to reveal important information to the subject of the order prevented the reviewing court from assessing whether the order had ever been justified. Yet the Court of Appeal did not need to decide the effect of the Home Secretary's refusal on pending criminal proceedings. The criminal court could have decided (a) whether to allow N to rely on the unlawfulness collaterally in the criminal proceedings, and (b) if N could do so, what the effect on the criminal proceedings should be. It might have decided, for example, that prosecuting N in the circumstances was an abuse of process, or that (as in *Director of Public Prosecutions v Head*[108]) it would be wrong to make criminal liability depend on the answer to tricky questions of administrative law. But that should have been a matter for the criminal court, not the Court of Appeal (Civil Division) on a statutory review of the sustainability of the control order.

The position in *N* is analogous to cases in which a person who has been detained is entitled to periodic reviews of the continuing justification for detaining him, but a review is missed, or held too late, or does not comply with statutory requirements. In *Roberts v Chief Constable of the Cheshire Constabulary*,[109] the claimant was arrested and taken to a police station, where the custody officer authorised his detention at 11.25 p.m. He was then transferred to another police station, where he arrived at 1.45 a.m. By virtue of section 34(1) and (2) of the Police and Criminal Evidence Act 1984 (PACE), his detention was lawful only if authorised at periodic reviews. The first review should have taken place six hours after the authorisation at the first police station, but the review officer wrongly waited until 7.45 a.m., six hours after his arrival at the second police station, when continued detention was authorised. The claimant was ultimately released without charge at 6.55 p.m. He sued for false imprisonment. The Chief Constable accepted that the detention had been unlawful between 5.25 a.m. and 7.45 a.m., but argued that breach of the review requirement did not give rise to a cause of action in tort, because the detention would have continued for the same period had the review been conducted at the appropriate time. He also argued that, as the claimant had been asleep throughout the relevant period and had not known that he was being

[108] [1958] Q.B. 132, C.C.A., [1959] A.C. 83, H.L., discussed at text to note 66 et seq. above.
[109] [1999] 1 W.L.R. 662, C.A.

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unlawfully detained, the breach of PACE was merely technical and should not give rise to more than nominal damages.

The judge awarded the claimant £500 damages, and the Court of Appeal affirmed the decision. In the absence of a review at 5.25 a.m., Mr Roberts had been entitled to his liberty. As had previously been said in the context of arrest under PACE, "... where statutory provisions which provide rights to police constables to interfere with the liberty of the subject are concerned those provisions ought to be construed strictly against those purporting to exercise those rights".[110] Furthermore, the supreme importance of liberty of the individual required that it should be actionable and offer the possibility of substantial damages without proof of special damage.[111] The claimant was not restricted to nominal damages either because of the technical nature of the breach, or because the claimant had been asleep, or because the claimant would have continued to be detained anyway. It is possible that the Supreme Court's decisions in *Lumba* and *Kambadzi*, above,[112] have in effect overruled the last of these conclusions; but those decisions are, with respect, unconvincing on this point (for reasons already outlined), and the Court of Appeal's conclusion on the other points is, it is submitted, clearly correct.

Nevertheless, it does not seem to have been argued that the failure to carry out a review at 5.25 a.m. made the detention retrospectively unlawful from the time of arrest or first authorisation of detention the previous night. Indeed, there is no reason why it should do so. Despite the view the Court of Appeal took in *N*, above, not every unlawfulness in the course of decision-making undermines the legality of the whole course of decision-making from its outset. There are particularly pressing public-interest reasons for not allowing unlawfulness to relate back in time where the effect is, or may be, to make a public body liable to compensate for a trespassory tort without proof of special damage.[113]

Although an unlawful act in the course of executing a valid decision does not normally relate back so as to undermine the lawfulness of the decision itself, statute may create that effect. For example, section 15(1) of the Police and Evidence Act 1984 provides that entry on or search of premises is unlawful unless it complies with that section and section 16. Section 16(5) requires a constable executing a search warrant to provide a copy of it to

[110] *Hill v Chief Constable of the South Yorkshire Police* [1990] 1 W.L.R. 946, 952, [1990] 1 All E.R. 1046, 1051, per Purchas L.J.

