

# **Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England & Wales<sup>1</sup>**

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## **Abstract**

*Judicial review is of growing importance to public administration in the UK but its role in relation to government remains highly contentious. There is much debate over the extent to which it is a threat that imposes costs and impairs service delivery or a positive resource that helps secure improvements in service quality. In this paper we consider the findings of the first comprehensive quantitative study of the relationships between levels of judicial review litigation and the quality of local government services. The findings indicate that judicial review may be making a positive contribution to local government in England and Wales. The paper also considers the way local government officials perceive judicial review and argues that reactions to judicial review cannot be wholly understood in terms of incentives. Judicial review makes a positive contribution to public administration and does so at least partly because it promotes values that are central to the ethos of public administration and assists officials in resolving tensions between individual and collective justice that lie at the core of their responsibilities.*

## **I Introduction and Overview of Argument**

This paper considers whether, and, if so, how judicial review litigation acts as a lever for change in the delivery of services by local authorities in England & Wales. The paper engages with two disparate fields of study. One relates to the incentives for local authorities to enhance their performance and the quality of their service provision. Public administration is increasingly subject to legal controls and performance targets imposed by central government. It is also increasingly susceptible to consumer oriented complaints and challenge systems (Department of Constitutional

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Affairs 2004: National Audit Office 2004/05). Interest here has generally focused on the influence on local authority performance of monitoring or audit arrangements established by central government as a 'virtual consumer', with associated costs for non-compliance.

The other concerns the influence of judicial review on public authorities and the services they deliver. There is significant interest in many countries in the impact of litigation on public administration, in part associated with the international trend towards judicialisation of government (Tate and Vallinder 1995). In the UK this trend has been manifest in the growing resort to judicial review (Bondy and Sunkin 2008). The work on the influence of judicial review has tended to emphasise its limited influence on administrative decision-making (Richardson 2004, 112). Courts may be well suited to adjudicate upon disputes, but their decisions are widely considered to be ineffective drivers of change in the quality of public services, in part because of barriers within public administration to the implementation of judicial decisions (Halliday 2004). Moreover, where courts do exert influence research indicates that this tends to be negative in various ways (Richardson 2004, 113; Halliday 2000; Loveland 1995, Chapter 11; for an overview of the US literature on impact, see Canon 2004).

This paper brings together the incentive effects of judicial review litigation and its impact on service delivery. Employing a mixed methods study of litigation it presents new quantitative evidence indicating that judicial review can act as a driver to improvements in the quality of local authority services. It throws light on these findings by exploring perceptions of judicial review amongst local authority officers.

Important differences exist between judicial review as it is commonly understood in the US and in the UK. Given the absence of a written constitution judicial review in the UK has not been concerned to ensure that public authorities comply with constitutionally imposed obligations, and the role of judiciary is limited by comparison with other countries (Cane 2004). The UK court cannot question the constitutional standing of primary legislation or organisations or systems established by that legislation. Rather, its role is to uphold Parliament's will and to ensure that public authorities do not exceed or abuse the powers conferred by primary legislation. UK judges tend to focus on the legality of past actions rather than on what public authorities must do to comply with the law. The range of remedies available to judges is also less extensive than that available to judicial review courts in the US. (Lewis 2004). In particular, UK judges do not appoint monitors or masters to oversee compliance with their judgments. Judicial review focuses on the process of administration rather than on the merits of administrative action and judges will not upset decisions because they disagree with them. Typically, when found to have acted unlawfully a public body will be expected to retake its decision.

In England and Wales the judicial review procedure has two key stages: the permission and final hearing stages. At the permission stage the court considers whether the challenge is arguable and timely, and whether the claimant has standing, and has exhausted other remedies. If permission is granted the claim is listed for final hearing. Less than ten per cent of claims reach a final judgment (Bondy and Sunkin 2008; 2009 (a); 2009 (b)), but litigation may exert influences whether or not cases reach judgment (Gambitta 1981; O'Leary 1989; Richardson and Sunkin 1996,

Richardson 2004, 112). We can, nonetheless, assume that it is by way of judgments that judicial review exerts its greatest formal influence. But even when judgments are adverse to authorities, judicial review is short of coercive muscle and, according to some, ‘hardly functions as a sanction’ (Halliday 2004, 103-105; Richardson 2004, 119). There are two particular factors here. Firstly, remedies granted to successful claimants are normally non-coercive declarations that public authorities are trusted to respect. Secondly, claimants cannot obtain compensation solely because they have suffered as a consequence of an authority’s excess or abuse of power.<sup>2</sup> This means that judicial review rarely imposes a direct cost, in the form of compensation liability, on public authorities (Law Commission 2008), though litigation costs usually exceed damages awarded (Audit Commission 2003).

Given the absence of sanctions, why should authorities change in response to judicial review? It would be misleading to assume that local authorities only change to the extent dictated by financial penalties including the desire to save litigation costs. Our research reinforces the view that factors other than the desire to maximise gains or minimise costs are likely to be significant (Levinson 2000; Rosenthal 2006). In particular, in seeking to understand how judicial review can encourage change, our findings highlight the influence of the public service ethos. Such an ethos possesses various attributes. For us the most pertinent are those concerned with fidelity to the law and achieving a just balance between the needs of the many and the claims of the individual (Needham 2006, 846-848). An authority’s reputation for success can also

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<sup>2</sup> Supreme Court Act 1981, s31(4); Civil Procedure Rules, r 54 r 3. There are limited situations where judicial review proceedings can lead to monetary remedies as when there has been a breach of EU law (*Francovich and Bonifazi v Italy* [1991] ECR I-5357), or ‘Convention rights’ have been breached: s 8 Human Rights Act 1998.

be significantly damaged by litigation, especially when its outcome is adverse and widely publicised.

