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## Administrative Justice and Empirical Legal Research

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**Administrative Justice and Empirical Legal Research:  
Debunking the Ordinary Religion of Legal Instrumentalism** 

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## Abstract and Keywords

For many years, most studies on administrative justice were written from a doctrinal legal perspective. More recently, however, administrative justice has also become the subject of a growing body of empirical research. This chapter provides an overview of empirical administrative justice research in three fields: administrative decision-making, redress mechanisms, and the impact of redress mechanisms on administrative practice. In legal doctrine, ‘legal instrumentalism’ has become central to thinking about administrative justice. However, the findings from empirical research provide little support for the underlying assumptions of instrumentalism. In this way, empirical legal research forces us to rethink the relationship between administrative law and administrative justice. The chapter concludes that while in some cases law and legal institutions may be an effective instrument to promote administrative justice in other cases, the direct impact of law is severely limited and law may even have a negative effect on the quality of administrative justice.

Keywords: empirical legal studies, decision-making, redress mechanisms, instrumentalism, methods

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[T]he normative structures created by legislation and by judicial decisionmaking are often, if not usually, removed from the concrete experience of bureaucratic implementation.

Mashaw (1983: 11)

## 1. Introduction

Administrative justice research looks at how justice is delivered through the decision-making of public bodies and the redress systems through which decisions can be challenged. For many years, most studies were written from a doctrinal legal perspective. This work looks at administrative justice through the lens of administrative law. More re-

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cently, however, administrative justice has also become the subject of a growing body of empirical research. These studies shift the focus from the 'law in the books' to the 'law in action' (Pound, 1910). Moreover, these studies take a wider perspective on administrative justice. They not only focus on the rules of administrative law, but they also examine the role of government bureaucracies, front-line officials, and the users of administrative justice systems. This chapter will discuss the main findings from this body of research. Empirical legal research allows us to test important underlying assumptions of legal doctrine and forces us to rethink the relationship between administrative law and administrative justice. The purpose of the chapter is also to serve as an appetizer for this section of the *Handbook*. Many of the themes that will be briefly touched upon in this chapter will be discussed in more detail in the following chapters.

The chapter will first explain the main methodological differences between a legal doctrinal and a legal empirical approach to administrative justice (section 2). Next, it will discuss some of the findings from empirical administrative justice research in three fields: administrative decision-making, redress mechanisms, and the impact of redress mechanisms on administrative practice (section 3). The chapter will then discuss several general lessons from this body of research. In the doctrinal literature, 'legal instrumentalism' has become central to thinking about administrative justice. Here, administrative law is primarily seen as a means to an end: administrative courts, ombudsmen, and other institutions are seen as effective tools to influence the organization and practice of public administration. However, based on the findings from empirical administrative justice research, it will be argued that there is little empirical support for two central assumptions of instrumentalism (section 4). Empirical research shows that perfect legal knowledge is less self-evident than the instrumentalist paradigm suggests. Also, empirical research contradicts the assumption that the state (and the courts) have a monopoly over the regulation of interaction. Against the background of these findings, the final section of the chapter will discuss some future challenges for empirical administrative justice research (section 5).

## **2. An Empirical Approach to Administrative Justice**

Although much research on administrative justice is conducted from a doctrinal legal perspective, some empirical research has also been long present in public law scholarship (Halliday, 2012; see also the chapter by Sunkin in this volume). In the context of law, empirical research can be described as 'the systematic and objective collection and classification of observations of social events, circumstances or processes relevant for the operation or the understanding of the law in society' (Van Boom, Desmet, and Mascini, 2018: 7). This systematic collection of information can be based on both qualitative research (using, for example, observations and interviews) and quantitative research (based on surveys and statistics). This (broad) definition of empirical legal research does not in-

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clude traditional historical studies and traditional studies of formal legal documents (like court decisions and legislative materials) (see Cane and Kritzer, 2010: 4–5).