[111] *Roberts v Chief Constable of the South Yorkshire Police* [1999] 1 W.L.R. 662 at 669 per Clarke L.J. , explaining a dictum in *Murray v Ministry of Defence* [1988] 1 W.L.R. 692, 703, [1988] 2 All E.R. 521, 529, H.L., per Lord Griffiths.

[112] *R. (Lumba) v Secretary of State for the Home Department (JUSTICE and others intervening)* [2011] UKSC 12, [2012] 1 A.C. 245, S.C.; *R. (Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23, [2011] 1 W.L.R. 1299, S.C.

[113] One possible exception to this relates to trespass to land, on account of the doctrine of trespass ab initio. But that doctrine has been doubted in modern times, and has been restricted by statute. See David Feldman, *The Law Relating to Entry, Search and Seizure* (London 1986), 385–87.

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the occupier. Where a constable provided a copy of only the front page of the warrant, section 15(1) made the entry and search unlawful ab initio, leading to an order for the return of seized materials.[114] But in the absence of such a statutory provision, the common law position is generally that unlawfulness at one time does not relate back to make earlier action unlawful.

Similarly, in *Cullen v Chief Constable of the Royal Ulster Constabulary*,[115] the claimant had been arrested on suspicion of involvement in an act of terrorism. Acting under section 15(8) of the Northern Ireland (Emergency Provisions) Act 1987, a police officer of the appropriate rank, with sufficient grounds, authorised delay in allowing the claimant to consult privately with a solicitor. In breach of requirements imposed by section 15, however, the officer had acted pre-emptively, rather than in response to a request from the claimant, and had not given reasons. It was held that the breaches did not give rise to an action for false imprisonment, because they did not render the detention unlawful.[116] This is consistent with the approach which Lord Dyson and Baroness Hale later took in *Lumba*: failing to wait for the detainee to make a request to consult a solicitor, and failing to give him the reasons for delaying access to a solicitor, did not relate to or affect the decision to detain, but only the circumstances of detention. Once again, we see that, where a detainee is seeking damages for a trespassory tort, public-law unlawfulness does not automatically entail private-law unlawfulness.[117]

2. The stage of proceedings at which the issue arises for decision

A different remedial problem arises where a party bringing proceedings to enforce a right or duty seeks an interim injunction to enforce the right or duty pending trial. The usual principle for awarding interim orders is that the court considers the balance of convenience, so it will not grant an interim injunction unless the party who seeks it undertakes to indemnify the other party against loss resulting from it if it transpires that there was no breach of the right or duty.[118] The matter is more complicated, however, if the defendant will argue at the main hearing that there was no right or duty because (for example) the legislation on which the claimant relies is invalid. At the interim stage, the court must find a way of proceeding without prejudging the issue but also without making it unduly expensive

[114] *R. (Bhatti) v Croydon Magistrates' Court* [2010] EWHC 522 (Admin), [2011] 1 W.L.R. 948, D.C.
[115] [2003] UKHL 39, [2003] 1 W.L.R. 1763, H.L.
[116] Lords Hutton, Millett and Rodger formed the majority; Lords Bingham and Steyn dissented. See to the same effect *R. (James and others) v Secretary of State for Justice (Parole Board intervening)* [2009] UKHL 22, [2010] 1 A.C. 553, [2009] 2 W.L.R. 1149, H.L.
[117] See to the same effect *R. (Sturnham) v Parole Board* [2013] UKSC 47, [2013] 2 A.C. 254, S.C.; *R. (Osborn) v Parole Board* [2013] UKSC 61, [2013] 3 W.L.R. 1020, S.C., on the effect of improper delay in dealing with a prisoner's request for release on licence.
[118] *American Cyanamid Co. v Ethicon Ltd* [1975] A.C. 396, H.L.