The particular nature of judicial review may also increase the susceptibility of local authorities to engage positively with litigation. For one thing, the increase in its use should mean that authorities are more aware of judicial review than they might have been decades ago (Bridges et al 1995). Also, while judicial review is one of many constraints upon local government, it is distinctive. First, it focuses exclusively on the legal duties and powers of public authorities and is the principal means for providing authoritative determination on these matters. Second, unlike audit and target techniques used to check and direct authorities, judges draw on common law principles that are not rooted in government policies and goals. Third, litigation is typically instituted by people with grievances arising from actions of public authorities. Fourth, judicial review challenges may be difficult to predict and have the capacity to take authorities by surprise, unlike other accountability and inspection processes. It is, then, an independent process that is motivated by peoples' experience of service delivery and grounded in judicially determined constraints on public administration.

Judicial review is also distinctive in how it subjects public decisions to scrutiny, in particular, in its regard for what might be called individualised administrative justice. It is concerned to ensure that administration has legal power to make decisions and that decisions that affect individuals are justified, properly reasoned and fairly taken. In this respect it focuses on dimensions of quality that are not central to other accountability regimes.

Broadly speaking two types of message are given by the courts: one confirms authority action; the other condemns it as being unlawful. Of course, condemnation may be unwelcome and calls for change will not necessarily be fully and enthusiastically implemented (Hertogh and Halliday 2004). Reactions are heavily dependent on the degree to which judgments fit with authority goals, policies, priorities, engrained cultures and professional values, or authority perceptions of how justice and fairness should be balanced. They are also influenced by the level of legal knowledge possessed by decision-makers and their legal conscientiousness (Halliday 2004). Consequently implementation of judicial decisions is likely to be patchy within and across authorities. We found similar variation. Within authorities judgments may fit the priorities and goals of some sections better than others. They may, for instance, provide clarity to front line social workers but real problems to managers and budget holders.

Inevitably, judicial review has potential to cause the greatest change when it conflicts with what is currently happening, but is most likely to attract minimum resistance when it strikes a chord with the needs of officials. We found substantial evidence, for instance, that judicial decisions are welcomed when they offer clarity and provide 'answers' to the perennial tensions between achieving individual justice and general fairness, or between particularism and universalism (Hoggett 2005). Judicial review challenges that have become institutionalised as a means of accessing scarce resources (such as housing) are less likely to lead to reconsiderations of service provision or uncomfortable awareness of gaps and failings than challenges in new areas, or those that break the equilibrium in the management of risk or resources.

In the next section we explore this latter issue by using quantitative data, amplified by qualitative responses, to examine the relationship between levels of challenge and quality of local authority services.

## **II Judicial review challenge and ‘quality’ of local authorities: what does our quantitative analysis tell us?**

To investigate an association between levels of challenge and local authority performance ratings, we constructed a specific data set. This contained a range of data from the period 2000-2006 for the 409 English local authorities. It comprised, at the level of the local authority: judicial review challenges filed with the Administrative Court (as well as permissions granted, decisions, and the subject areas of challenges) for 2000-2005;<sup>3</sup> Comprehensive Performance Assessment (CPA) scores for higher level local authorities for the years 2002-2006;<sup>4</sup> presence of legal firms carrying out publicly funded work in relevant areas of law; and a range of contextual features relating to local authorities, such as population size and diversity, deprivation (as measured by the official indices of multiple deprivation), levels of ill-health, and the numbers of carers. In this paper we analyse those data for which we have observations on both our measure of litigation – judicial review challenges and on our measure of quality – CPA scores. This means we focus on the years 2002-2005 and on the 149 higher level local authorities.

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<sup>3</sup> For more detail on the data on judicial review challenge, see Sunkin et al. 2007.

<sup>4</sup> Local authorities are either unitary, metropolitan, London Boroughs, county councils or district councils. Counties are divided into districts and share responsibilities between the two levels. The other authorities are solely responsible for all main areas of service provision. Higher level authorities exclude districts.

We investigated whether a relationship exists between levels of litigation and quality at the pre-permission stage, given that 90 per cent of judicial review challenges do not reach a final judgment. While the volume of challenges is small in relation to overall local authority activity, and while judgments are likely to have more substantial impacts than challenges, it is reasonable to assume that the quality of local authority activity and judicial review challenges have some relationship. In our data we distinguished challenges according to their broad type. We have investigated the distribution of types of challenge elsewhere, recognising that challenges relating to specific areas (such as education, housing benefit, planning and so on) engage with particular aspects of service delivery and are used by complainants and responded to by officers in different ways (Sunkin et al 2007). However, here we bring together challenges across all areas. The impact of judicial review at service level has been shown to be contextually specific; but we are interested in whether it is possible to discern systematic effects of levels of challenge and of changes in those levels across areas. We posit a number of reasons why the volume of challenges may affect or reflect the more general culture and responsiveness of an authority as well as the way it deals with problems in the system. For example, whether it waits for challenges to manage demand, but thereby fails to resolve underlying issues.

Our aggregate measure of challenge is matched by a generic measure of quality in the form of the Comprehensive Performance Assessment (CPA). Again, we are not concerned to identify service level effects but to evaluate whether there is a more general impact of challenge on the way the authority presents and is judged on its overall performance. Our measure of ‘quality’ as represented by the CPA is not uncontentious as there is much criticism of the adequacy and reliability of CPA scores



(Miller 2005; McLean et al 2003; Jacobs and Goddard 2007; Clarke 2005). CPA scores, nevertheless, represent our best opportunity to capture authority-wide performance and culture of delivery. Moreover, CPA scores may be related to authority reputation, with the consequent impact for elected officers and for management of poor performance. Achievement of high CPA scores reflects attention to performance and efficacy in instituting and monitoring effective processes. It is also linked to a range of alternative interpretations of ‘quality’ as our earlier work has shown (Calvo et al 2008). Judicial review litigation also has a clear bearing on reputation, as many of our respondents indicated. Both low CPA scores and judicial review challenges are regarded as ‘risks to be managed’. As one respondent put it, ‘one of the risks, the corporate risks, is ... the risk of litigation... we identify the potential risk, the fact that we might get legal costs, the fact that it may affect our reputation. All the different sorts of risks we have and then we look at how we can control those risks’ (IDNO2). While we would not claim that authorities that deal poorly with risks necessarily also deliver poor services, we think it is reasonable to posit – and to test – whether authorities who experience challenges that reveal gaps in service provision or procedural problems are thereby enabled to improve their performance and consequently their CPA scores. Conversely, if risks are being poorly managed on a number of fronts this probably tells us something about the efficacy of internal systems, management and leadership.