## **2.1 Empirical Legal Research**

In the context of administrative justice, there are roughly three different schools of empirical legal research (see Cane and Kritzer, 2010). Since the early 1970s, political science has produced a series of publications on judicial behaviour and the impact of court decisions. Administrative justice also plays an important role in (mostly US based) ‘law and society scholarship’ and in (mostly European and British) ‘socio-legal studies’. Finally, in the past two decades there has been a rapid development of a movement, which is often referred to as Empirical Legal Studies (ELS). This school is usually associated with empirical research based on statistical and other quantitative methods. As indicated before, this chapter uses a broad definition of the term ‘empirical’ and it will cover all three schools of empirical legal research.

In general terms, empirical studies of administrative justice focus on the ‘law in action’, as opposed to the ‘law in the books’ (the primary topic of most legal research). Empirical legal research focuses on the effects of legal instruments or views law in its social context. Also, the empirical study of law is thought to provide a ‘more realistic view on what the law is, what it does and how it can be improved’ (Van Boom, Desmet, and Mascini, 2018: 2). In this way, ‘empirical research has the enriching potential to inform, underpin and also debunk doctrinal research’ (6). Compared to doctrinal legal research, empirical legal research is based on different methodological premises (6–7). Firstly, empirical legal research is committed to ‘value freedom’. Whereas in doctrinal research the ‘is’ and the ‘ought’ are often indistinguishable, empirical researchers usually limit themselves to describing or explaining. Secondly, while in doctrinal research authority arguments often play a role in the weight that is attributed to legal sources, empirical research is determined by universal criteria such as reliability and validity. Finally, whereas doctrinal research often focuses on individual cases, in empirical research data are analysed systematically with the aim of broadening understanding from the specific to the general.

## **2.2 Administrative Justice**

Most empirical administrative justice research focuses on three fields: administrative decision-making, redress mechanisms, and the impact of redress mechanisms on the process of decision-making (see Halliday and Scott, 2010). The first field focuses on the application of law and policy in government agencies. This field of research interprets ‘administrative justice’ as referring to ‘the justice of the primary administrative process: what model(s) of justice is (are) implicit in agencies’ administrative and rule-making operations?’ (471). The second field of research focuses on various institutions and processes of redress and grievance handling. Here, ‘administrative justice’ refers to ‘a subsystem of dispute resolution within the overall architecture of the legal system.... In this work, the focus is on citizens seeking justice, after the event, for their plight as the subjects of the administrative process’ (471). The final field of research links the previous two fields of

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decision-making and review. These studies examine the impact of redress mechanisms in terms of their influence on decision-making within public agencies. This research mostly focuses on judicial review, but there are also studies on (the impact of) the ombudsman, tribunals, and other similar institutions.

### **3. Three Fields of Empirical Administrative Justice Research**

This section provides an overview of empirical administrative justice research in three fields: administrative decision-making, redress mechanisms, and the impact of redress mechanisms on administrative practice.

#### **3.1 Studies on Administrative Decision-Making**

A first field of empirical administrative justice research examines the everyday practice of administrative decision-making (see also the chapters by Martin and Raaphorst in this volume)

##### **3.1.1 Street-Level Bureaucracies**

Since Lipsky's (1980) pioneering work, students of public administration and administrative justice have recognized that public policy 'is not best understood as made in legislatures or top-floor suites of high-ranking administrators', but is, in important ways, actually made 'in the crowded offices and daily encounters of street-level workers' (Lipsky, 1980: xii). Typical features of these 'street-level bureaucrats' or 'front-line officials' is that they work directly with the public and they have wide discretion over the dispensation of benefits or the allocation of public sanctions (see Hupe, Hill, and Buffat, 2015; Maynard-Moody and Portillo, 2010; Zacka, 2017). Detailed empirical studies of, for example, welfare and taxing officers (Buffat, 2015; Walker, 2015), housing officials (Cowan, Halliday, and Hunter, 2006; Hunter et al., 2016), and regulatory inspectors (Hawkins, 2002; Lehmann Nielsen, 2015; Loyens, 2015) have revealed how they use various coping mechanisms to deal with limited resources and excessive demand.