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or difficult for enforcement agencies to take action to enforce what appears to be a valid law. The court will consider the role and status of the agency seeking an interim injunction, and make a rebuttable presumption that a facially regular legislative instrument is valid until shown to be invalid. But what is to be done when a public body seeks to enforce by way of injunction a statutory instrument against a person who claims that the statutory instrument was made unlawfully? This was the situation in *F. Hoffmann-La Roche & Co. AG v Secretary of State for Trade and Industry*.[119] The Secretary of State had made a statutory instrument, duly approved by each House of Parliament, limiting the price which could be charged for the drugs Librium and Valium. The manufacturers, Hoffmann-La Roche, issued a writ claiming a declaration that the statutory instrument was invalid. The Secretary of State issued a writ seeking an injunction to restrain the company from charging more than the amount permitted under the statutory instrument. The Secretary of State also sought an interlocutory injunction restraining the company from charging more than the permitted amount pending determination of the validity of the statutory instrument. The company refused to submit to an interlocutory injunction unless the Secretary of State gave an undertaking in damages, which he refused to do.

The House of Lords decided that the Secretary of State was entitled to the interlocutory injunction because the Crown was enforcing a legal rule made in accordance with statute. In such circumstances the onus lay on the person challenging the rule to show why the rule should not be enforced up to the time when it was shown to be unlawful. The special role of the Crown in making and enforcing law was different from its role when enforcing its own proprietary or contractual rights. According to Lord Reid, the statutory instrument represented the law unless and until it was shown to be unlawful, and he and Lord Morris considered that the company had not shown sufficient reason for not enforcing it until that time, although the company might suffer significant loss as a result. Lord Diplock spoke in terms of a presumption that the statutory instrument was lawful, and decided that the company had failed to make out a convincing argument that it was ultra vires. He was, however, alone in this, and there is no clear ratio supporting the result. Nevertheless, it does not follow that the result is wrong. It simply shows that the problem which we are addressing cannot be resolved by applying labels such as void and valid (as Lord Diplock himself recognised).

[119] [1975] A.C. 295, H.L. Lords Reid, Morris, Diplock and Cross formed the majority; Lord Wilberforce dissented.

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3. Prospective and retrospective remedies

In *Percy v Hall*,[120] Schiemann L.J. considered the effect of flawed decisions and rules from the perspective of public-law remedies. He regarded the "basic principle that an ultra vires enactment is void ab initio and of no effect" as a "beguilingly simple formulation" which "conceals more than it reveals":

> Manifestly in daily life the enactment will have had an effect in the sense that people will have regulated their conduct in the light of it. Even in the law courts it will often be found to have had an effect because the courts will have given a remedy to a person disadvantaged by the application of the ultra vires enactment to him or because a decision, binding on the parties thereto, has been rendered on the basis of an apparent law or because some period of limitation has expired making it too late now to raise any point on illegality.
>
> The policy questions which the law must address in this type of case are whether any and if so what remedy should be given to whom against whom in cases where persons have acted in reliance on what appears to be valid legislation. To approach these questions by rigidly applying to all circumstances a doctrine that the enactment which has been declared invalid was "incapable of ever having had any legal effect upon the rights and duties of the parties" seems to me, with all respect to the strong stream of authority in our law to that effect, needlessly to restrict the possible answers which policy might require.[121]

EU law was (and is) much more flexible in this regard, allowing a court to decide whether a flaw takes effect *ex nunc* (i.e. prospectively only) or *ex tunc* (depriving the rule of effect from the moment it was purportedly made).[122] Schiemann L.J. suggested that English law might draw on that tradition to develop its response to this kind of problem.[123] This offers a way of giving legal effect to flawed decisions and rules (whatever kind of flaw is involved) building on the flexibility of remedies.