We therefore interrogated our quantitative data to establish whether poor performance, as indicated by levels of judicial review challenge, reflected poor performance as measured by CPA scores. We then built on this estimation of an association between quality and level of challenge by exploring our primary question:

whether judicial review challenge can stimulate change – specifically improvement – in internal procedures and systems sufficient to increase CPA scores. We therefore examined whether a *change*, specifically an increase, in judicial review result in a significant improvement in CPA score. Of course, even if judicial review stimulates improvements in services we may not see a reflection of this in CPA score, partly because, as discussed above, we are not capturing service-specific change; and partly because CPA is only a very approximate measure of the overall quality of an authority. Any relationship between change in judicial review and CPA score is likely therefore to be a conservative one and may well underestimate various impacts and improvements stemming from judicial review.

Before going on to consider the ways in which we estimated these relationships, it is worth highlighting some key features of our litigation and quality variables. (A full table of descriptive statistics can be found in the Appendix.) Over the period 2002-2005, there was an average of five challenges per authority per year. But there were substantial differences between authorities with some having no challenges, and the most highly challenged authority in 2002 having 103 challenges.<sup>5</sup> There was a slight but not significant decline in the average number of challenges over the period. By contrast, CPA scores, which can take a value between 0 and 4 stars showed a steady improvement, with the proportion of authorities gaining 4 stars rising from 14 per cent to 26 per cent over the period and only one authority getting a zero score in 2005, down from 12 authorities (8 per cent) in 2002.

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<sup>5</sup> For more detail on the distribution of challenges, see Sunkin et al. (2007).

To model the relationship between levels of judicial review challenge and change in judicial review challenge and CPA score, we employed random effects ordered probit models (Fréchette 2001) to model the rank of the CPA score. Random effects models allow correlation between the errors over the different observations (years) for each case (local authority). This takes account of unobserved heterogeneity. That is, it allows for unmeasurable differences between authorities, differences which are associated with the outcome variable (here the CPA score) but which are not directly associated with the explanatory variables. Examples of such unmeasurables might be the authority culture or staff morale. Compared to alternative random effects models, an ordered probit model is appropriate in this instance since it is designed for outcomes which consist of discrete levels, hierarchically ranked, as we find in the CPA score.

We explored the association between levels of challenge and the impact of a change in levels of litigation controlling for a simple set of local authority characteristics.<sup>6</sup>

These control variables comprised type of authority, critically associated with the types of service provided and with levels of litigation; variables which indicated potential demand on services (population, proportion with health problems, carers, children, elderly), and levels of deprivation, ethnic composition and number of lawyers, which have been associated with levels of challenge (Sunkin et al. 2007).

Without such controls for local population characteristics, any observed relationship between litigation and quality could be a spurious one, representing instead the impact

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<sup>6</sup> We also investigated different specifications, and carried out a range of sensitivity tests. Treating the dependent variable as interval rather than ranked, still using a random effects approach led to similar conclusions. In addition we were able to compare this random effects regression model with a fixed effects model, which indicated, via a Hausman test, similarity of coefficients across the two models, leading us to prefer a random effects specification. In relation to our key independent variable, we used the lag of litigation as an alternative to the contemporary measure, and found largely similar results.

of population or the demands of particular population groups on services and the relationship of such demand with quality. We also controlled for year, since there were secular increases in quality rankings from year to year.

Table 1 provides the main estimates from the model. For brevity it illustrates the coefficients only for those variables directly relevant to our discussion. The correlation of errors within cases can be found in the rho which is very large and highly statistically significant, indicating that specific, unobservable characteristics of authorities play a substantial part in their CPA score, as we might expect..

Table 1: Relationship between Judicial Review (JR) litigation and CPA Score: Coefficients from random effects ordered probit (standard errors in brackets).

Variable	Coefficient (SE)
<b>Litigation</b>	
Number of challenges	- 0.05 (0.01)***
Change in challenge	0.03 (0.01)*
Number of lawyers	0.01 (0.02)
<b>Year</b> (base is 2002)	
2003	0.31 (0.15)*
2004	1.35 (0.17)***
2005	1.52 (0.17)***
<b>Local authority type</b> (base is Unitary/Metropolitan)	
London Borough	2.16 (0.51)***
County Council	1.77 (0.36)***
Deprivation score	-0.03 (0.02)
<b>Cutpoints</b>	
Cutpoint 1	-0.19 (1.84)
Cutpoint 2	1.57 (1.83)
Cutpoint 3	3.72 (1.82)*
Cutpoint 4	7.17 (1.86)***
rho	0.87 (0.01)***
LR chi2(df)	160.18 (15)***
N	596

Notes: Standard errors in parentheses; + p<.10, \* p<.05, \*\* p<.01, \*\*\* p<.001; additional controls: population size (logged), age and ethnic composition; proportion long-term ill; proportion of carers.

We found, first, that lower levels of challenge corresponded to higher CPA scores. There was a statistically significant negative association between levels of challenge and CPA scores, controlling for type of authority and a range of other characteristics of the authority that might be thought to influence quality. This finding appeared robust to a range of alternative ways of modelling the data (see Note 6) and suggests that judicial review challenge reflects problems with local authority service provision. The inference that poorly performing authorities experience greater levels of challenge is reinforced by the finding that judicial review challenge is closely correlated with levels of complaint to the local authority ombudsman, about which we also collated data, which implies that rates of challenge reflect a genuine level of dissatisfaction. The association is estimated in the context of an overall trend to improved CPA scores which can be identified from the Year dummies in Table 1.

Nevertheless, it is still possible that there is an element of reverse causation here. That is, that judicial review litigation causes the problems in local authority services by diverting resources from the provision of services, and it is this that results in poorer CPA scores and an increase in complaints to the ombudsman. However, even if this were the case we can see a measurable, albeit fairly modest, association between levels of judicial review challenge and local authority performance. This provides an important link between these two aspects of our investigation.