An important theme in the literature is 'the nature and extent of discretion granted to officials and how that discretion is exercised' (Halliday and Scott, 2010: 474). In their study of 'cops, teachers and counselors', for example, Maynard-Moody and Musheno (2000; 2003) distinguish between two different narratives of discretion. In their view, the dominant scholarly narrative starts from the premise that street-level workers are 'state-agents'. They are basically government employees who are charged with carrying out the plans and policies of government agencies. Moreover, this view acknowledges the inevitability of discretion and emphasizes that self-interest guides street-level choices; they use their discretion to make their life easier, safer, and more rewarding. Based on extensive fieldwork in five agencies, however, Maynard-Moody and Musheno (2000) argue that

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street-level workers themselves tell a different story in which they see themselves as ‘citizen-agents’ instead:

Rather than discretionary *state-agents* who act in response to rules, procedures, and law—sometimes following the rules, other times bending or ignoring them—street-level workers describe themselves as *citizen agents* who act in response to individual citizen clients in specific circumstances.

(Maynard-Moody and Musheno, 2000: 348; my emphasis)

Similarly, based on an extensive empirical study of an administrative agency in the United States, Kagan (1978) has developed an analytical framework to study how public officials use their discretion in the application of legal rules (see also Kagan in this volume). Kagan makes a distinction between adherence to the legal rules by public officials and their emphasis on the realization of organizational ends. On the basis of these dimensions, he then distinguishes between four different modes of rule application: the ‘judicial mode’, ‘legalism’, ‘unauthorized discretion’, and ‘retreatism’. In the first mode, public officials try to combine allegiance to official policies with the rules; the second mode reflects on official means without adequate attention to their original ends; the third mode is an emphasis on certain substantive ends without regard for the rules; and the final mode is characterized by avoidance of decisions. Kagan (1978: 91) himself refers to the ‘judicial mode’ as ‘the preferred pattern of rule application in American regulatory agencies’, and he characterizes the other three remaining patterns as ‘deviant’ modes (Kagan, 1978: 92).

### 3.1.2 Models of Administrative Justice

Mashaw (1983) has translated these and other similar insights into different models of administrative justice (see also the chapter by Mashaw in this volume). In his empirical study of the US Social Security Agency, he does not apply a strict legal definition but he uses a ‘pluralistic understanding’ (Halliday and Scott, 2010: 475) of administrative justice instead. Mashaw defines administrative justice as ‘the qualities of a decision process that provide arguments for the acceptability of its decisions’ (Mashaw, 1983: 24). Based on a review of the literature, he has constructed a threefold typology. His first model of administrative justice is termed ‘professional treatment’: the goal of the system is to meet the needs of the individual claimant. The second model is that of ‘moral judgment’. The central idea of this model is that the claimant is someone who has come to claim a right and he/she should be given a fair opportunity to participate in the process of adjudicating this right. The third model of administrative justice is referred to as ‘bureaucratic rationality’. This model is mostly focused on efficiency and cost-effectiveness. Building on Mashaw’s work, Adler (2006) has also suggested several additional models of administrative justice to reflect the increasing influence of New Public Management on public administration. Moreover, other researchers have used Mashaw’s typology in their own empirical work on, for example, social welfare administration in the UK (Sainsbury, 2008), the UK’s Inde-

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pendent Review Service of the Social Fund (Sunkin and Pick, 2011), and the Refugee Review Tribunal of Australia (Richards, 2015; 2018).

### **3.2 Studies on Redress Mechanisms**

A second field of empirical administrative justice research focuses on redress mechanisms (like the courts/tribunals and the ombudsman) and the users' perceptions and experiences of these mechanisms.

#### **3.2.1 Users of Administrative Justice Systems**

In a pathbreaking study, Genn (1999) has used a national survey in England and Wales (with additional qualitative interviews) to identify how often people experience problems for which there might be a legal solution and how they set about solving them. This study, which focused on the civil justice system, has also been repeated in similar 'legal needs' studies in many other countries (see Pleasence, Balmer, and Sandefur, 2016). In the Netherlands, for example, similar studies were conducted in 2003, 2009, and 2014, which included (potential) legal problems in both civil and administrative law. The researchers observe a decreasing trend in the share of respondents who experienced one or more problems during a five-year period: from 67 per cent in 2003, to 61 per cent in 2009, to 57 per cent in 2014. Also, judicial procedures as a percentage of all problems show a decreasing trend from 6 per cent in the first to 4 per cent in the latest study. The share of extrajudicial procedures, including objectives against administrative decisions, increased over time, from 6 per cent in 2003 to 11 per cent in 2014 (Ter Voert and Klein Haarhuis, 2015: 209).