The public interest in detecting crime and protecting consumers and other people may also lead a court to delay the implementation of a judgment holding an action to be unlawful for breach of a statutory duty. In *R. (Van der Pijl) v Crown Court at Kingston*,[124] Wilkie J., with whom Sir John Thomas P. agreed, held that a search warrant issued to the police under section 9 of, and Schedule 1 to, the Police and Criminal Evidence Act 1984 failed to specify with sufficient particularity the items to be searched for. As a result, the warrant was invalid, and the subsequent

[120] [1997] Q.B. 924, C.A., discussed at text to note 96 et seq. above.
[121] Ibid., at p. 951.
[122] See now *Interfact Ltd v Liverpool City Council (Secretary of State for Culture, Media and Sport intervening); R. v Budimir (Secretary of State for Culture, Media and Sport intervening)* [2010] EWHC 1604 (Admin), [2011] Q.B. 744, D.C.
[123] *Percy v Hall* [1997] Q.B. 924, 952.
[124] [2012] EWHC 3745 (Admin), [2013] 1 W.L.R. 2706, S.C.

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search of premises and seizure of items were unlawful. Instead of ordering the police to return the items immediately, however, the court gave the police 14 days in which to apply to a court for an order authorising retention of the items under section 59 of the Criminal Justice and Police Act 2001, and allowed the police to retain the items in the meantime.[125]

The position is different, however, when a court holds that interfering with a person's right is unlawful because a legislative instrument purporting to authorise the interference, rather than an action implementing legislation, is invalid. In such a case, there is no scope for delaying the effect of the court's judgment.[126] Whilst the Supreme Court justified this result on the basis that all errors of law make a rule or decision affected by one void ab initio, that wide ratio is impossible to reconcile with other cases discussed above. It is submitted that the decision can best be understood as illustrating a distinction between invalidity of the legislative instrument which alone could have justified an interference with a legal interest or right, which makes it impossible to justify continuance of the interference, and unlawfulness of an action taken pursuant to a valid piece of legislation, which would have authorised the interference but for an error affecting the lawfulness of the action.

E. Achieving Sensible, Morally Justified Outcomes Where Interests Conflict

A seventh principle is that courts must seek sensible, practically workable, morally acceptable outcomes. Once a court has decided that a decision is so significantly flawed as to compromise its lawfulness, it would often make little sense to allow the decision or rule to take effect. Yet we have seen a number of fields in which the flaw is minor, or does not adversely affect everyone subject to the affected decision, so that it would be morally inappropriate to deprive the decision of all legal force and effect. One job of legal rules is to help judges to achieve sensible, practicable outcomes. Sometimes the wider, social or economic consequences of granting a remedy which makes a decision or rule ineffective as well as unlawful would undermine the core of the statutory scheme even more comprehensively than non-compliance with the statutory requirement. This is particularly likely when a decision is flawed not by breach of a requirement imposed by the statute which authorises the decision, but from non-compliance with a duty imposed by unconnected legislation, such as environmental or equality statutes. In such cases, fashioning an appropriate remedy involves complex, cross-cutting considerations which, despite the unlawfulness, sometimes militate against holding the decision or rule to be void.

[125] Ibid., at paras. [66]–[68], [85]–[88] per Wilkie J.
[126] *HM Treasury v Ahmed (No. 2)* [2010] UKSC 5, [2010] 2 A.C. 534, S.C.

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R. (Hurley and Moore) v Secretary of State for Innovation, Business and Skills offers an example.[127] The claimants challenged regulations authorising universities, subject to certain conditions, to charge fees of between £6,000 and £9,000 per annum to EU undergraduate students, instead of the previous range of £1,310 to £3,290.[128] The Divisional Court held that the Government had failed in its statutory duty to pay due regard to its public sector equality duties (PSEDs),[129] because its assessment had focused almost entirely on applicants' socio-economic backgrounds, rather than on "such issues as are unique to a particular protected characteristic", including whether other PSEDs might be engaged. Elias L.J. said, "I cannot discount the possibility that a more precise focus on the specific statutory duties might have led to the conclusion that some other requirements were potentially engaged and merited consideration." The decision was therefore legally flawed, and the court regarded the breach as substantial rather than merely technical, even though there had been "very substantial compliance" with the PSEDs.[130]