Moreover, our second finding challenges the idea of reverse causation, since it indicates that a *change* in challenge, holding the *level* constant was significantly and positively associated with CPA score. That is, an increase in challenge was indicative of some improvement in performance, as we can see in the second row of Table 1.

This means that, since the underlying level of litigation is held constant, we can see this positive effect of change as representing a shock or impulse that is beyond the typical experience of the authority. The effect may be quite small, but it is significant, even within the relatively small data set and after controlling for unobserved heterogeneity. This important finding indicates that challenges have the potential to drive improvement. As we noted above, our estimate is likely to be a conservative one, since there may be aspects of service improvement impacted by judicial review that are not reflected in the CPA. In this case there seems no potential for reverse causation, since if litigating diverted resources from core functions, an increase in litigation could only make things worse. Instead, the two findings together indicate that the shock of an increase in the scale of challenge will affect authorities, whether they generally experience lower or higher levels of challenge.<sup>7</sup> We can, then, with some caution, interpret this finding as litigation acting as a driver for (positive) change in authorities' performance.

Our main cautions would be, first, the difficulties of inferring causality even from panel data and despite finding similar results using specifications with lagged variables (see Note 6). Moreover, the time taken for the impact of litigation to work through into system change is hard to determine very precisely and is likely to take longer in different departments and for different authorities. This leads to the second caution, which is that the apparent association between litigation and CPA score may actually be a spurious one. That is, we may be seeing, in the change effect, the impact of a separate factor that is simultaneously driving the increase in litigation and the improvement in CPA score. Nevertheless, we consider these findings to be highly

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<sup>7</sup> We specifically tested for whether this effect was different at lower and higher levels of litigation and found no evidence to support such a position.

suggestive and while they may stand to be refuted or refined they are certainly consistent with the interpretation we have put on them – an interpretation which we develop in Part III.

We have been suggesting that low quality leads to litigation rather than vice versa. Nonetheless, it is often suggested that litigation is generated by lawyers, or that its occurrence is largely arbitrary, and that it has a detrimental effect on local authority services. Although our examination of the data indicated that the causal effect was unlikely to be in the direction of litigation lowering quality, we felt that this was a sufficiently important issue to warrant separate investigation.

We explored this issue by examining the relationship between the location of legal services publicly funded to undertake work in relevant fields of law and levels of litigation in local authorities. Using random effects estimation methods (as before), we modelled the relationship between legal services and levels of litigation, again controlling for authority level characteristics that might influence the number of legal services and the demand for legally aided representation (population size, demographics of the local population, deprivation score and type of authority). We also investigated whether the relationship was mediated by the quality of the authority.<sup>8</sup> The results from the models did not indicate a statistically significant association at conventional levels between the location of law firms and the prevalence of litigation, once we controlled for basic demographic characteristics of the authority. That is, there appeared to be an absolute and positive correlation

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<sup>8</sup> An issue with this model was the skew in the distribution of applications across authorities. We therefore explored various specifications of the dependent variable and the results were robust to all of them. When including the potential role of authority quality as a mediating factor, we again explored various specifications of these models, for example including CPA as both a continuous variable and a set of dummies. The same conclusions were indicated by the different specifications. Tables available from authors on request.

between the presence of law firms carrying out legally aided work in relevant fields and levels of litigation; but this effect reduced in size and became statistically non significant once we controlled for the age composition of the authority population, its deprivation, the proportion with long term illness in the authority and ethnic diversity. This suggests that the common claim that it is lawyers eager for work which determines the levels of litigation, a claim also repeated by certain of our respondents, is at best overstated and at worst groundless.

Interestingly, deprivation was positively and significantly associated with levels of judicial review challenge, even controlling for presence of lawyers. This is consistent with findings of Buck et al (2008) that those on benefit are more likely to seek advice in relation to justiciable problems but contrasts with the widely held view that those in this group are more likely to be ‘lumpers’ or sceptical of the worth of complaining or challenging public actions (Genn 1999; Cowan and Halliday 2003; Simmons et al 2007). The finding also indicates that law firms are attracted to areas of need, in terms of deprivation and marginalisation, rather than that they ‘create’ litigation regardless.<sup>9</sup>

This discussion of our quantitative study reveals associations between judicial review challenge and the quality of local authorities as measured by CPA. Significantly, it also indicates that increases in challenge appear to be connected to improvements in quality scores, and are not simply the consequence of lawyers making work for themselves. The findings provide a quantitative basis for arguing that judicial review

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<sup>9</sup> Contrast with our early finding in Sunkin *et al.* (2007). The finding in our earlier paper used a sample of all authorities, including districts, to explore the role of the lawyers. Part of the difference here may be the different sample (we exclude districts from this analysis) as well as the different estimation methods.



challenges may contribute to improvements in local government services and therefore that the effect of judicial review is neither insignificant nor wholly negative.

The analysis does, however, raise the question as to how and why judicial review acts to change the quality of local government services. One important element may be the ways in which challenges are resolved at the judgment stage and the implications of judgments for authorities. This is the issue we turn to next. We draw on two particular judgments and explore the processes by which they are resisted and drive change at local authority level. We observe that resistance and change are intimately intertwined as responses to judgment: it will be the most difficult or challenging decisions which simultaneously have the greatest potential to change the ways that authorities deliver services and attract the most resistance. We can only touch upon the complex processes, pressures and counter pressures involved in the implementation of judicial decisions by local authorities; but through these case studies we aim to shed light on some of the ways in which judgments can ‘matter’.

We utilise our qualitative interview data both in the following discussion and in Part IV. We conducted 42 interviews with key informants from selected local authorities, primarily local authority officers of different levels of managerial responsibility, which provided a range of insights into the ways in which judicial review can act, not simply as an irritant to local authorities but as a resource that contributes to the goals of local authorities as public service providers.<sup>10</sup>

### **Part III: Judicial review: public service and positive change**

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<sup>10</sup> The profile of our interviewees and our inductive approach is discussed more fully in Calvo et al. 2007 and in our end of award report (see: <http://www.esrcsocietytoday.ac.uk/>).