Summarizing the findings from both quantitative and qualitative research, Halliday and Scott (2010: 477) identify two different types on barriers for the use of administrative justice systems. On the one hand, research points to several 'practical' barriers such as cost, procedural complexity, ignorance, and physical accessibility (e.g. Adler and Gulland, 2003). On the other hand, research also reveals important 'attitudinal' barriers such as scepticism, fatigue, faith in the rectitude of rules, and satisfaction (e.g. Cowan et al., 2003). Both types of barriers are also reflected in empirical research on the ombudsman. Combining the findings from a number of ombudsman institution in Europe and elsewhere, Hubeau (2018) has identified, what he calls, a 'Matthew effect' in the profile of complainants. '[A]lthough ombudsman services tend to be regarded as an institution that is open to all, and particularly to vulnerable people, those in the most vulnerable categories often do not find their way to the institution' (Hubeau, 2018: 259). International research conducted in the past thirty-five years suggests that the typical profile of complainants is that of 'a middle-aged, highly educated man or woman with a substantial income, who possesses sufficient bureaucratic competence and who is willing to clear a few hurdles' (Hubeau, 2018: 261).

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### **3.2.2 Redress Mechanisms in Action**

Contrary to most legal studies—that look exclusively at the final decisions of courts, tribunal or ombudsmen—empirical research also opens up the black box of the everyday operations of these redress mechanisms in action. For example, Baldwin, Wikeley, and Young (1992) have studied tribunal hearings and have analysed when and how inquisitorial methods were used. Also, in his study of the Refugee Review Tribunal of Australia, Richards (2018) explores the legal and moral values that the members of this tribunal use to make their decisions. Building on Mashaw (1983), he argues that while previously public officials were generally driven by their concern for bureaucratic rationality, professional treatment, moral judgment, and the logics of ‘new managerialism’, contemporary public officials (including tribunal members) show a greater concern for the protective parameters of the rule of law, a purposive pursuit of fair outcomes and a commitment to flexible decision-making.

In addition to the work of administrative tribunals and courts, empirical research has also been used to study the work of the ombudsman. For example, both Gilad (2008) in her study of the UK Financial Services Ombudsman and Dahlvik and Pohn-Weidinger (2018) in their study of the Austrian Ombudsman Board have used extensive observations and interviews with ombudsman staff members. Their research shows how these complaint handlers operate as effective gatekeepers and have therefore a profound influence on the everyday complaint-handling by their ombudsman office.

### **3.2.3 Users’ Experiences**

Empirical research also examines users’ experiences of administrative justice mechanisms. Genn, Lever, and Gray (2006), for example, examined users’ perceptions of three different public law tribunals in the UK. They found that Minority Ethnic respondents were consistently more negative than other groups in the assessment of tribunal hearings, but are less likely to be so if the tribunal panel is ethnically diverse.

In a detailed comparative study, Creutzfeldt (2018) has analysed users’ perceptions of ombudsman services in the UK and Germany. Her study reveals different motivations for bringing a complaint to the ombudsman. While, for example, UK respondents mostly wanted someone to listen to them and wanted to prevent others from having the same problem as themselves, German respondents wanted to be given what was owed financially and what they felt was their legal right (Creutzfeldt, 2018: 82). She argues that the relationships people have with the ombudsman (and other institutions of the informal justice system) are shaped by their experiences with the formal legal system. Moreover, people’s expectations of informal justice are rooted in practices of (national) socialization (Creutzfeldt, 2018: 156).

To analyse their empirical data about user’s experiences with the court or the ombudsman, researchers often use the theoretical framework of ‘procedural justice’. The vast literature on procedural justice originated in experimental research in social psychology (Thibaut and Walker, 1975). Tyler (1990) has demonstrated that people do not only comply with laws and regulations through fear of punishment or self-interested motives.



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Rather, the perceived legitimacy of legal authorities also has a role to play, and those who consider the courts and the police more legitimate are more likely to obey the law (Jackson et al., 2012).