If it were correct to say that any error of law makes a decision or rule ultra vires, and that any ultra vires decision or rule is null and void, it should have followed that the regulations were void, and that no university could lawfully charge the higher fees. Indeed, Elias L.J. observed, "It will be a very rare case, I suspect, where a substantial breach of the PSEDs would not lead to a quashing of the relevant decision." But he considered that this was such a case. There had been an appropriate analysis of the implications of the proposed fee structure for protected groups, though not of the possibility that some other aspects of the PSEDs might have been engaged; the Government, universities and students had all been planning on the assumption that the higher fees would be in effect by October 2011; the Government was keeping the position under review, and subsequent impact assessments had dealt properly with different protected groups as required by the Equality Act 2010. King J. thought "that it is difficult to see how [the failure to consider whether other PSEDs might have been engaged] can impinge upon the particular decision reflected in the regulations, namely to introduce a fee structure with fees at a particular level". In these circumstances, it would have been disproportionate to quash the regulations, so the court merely made a declaration that the Secretary of State had failed to comply with his PSEDs.[131]

[127] [2012] EWHC 201 (Admin), [2012] H.R.L.R. 374, D.C.
[128] Higher Education (Higher Amount) Regulations 2010 (SI 2010/3020); Higher Education (Basic Amount) Regulations 2010 (SI 2010/3021).
[129] Sex Discrimination Act 1975, s. 76(a), Race Relations Act 1976, s. 71, and Disability Discrimination Act 1995, s. 49(1). These provisions have now been superseded by Equality Act 2010, s. 149.
[130] [2012] EWHC 201 (Admin), [2012] HRLR 374, at [91], [96], [99] per Elias L.J. See Tom Hickman, "Too hot, too cold or just right? The development of public sector equality duties in administrative law" [2013] P.L. 325.
[131] [2012] EWHC 201 (Admin), [2012] HRLR 374, at [99]–[100] per Elias L.J., [102] per King J.

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This outcome has been criticised as inconsistent with the principle that any error of law makes decisions ultra vires and so, logically, non-existent in law.[132] On this view, refusing to quash the statutory instrument cannot make it effective, because there is, in law, nothing authorising universities to charge fees at the higher level. The proper course would have been to declare that the statutory instrument was invalid, or, perhaps, to make a quashing order. That argument depends on the correctness of the propositions set out at the beginning of this article. But the propositions that any error of law, broadly defined, makes a decision or rule ultra vires its maker, and that an ultra vires decision or rule is incapable of having any legal effect, are not logically linked. Saying that a decision is ultra vires does not determine the effectiveness of the decision. That calls for a separate, normative judgment: is the error sufficiently significant to merit treating the decision as wholly ineffective? If any error makes a decision ultra vires, it is likely that many of them will not have a sufficiently serious impact on those subject to the decision to merit being treated as entirely ineffective. Why should a person who is not the beneficiary of an equality duty be free of the requirement to pay £9,000 when the statutory duty which the Government breached was directed to protecting the interests of other people?

III. Conclusions And Implications

Public-law errors are not all "errors of law" and do not always make a decision void. The case law shows that legal doctrine (not merely discretion or absence of a competent challenge) dictates that some decisions and rules are "voidable", i.e. flawed but valid and effective except to the extent that a competent tribunal annuls them. Attempts to explain this away do not offer reliable guides to future cases. When we look afresh at the case law, rather than imposing a theoretical straitjacket on it, it is seen to be shaped by common-law principles which enable us to understand and predict outcomes reasonably confidently in most cases. Scholars who believe that all "errors of law" always make decisions void draw normative support from the rule of law and the principle of legality: people should not suffer as a result of an act which is touched by unlawfulness. That is an important principle, but there are others, and they can outweigh it. Good government allows people to plan their affairs with a degree of confidence, relying on decisions and rules which appear to be lawful, and people who are affected by a rule but have suffered no disadvantage as a result of a legal flaw ought not to gain a windfall benefit at the expense of the common good merely because the flaw adversely affects someone else. As this is governed by principle, administrative law is neither arbitrary nor dominated

[132] See Christopher Forsyth, "The rock and the sand" (2013) 18 J.R. 360.