We looked closely at those decisions that officials identified as having had significant impacts on local authorities. By contrast to more routine cases, these were acknowledged to have been high impact, to have shaken authorities, and yet to have had positive effects. The decisions, therefore, were not necessarily representative of judicial review in general and nor were they necessarily concerned with routine matters (cf Halliday 2004, 6). They provide graphic illustrations of judicial review at its most challenging for local authorities. Two of the cases are particularly apposite in the context of this paper.

The first is the decision in *R(on the application of Behre) v London Borough of Hillingdon*.<sup>11</sup> Here Hillingdon was held to have mistaken the scope of its duties to former unaccompanied asylum seeking children who had been ‘looked after’ by the local authority. The court held that the authority had a legislative obligation to continue to provide after care services, including providing accommodation, until the claimants were 21 years old or beyond if they stayed in full time education.

At one level this was a straightforward case. The authority now knew that it had not been doing what it should and what the law required. In this sense, while critical of Hillingdon, the judgment had operational benefits in providing clarity. As one lawyer put it: ‘Certainly the ...the people who were consulting me ... didn’t see it as a big problem, they saw it as: “right we’re clear about that”.’ Another interviewee in children’s services echoed this: ‘it’s clarity. We know what our responsibilities are, we know how we’re supposed to deal with these things...’ (IDNO19).

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<sup>11</sup> [2003] EWHC 2075

The problem was that funding to deliver the services came from central government and Hillingdon, like other authorities, believed that the level of funding was inadequate (Free 2005; Refugee Council 2005). Here then is a somewhat typical problem of judges interpreting the law in a way that requires the provision of services that authorities say they cannot afford. It appears that the additional costs were such that many authorities were unable to fully implement the judgment and some appear not to have done so at all (Commission for Social Care Inspection 2005, 78). As one of our NGO respondents, told us: lack of funding meant ... it's sort of beyond the power of the local authority to implement the judgment' (IDNO40). Where authorities have responded many have done so formally (by listing claimants as falling under the relevant statutory provision) but without significantly altering the level of service provided. Free, for example, has observed that 'transferring support from section 17 to Section 20 support does not automatically mean that standards of care have risen' (2005, 16). As one local authority lawyer, put that: 'in the main [USAC claimants] are going to fall within Section 20, and you'd be foolish not to take that route in most of the cases. And I certainly think there was a sense in which we thought if we didn't go down that route [a local firm of solicitors] will be on to us and we'd be in difficulty further down the line' (IDNO5).

From the perspective of authorities the fundamental problem was that prior to the judgment they had already been doing what they considered possible given their budgets and the judgment did not deliver additional funds. If that were true the litigation drew attention to a real and important gap between legislative (and governmental) expectations and funding to enable effective delivery. Given the increase in the number of asylum seekers this gap was likely to grow. On one view it

was the judgment that created the problem. But arguably the judgment drew attention to a deeper problem: central government funding was inadequate to enable authorities to deliver the services that Parliament required. While creating problems for authorities the judgment also acted as a catalyst for intensive lobbying by local authorities for improved levels of funding.<sup>12</sup>

Our second case is *R (on the application of J) v Caerphilly County Borough Council*.<sup>13</sup> Here it was held that the local authority had failed in its duties to a minor who had left a young offender institution. The judge, Munby J, repeated his past criticism of the ‘mindset’ and ‘culture’ of local authorities who exclude families from decision making about establishing care plans for children (para [34]). This, he said: ‘may well involve breach of the family's rights, under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms’. Observing that it is ‘depressing to see the same attitude in the present case’ he went on to spell out what authorities should do in the future: ‘because the point is so important, and a clear statement of what is required may assist not merely this but other local authorities’ (para [34]).

No judgment could be more critical, nor more specific as to what authorities should do to improve. We were told that the decision ‘came out of the blue for’ and was ‘a shock to a lot of local authorities’. A respondent spoke of the judgment’s ‘harshness’.

There is a strong feeling from the interviews that officials doubted that the judge

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<sup>12</sup> See eg [www.londoncouncils.gov.uk/CSR2007youngasylumseekers](http://www.londoncouncils.gov.uk/CSR2007youngasylumseekers); the case was also discussed in Parliament: HC Deb 13 February 2004 vol 418 c23W. Since the decision Councils have continued to push for better funding and Hillingdon has brought unsuccessful judicial review proceedings against central government: *Hillingdon v Secretary of State for Education and Skills* [2007] EWHC 514

<sup>13</sup> [2005] EWHC 586

could really appreciate what it is like to have to deal with a young person who has a long history of difficulty. Officials considered that they just did the best they could for a young person who would not cooperate with them. Despite its initial devastating effect on the officials and the reputation of the authority, and an initial period when officials found it difficult to respond, when we asked whether the judgment could be considered helpful, we were told that: ‘It’s taken a long time to become helpful, yes. And I think “yes”’.

With hindsight, the judgment is seen to have had a ‘a massive effect’, and to have contributed to the improvement of services. In 2006 a major conference for authorities in Wales was held to discuss its implications and to showcase good practice and assist authorities that were still not compliant. Those in the authority directly affected are now proud of their achievements.

Both *Hillingdon* and *Caerphilly* presented very real problems for authorities. Neither was predicted and both called for major reassessments, in *Hillingdon* focusing on budget and service priorities, and in *Caerphilly* focusing on changing established professional practice. Both cases illustrated how judgments may have different impacts across authorities both in the short and longer terms. Both also illustrate how views of judicial review within authorities will vary depending on perspective. What some may see as a threat others will see as a benefit. What appears to be a threat in the short term is later recognised as having helped to improve matters. Consistent with our quantitative analysis, we can see, though, that judicial review can act as a form of shock, alerting authorities to gaps or responsibilities that demand a much more conscious reflection on what is delivered and the systems in place.

The importance of judicial review in cases such as these was presented in two ways: on the one hand as constituting a threat to be resisted, but on the other hand as an opportunity to change. How we can understand these twin aspects of judicial review litigation is the focus of the next section. We draw on conceptions of public service ethos and local authority ‘culture’ and the evidence from our interviews to understand the ways in which judicial review can make a difference.