This work has also influenced administrative justice scholars (see also the chapter by Creutzfeldt in this volume). For example, Grootelaar and Van den Bos (2018) have analysed the importance of litigants' perceived procedural justice for their trust in judges. Based on a large survey among nearly 500 litigants (conducted after both administrative and criminal court cases in the Netherlands), they found that perceived procedural justice was positively associated with trust in judges when outcomes were relatively favourable. Moreover, this association was even stronger when outcomes were relatively unfavourable. Creutzfeldt and Bradford (2016) have used a similar approach to study users' experiences with the ombudsman. Based on a survey among more than 1,700 recent users of two public and two private ombudsman institutions in the UK, they asked what motivates people to accept decisions made by an ombudsman. Their study found that outcome favourability and procedural justice are key factors shaping decision acceptance; however, outcome favourability has a more important weighting in this context than is often the case in other studies, for example of policing.

### **3.3 Studies on the Administrative Impact of Redress Mechanisms**

Linking the first and the second field, a third field of empirical administrative justice research examines the impact of redress mechanisms on administrative decision-making.

#### **3.3.1 Impact of the Court**

Since the early 1970s, judicial impact studies have been a prominent field of political science (especially in the United States). After an initial period of descriptive studies—registering the reactions and the behaviour of public officials and the general public—researchers also began to develop explanatory hypotheses and theoretical approaches. In one of the earliest collections of impact research at the time, for example, Wasby (1970) lists a total of 135 hypotheses that were derived from the existing impact literature. Canon and Johnson (1999) in their survey of the literature discuss nine competing theories of impact, ranging from psychological and utility theories to approaches from communications and organizational theory. One of the most influential—and most controversial (see, e.g., Schultz, 1998)—judicial impact studies is Rosenberg's (1991) book *The Hollow Hope: Can Courts Bring About Social Change?* This study focuses on two important cases of the US Supreme Court, which are often cited as examples of the courts' involvement in social change: *Brown v. Board of Education* and *Roe v. Wade*. Based on a detailed empirical analysis, Rosenberg documents both the direct and indirect effects of the courts' decisions and he finds them to be insignificant. Analysing the effects of *Brown* on school segregation, for example, Rosenberg argues that congressional and executive actions—as well as a determined civil rights movement—were the real agents of change.

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Other studies have also focused more explicitly on issues of administrative justice, by studying the impact of judicial review on administrative agencies (see, e.g., Halliday, 2004; Hertogh and Halliday, 2004). Both Richardson (2004) and Platt, Sunkin, and Calvo (2010) present an overview of some of the most important research in this field in the UK. Also, Sunkin (2004) has identified a number of conceptual issues in researching the bureaucratic impact on judicial review. Hertogh (2001) has proposed an analytical framework for assessing the extent to which courts will influence administrative decision-making. This framework conceptualizes the process of administrative decision-making as three consecutive phases. Each phase is concerned with a crucial decision with regard to the implementation of court decisions. In the first phase, *information*, officials ask what this ruling by the court said. In the second phase, *transformation*, they ask what this ruling means for them. And, finally, in the third phase of *processing*, they ask what they should do with the ruling. This analytical framework is based on the idea that, during each of the three phases of the decision-making process, the implementation of court rulings can be obstructed by three barriers for policy impact. During the first phase, it is especially important that officials feel that they are confronted with clear and well-formulated rulings. During the transformation phase, the implementation is determined by the 'policy-tension' between the court's decisions and the policies of the agency concerned. In the third and final phase, defensive reactions play an important role. This analytical framework has also been applied and modified in other studies, including a study of administrative impact of court decisions on the Dutch Immigration and Naturalization Service (Wijkhuijs, 2007) and a study of 'executive acquiescence' to constitutional norms and judicial decision-making in South Africa (Konstant and Vance, 2015).

### **3.3.2 Impact of the Ombudsman**

Several empirical studies focus on the impact of various ombudsman institutions on administrative decision-making and examine whether government can learn from the ombudsman. Van der Vlugt (2018) has also studied the impact of the ombudsman on the police. While some of these studies have produced rather pessimistic or ambivalent findings and suggest that the impact of the ombudsman is limited (e.g. Hill, 1972; Gill, 2012; Steyvers and Reynart, 2009; Van Acker and Bouckaert, 2018), other studies are more positive about the ombudsman's influence on administrative decision-making (e.g. Hertogh, 2001; Kostadinova, 2015; Steimatycki et al., 2015). In a recent review of these and other empirical studies, Gill (2018) concludes that this body of research provides some support for those who emphasize that the ombudsman can help governments to learn. However, these individual studies do not yet provide a robust evidence base for strong conclusions about the administrative impact of the ombudsman.