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by discretion. Where discretion arises, it is exercised in consistent and predictable ways.

We have identified seven principles which operate alongside the principle of legality, and can mitigate its potential to operate in anti-social ways in some circumstances.

Principle 1 – the access principle: in order to protect the overall effectiveness of judicial protection against unlawful administrative action, judicial resources should be concentrated on (a) cases in which people have no other reasonably effective means of seeking redress, and those in which other means of redress have been pursued unsuccessfully, and (b) the rule of law requires a further review because of the importance of the issue or of the consequences of the case. This principle is associated with two rules: (i) claimants must usually exhaust statutory routes to redress before resorting to judicial review; (ii) the use of judicial resources should be proportionate to the significance of the case. Those rules are subject to a condition based on fairness under the rule of law: overall, the claimant must have had a fair opportunity to have the lawfulness of his or her treatment adjudicated on by an independent and impartial tribunal.

Principle 2 – the principle of legality: it is in principle unacceptable to coerce or impose a penalty on a person unless there is authorisation for doing so in a positive legal rule.

Principle 3 – the principle of certainty: legal certainty requires that people, including both public bodies and those with whom they deal, generally be able to assume that a rule, order or decision which has not been successfully challenged is lawful, and to act accordingly without risking legal sanctions. This operates hand in hand with Principle 4.

Principle 4 – the principle of finality: as a particular aspect of Principle 3, a decision of a judicial tribunal determining rights and obligations of parties to the proceedings as against each other, which is not subject to appeal or judicial review, binds the parties to the proceedings regardless of any subsequent events, including subsequent judgments which show the decision in question to have been made on an erroneous understanding of the law.

Principle 5 – courts do not act in vain: a court will not usually entertain a case, or give a remedy, where it would provide no practical benefit to the parties to the case, unless it would serve to clarify an important legal issue so as to guide official behaviour or help to resolve disputes in other cases before courts and tribunals.

Principle 6 – the principle of difference: courts should recognise that people affected by a single course of administrative decision-making may have different legal interests and obligations from each other arising from the various relationships between them. It is inappropriate to try to determine the effect of those interests and obligations as if the relationships were of the same kind. For example, the difference between public law and private law is significant, because interests are weighted differently

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in each. It is also inappropriate to try to determine them by applying a decision taken in relation to a relationship to which a party to present litigation was not a party. This is the converse case to Principle 4.

Principle 7 – the principle of morality and efficacy: courts try not to make decisions or give remedies which would cause administrative chaos or be morally questionable.

These principles may conflict with each other, and they overlap in ways which can cause tensions between them. It might be possible to develop higher-order principles which guide the resolution of tensions, although this article (which is already too long) does not attempt to do so. My aims here have been to challenge the orthodox paradigm of English administrative law, and to identify more realistic principles which provide more useful tools for analysis. Analysing the working of those principles in depth is a task for another day. Nevertheless, this first step is practically useful as an aid to understanding and prediction. It is also normatively significant: the values which underpin the principles can lead us towards a normative ground for distinguishing between public and private law; being developed at common law, they also help to explain the importance of common law as a foundation of judicial review of administrative action. They show that legislative action or intention is only one of the sources of legitimate authority for it. Finally, the analysis suggests something significant about the use of theory in law. Theories are aids to understanding or advocacy, not logical truths or divine revelations. They must be constantly tested and reshaped in the light of reality. Inadequate theories promote confusion, not understanding.[133]

[133] See Jason N. E. Varuhas, "The reformation of English administrative law? 'Rights', rhetoric and reality" [2013] C.L.J. 369.

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