#### **Part IV: The value of judicial review**

There are many reasons why judicial review may be seen as a threat by local authorities. Responding may be costly and unsettling and involve revisiting conventional practice and policies or budgeting priorities that have been carefully arrived at. Judgments may be opaque or ambiguous, and authorities might fear investing in responses to one decision only to find that others provide a different steer. They may be reluctant to make changes in one service area at the expense of performance elsewhere. Reluctance to embrace judicial decisions may also exist for local political reasons, as when decisions are perceived to further minority interests and possibly politically unpopular causes, typified by asylum seekers or the homeless; or if challenges are thought to reflect individualised problems deriving from particular litigious individuals (Hoggett 2005), or to have been stimulated by lawyers, rather by systemic shortcomings that need attention: in the experience of one of our respondents, ‘it’s often the child’s solicitor rather than the child’s parents ... who feels particularly strongly about something’ (IDNO3).

It is therefore hardly surprising that judicial review has been widely perceived as a threat to be defended against. But judicial review can be perceived more positively.

Authorities, for instance, are often willing to reconsider decisions and settle challenges in favour of claimants and this is a major reason why a substantial proportion of challenges drop from the process early on (Bondy and Sunkin 2009a; see also research from Australia: Creyke and McMillan 2004). Our research also found evidence confirming that authorities alter their systems or policies in response to challenges (Sunkin 2004). At least one London Borough has radically reorganised its system in order to improve its ability to respond to litigation by involving lawyers at an earlier stage in the decision-making process: a strategy that appears to have helped reduce the scale of litigation involving that authority.

Our interviews also showed judicial review to be viewed in a positive light by officials. It was striking that respondents who were engaged in judicial review at a variety of levels and in different ways, stressed their desire to do the ‘right thing’, which included doing their best to comply with the law, even if that was not easy. As one respondent put it: ‘local authorities tend to respond ultimately to what the court orders them to do, because that’s how local authorities operate’ (IDNO42). Certainly, respondents expressed a high degree of legal conscientiousness and a desire to comply with the law because it is right to do so, rather than because there are extrinsic reasons for doing so (cf Halliday 2004). Overall, officials expressed a strong desire to respect judicial review not out of self-interest or because of coercion, but as part of the way in which professional identities within local authorities are understood. As one official put it:

‘As a general point we were not sitting around worrying about judicial review and it’s not making us defensive. We’re much more proactive about doing things right than defensive about trying to avoid making mistakes’ (IDNO42).

This is compatible with the conventional wisdom regarding public service motivations in contrast with private sector motivations (Houston 2000). There is a substantial literature indicating that bureaucracies are underpinned by a range of values which drive service delivery. Paul du Gay has been at the forefront of the 'defence' of bureaucracy (du Gay 2000); and more recently he edited a collection supporting the concept (and existence) of a 'public service ethos' (du Gay 2005). du Gay has argued that the bureau, (which encompasses public administrations such as local authorities) is a moral institution which embodies values, such as 'fairness' or 'impartiality'. Its proceduralism is necessary for 'allocating scarce resources... by using consistent, fair and therefore legitimate means' (Hoggett 2005, 169). And these values are central to the 'professional identity' of the bureaucrats and are expressed through their actions. As Miller (2005) points out, the public service ethos remains of fundamental importance to many public servants and a core part of their professional identity: 'If you work in education and medicine you do not need to establish your identity as a public servant; if you work in generic public service this is exactly what you are inclined to do' (p.249). Furthermore, Gregg et al. (2008) have demonstrated that those in the not-for-profit sector have higher levels of 'pro-social' behaviour, as measured by voluntary work.

Certainly, there are reasons why judicial review might be experienced as helpful to public officials. Hoggett (2005) develops du Gay's argument by proposing that it is discretion that is fundamental to the role of public servants. He makes the case that it is not impartiality that characterises the public servant so much as the need to reconcile tensions between competing claims with fairness and justice. This tension, he argues, is unavoidable given that the claims of universalism and of particularism



are inevitably at odds with one another; and that the ideals of the welfare state will coexist with its disciplinary aspects, leading to the distinctions made by officers between ‘deserving’ and ‘undeserving’ claimants . Moreover, ‘there are other value contradictions that must be reconciled by public officials on a daily basis. Besides the tension between universalism and particularism, perhaps the most crucial is the inherent tension between an ethic of care and an ethic of justice’ (Hoggett 2005, 175). Hoggett argues that on the one hand public officials are concerned to deal sensitively with the case in hand; but that they are alert to the existence of others who deserve care who are not coming to their attention in the same way. He further argues that while such tensions are irresolvable it is essential to the health of public life that they are worked through. Judicial decisions can help clarity by upholding the claims of the abstract many behind the individual claimant. This was made clear by an interviewee who explained the effect of a judgment on the vulnerability of a particular client group for purposes of housing. The decision saved officers from having to ponder each case in order to determine what would be a fair outcome. ‘I think as the law has been clarified we’ve been clearer as to what our advice to the client department should be and we’ll be saying “you’ve got a duty to meet needs here” ...’ (IDNO5).

Judicial review similarly offers opportunities to reallocate resources to under-resourced areas that have suffered from budget setting driven by more populist concerns. Thus they offer potential to reorient or rebalance systems of allocation in a more ‘just’ fashion. As one of our respondents expressed it when discussing the situation in relation to care leavers prior to *Caerphilly*: ‘local authorities would probably tell you it was because they weren’t resourced to do it, but actually the reality was they weren’t educated’ (IDNO39). Here the reference to being ‘educated’

implies both a lack of direct knowledge, but also a failure to recognise the merits of claims that could be made by care leavers. In addition, such court rulings will enable politically sensitive allocations to be pursued, in line with the overall goals of public provision: ‘the council would rather have the court telling them they have to do it because then they can say “...the budget will have to be constructed to enable this work to be done”’ (IDNO15). By such adjustments of emphasis, judicial review can empower particular individuals within a bureaucracy to initiate change or improve quality. Individuals clearly matter to how authorities are run and perform, and judicial review may enable new key players to emerge, who can go on to have a significant impact on the future direction and culture of an authority.

In our conclusions we suggest that while judicial review litigation, at both the challenge and the judgment stage, can result in defensive responses and be regarded as having little bearing on the main work of local authorities, it can be a resource for local authorities. It does not necessarily make sense to separate out the defensive and positive elements of response. Judicial review, far from being an irrelevance, has the potential to provide opportunities for authorities to develop in ways which are consistent with an underlying (if occasionally well-hidden) public service ethos.

## **V Conclusions**

Our quantitative analysis shows that judicial review litigation may act as a modest driver to improvements in the quality of local government services, at least in so far as quality is defined by the government’s performance indicators. The effect of litigation in this regard occurs when the incidence of challenge increases from that typically experienced by the authority.

Our interviews also show that judicial review litigation matters to local authorities, although it is seen to matter in different ways to officials depending on their level and the nature of their engagement with it, the ways that it rebalances the interests of their sector or their influence, and over time. In this respect our qualitative findings broadly reflect the range of factors identified by Halliday as influencing the likely impact of judicial review, that is to say that impacts will tend to vary depending on such matters as the level of legal conscientiousness amongst officials and whether there is convergence or dissonance between the demands of the law and the demands of the decision-making environment (Halliday 2004). Our key cases illustrate how non-routine judicial decisions may shock local authorities, but lead to changes that are widely perceived to be positive by officials. There were certainly many indications in our interviews that judicial review is considered to have improved the quality of decision making: ‘it has made our decision process more solid. We’re also probably making better decisions and the right decisions where perhaps before we weren’t’ (IDNO10). An important issue here, and one worth of further investigation is the extent to which it is the potential of judicial review to empower local authority officers to make ‘better decisions’ that lies at the heart of its impact and whether its overall effect on the local authority is negative or positive. Where officers simply feel embattled or constrained by litigation, the impact may well be less positive (and thus the overall association of high levels of litigation with poorer quality services). By contrast, where judgments can give them clarity and confidence to pursue just outcomes, local authorities and the populations they serve may well benefit.

It is also clear that the influence of judicial review cannot be understood solely in terms of coercive sanctions or its ability to impose costs. Nor should judicial review be viewed as constraint to which authorities react in predominantly defensive ways. Judicial review has the capacity to challenge and to do so from an awkward and often unpredictable angle. It may create significant problems for authorities and may also undermine morale. Responding to litigation may also be felt to distract from service delivery:

‘the big problem for local authorities is that the stoplight goes on one case, you have to invest a great deal of time and effort in supporting it and actually that’s the time when the other things start to fall apart and then somebody else comes along and says you’re not doing your job properly and they’re probably right because of the disproportionate allocation of time and attention’ (IDNO3).

And attending to threats of judicial review was also seen as reducing responsiveness and speed of delivery.

But, even at its most intrusive, as in our high impact illustrations, it would be misleading to view judicial review as being an external threat that is wholly negative, especially over a longer period. Typically, the literature on incentives assumes a rather instrumental equation: poor practice must be penalised by sanctions, largely seen as financial penalties, if good practice is to be encouraged. Our research provides a picture that is rather less monotone and reveals attitudes that are much more nuanced in their approach to judicial review.

There are strong associations between the values of public service and fidelity to law and both are intimately connected with the responsibility of local authorities to serve the public interest. It is not surprising that officials should view judicial review litigation in a positive light. The connections between the goals of public

administration and the courts has been emphasised by judges, most famously by Lord Donaldson MR when he referred to the partnership between judges and public authorities ‘... based on a common aim, namely the maintenance of the highest standards of public administration’.<sup>14</sup> The mutuality of the aims of the law and of public administration provides a fundamental reason for authorities to respect judgments: it is in the public interest and therefore in their interest to do so.

Moreover, judicial review is also an important resource for local authorities, enabling change in response to judgments that are rooted in grievances arising from peoples’ experience of services and giving expression to claims that might otherwise be neglected as being politically unpopular. As well as guiding authorities as to their legal duties, judgments give expression to the needs of individualised administrative justice; to the requirement that public authorities are able to justify their actions in law and that they act fairly and in a manner that is compatible with human rights. These requirements are not foreign to public administration. On the contrary they accord with the ethos of public service and are of value to administrators as they resolve tensions that lie at the heart of their tasks. Such values are endogenous to the way authority construct their best interests. The image of judicial review that is provided by our research is rather more positive than is commonly presented.

## References

- Bondy, Varda and Maurice Sunkin, 2008. Accessing Judicial Review. *Public Law*: 647-667.
- . 2009a. Settlement in Judicial Review Proceedings. *Public Law*: 237-259.
- . 2009b. *The dynamics of judicial review litigation: The resolution of public law challenges before final hearing*, London: Public Law Project.
- Bridges, Lee, George Meszaros and Maurice Sunkin. 1995. *Judicial Review in Perspective* (2<sup>nd</sup> ed). London: Cavendish Publishing.

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<sup>14</sup> Lord Donaldson MR in *R v Lancashire CC ex parte Huddleston* [1986] 2 All ER 941.

- Buck, Alexy, Pascoe Pleasence, and Nigel J Balmer. 2008. Do citizens know how to deal with legal issues? Some empirical insights. *Journal of Social Policy* 37(4): 661-81.
- Calvo, Kerman, Lucinda Platt, and Maurice Sunkin. 2008. Does judicial review influence the quality of local authority services? Institute for Social and Economic Research Working Paper 2007-34. Colchester: University of Essex.
- Campbell, Catherine, and Carl McLean. 2003. Social capital, local community participation and the construction of Pakistani identities in England: implications for health inequalities policies. *Journal of Health Psychology*, 8(2): 247-262.
- Canon, Bradley C. 2004. Studying bureaucratic implementation of judicial policies in the United States: Conceptual and methodological approaches. In *Judicial Review and Bureaucratic Impact: International and Interdisciplinary perspective*, eds M. Hertogh, and S. Halliday, S, 76-101. Cambridge: Cambridge University Press.
- Commission for Social Care Inspection. 2005. *Safeguarding Children: The Second Joint Chief Inspectors' Report on Arrangements to Safeguard Children*, London: CSCI.
- Cowan, David and Simon Halliday. 2003. *The appeal of internal review*. Oxford: Hart.
- Clarke, John. 2005. Performing for the public: doubt, desire and the evaluation of public services. In *The values of bureaucracy*, ed P. du Gay, 211-233. Oxford: Oxford University Press.
- Creyke, Robin, and John McMillan. 2004. Judicial Review Outcomes – An Empirical Study, *Australian Journal of Administrative Law* 11: 82-100.
- Fréchette, Guillaume R. 2001. Random-Effects Ordered Probit. *Stata Technical Bulletin* 59: 23-27.
- Free, Elli. 2005. Local authority support to unaccompanied asylum-seeking young people: Changes since the Hillingdon Judgment. Save the Children research report. London: Save the Children.
- Gambitta, Richard. 1981. Litigation, judicial deference and policy change. *Law & Policy* 3(2):141-165.
- du Gay, Paul. 2000. *In praise of bureaucracy: Weber, organisation, ethics*. London: Sage.
- (ed). 2005. *The Values of bureaucracy*. Oxford: Oxford University Press.
- Genn, Hazel 1999. *Paths to justice*, Oxford: Hart.
- Gregg, Paul, Paul A. Grout, Anita Ratcliffe, Sarah Smith, and Frank Windmeijer. 2008. How important is pro-social behaviour in the delivery of public services? Research Paper, The Centre for Market and Public Organisation 07/197, Department of Economics: University of Bristol.
- Halliday, Simon. 2004. *Judicial review and compliance with administrative law*, Oxford: Hart.
- . 2000. The influence of judicial review on bureaucratic decision-making. *Public Law*: 110-122.
- Hertogh, Marc, and Simon Halliday, S, eds. 2004. *Judicial review and bureaucratic impact: International and interdisciplinary perspectives*, Cambridge: Cambridge University Press.
- Hoggett, Paul. 2005. A service to the public: the containment of ethical and moral conflicts by public bureaucracies. In *The values of bureaucracy*, ed. P. du Gay, 165-191. Oxford: Oxford University Press.

- Houston, David. J. 2000. Public-service motivation: a multivariate test. *Journal of Public Administration Research and Theory* 10(4): 713-727.
- Jacobs, Rowena, and Maria Goddard. 2007. How do performance indicators add up? An examination of composite indicators in public services'. *Public Money and Management*, 27(2): 103-110.
- Jowell, Jeffrey. 2007. The rule of law and its underlying values. In *The Changing Constitution* (6<sup>th</sup> ed.), eds. Jeffrey Jowell and Dawn Oliver, 5-23. Oxford: Oxford University Press.
- Law Commission. 2008. Administrative redress: Public bodies and the citizen. Consultation Paper No. 187. London: Law Commission.
- Levinson, Daryl J. 2000. Making governments pay: markets, politics and the allocation of constitutional costs. *University of Chicago Law Review* 67: 345.
- Lewis, Clive. 2004. *Judicial remedies in public law* (3rd ed.), London: Sweet & Maxwell.
- Loveland, Ian. 1995. *Housing homeless persons: Administrative law and process*, Oxford: Oxford University Press
- McLean, Ian, Dirk Haubrich, and Roxana Gutiérrez-Romero. 2007. The perils and pitfalls of performance measurement: the CPA regime for local authorities in England. *Public Money and Management*, 27(2): 111-118.
- Miller, Daniel. (2005) What is best 'value'? Bureaucracy, virtualism and local governance. In *The values of bureaucracy*, ed. P. du Gay, 233-257. Oxford: Oxford University Press.
- Needham, Catherine. E. 2006. Customer care and the public service ethos. *Public Administration* 84(4): 845-860.
- O'Leary, Rosemary. 1989. The impact of federal court decisions on policies and administration of the U.S. Environmental Protection Agency, 41 *Administrative Law Review*:549-574.
- Refugee Council. 2005. Ringing the changes: The impact of guidance on the use of Sections 17 and 20 of the Children Act 1989 to support unaccompanied asylum-seeking children. London: Refugee Council.
- Richardson, Geneva, and Maurice Sunkin. 1996. Judicial Review: Questions of Impact. *Public Law*: 79-103.
- Richardson, Geneva. 2004. Impact Studies in the UK. In *Judicial Review and Bureaucratic Impact: International and interdisciplinary perspectives*, eds. Marc Hertogh and Simon Halliday, S, 103-129:Cambridge: Cambridge University Press.
- Rosenthal, Lawrence. 'A theory of governmental damages liability: torts, constitutional torts and takings', *Journal of Constitutional Law*, 9(3) 793-870.
- Simmons, Richard A, Johnston Birchall, and Alan Prout. 2007. Hearing voices: user involvement in public services. *Consumer Policy Review* 17(5): 234-240.
- Sunkin, Maurice and Kathryn Pick. The changing impact of judicial review: The independent review service of the social fund. *Public Law*: 736-762.
- Sunkin, Maurice. 2004. Conceptual issues in researching the impact of judicial review on government bureaucracies. In, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary perspectives*, eds. Marc Hertogh and Simon Halliday, S, 43-76. Cambridge: Cambridge University Press.
- Sunkin, Maurice, Kerman Calvo, Lucinda Platt, and Todd Landman. 2007. Mapping the use of judicial review to challenge local authorities in England & Wales. *Public Law*: 545-567.

## Appendix: Descriptive Statistics

Means and proportions of variables in regression models across authority-year observations (N=596)

	Mean (sd)	Proportion with characteristic (%)
Litigation	4.7 (9.6)	
Change in litigation	-.3 (4.9)	
Number of lawyers	10 (17.2)	
<i>CPA score</i>		4
0		4
1		11
2		24
3		40
4		21
<i>Local authority type</i>		
London Borough		23
County Council		21
Metropolitan / Unitary Authority		56
Logged population	12.5 (0.7)	
Aged 0-15		20
Aged 75+		7
Long term ill		18
Carers		10
White ethnicity		84