## **4. The ‘Ordinary Religion’ of Legal Instrumentalism**

In doctrinal legal scholarship, law is considered an effective instrument to promote administrative justice. According to Adler (2010: 156), administrative justice means that ‘everyone receives what is due to them, both in terms of how they are treated by administrative agencies and in terms of what they receive from them’. Based on different enforcement and compliance mechanisms, he distinguishes three contrasting approaches to administrative justice, which he refers to as the ‘administrative law approach’, the ‘justice in administration approach’, and the ‘administrative justice approach’ (154). However, in all three approaches administrative law and administrative courts are seen as powerful tools to achieve administrative justice. This illustrates a common approach to law, which is often referred to as ‘legal instrumentalism’. According to Cane (2011: 406), ‘[i]nstrumentalism has become central to thinking about the administrative justice system’. From this perspective, ‘administrative law protects and promotes values chiefly by influencing and affecting the organization and practice of public administration’ (Cane, 2011: 405).

### **4.1 Legal instrumentalism**

The instrumental view of law—the idea that law is a means to an end (Tamanaha, 2006)—is not limited to administrative justice. According to some authors, legal instrumentalism has become ‘the “ordinary religion” of the law school classroom’ (Cramton, 1978: 247) and is ‘almost a part of the air that we breathe’ (Tamanaha, 2006: 1). Legal instrumentalism may be criticized from a legal or a normative perspective. However, in the field of administrative justice legal instrumentalism also acutely raises the question of ‘whether law and legal institutions can and do effectively improve public decision-making and service-delivery’ (Cane, 2011: 406). This is, however, not a normative but an empirical question.

According to Griffiths (2003: 13), legal instrumentalism considers law as ‘a tool in the hands of a policy-maker who is bent on realizing (or forestalling) some sort of social change’. Griffiths focuses on the role of legislator, but his analysis of legal instrumentalism may also be applied to courts, tribunals, ombudsmen, and administrative law in general. In empirical terms, ‘[t]he relationship between a rule [or, for example, a court decision] and its social effects is conceived of in the instrumentalist paradigm as a straightforward causal one’ (Griffiths, 2003: 13). Griffiths explains that legal instrumentalism is based on (at least) two important assumptions:

- Instrumentalism is based on *the assumption of perfect legal knowledge*. Here, the state organization is seen as a ‘chain of command’ that transmits the commands of the legislator [or, for instance, the court] in undistorted form. In other words, ‘[i]nstrumentalism treats the legally correct interpretation of the law ... as the command that reaches the individual and influences his behavior’ (Griffiths, 2003: 15).

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- Instrumentalism is also based on *the assumption of legal monism*. The state [or, for instance, the court] is assumed to have 'an effective monopoly over the regulation of interaction' and excludes 'other sources of regulation as important influences on behavior' (Griffiths, 2003: 16).

As will be discussed in the next two sections, the findings from empirical administrative justice research show that both assumptions of legal instrumentalism are highly problematic.

### 4.2 Legal Knowledge is Socially Contingent

Empirical research shows that perfect legal knowledge is less self-evident than the instrumentalist paradigm suggests. Contrary to the abstract idea of an undistorted 'chain of command', the process of legal communication is highly contextual.

Empirical studies about the administrative process show that public officials often struggle with the correct interpretation of the law. For example, Kagan's (1978) classic four modes of rule application ('judicial mode', 'legalism', 'unauthorized discretion', and 'retreatism') also reflect different degrees of legal knowledge and legal awareness. In a more recent study, Hunter et al. (2016) have analysed the implementation of homelessness law in three different local authorities in England. Their study shows that the level of legal compliance at these authorities is shaped by the (limited) legal knowledge and legal competence of local street-level bureaucrats. As a result, those legal provisions with an 'attractive simplicity' (like those related to the notion of 'vulnerability') are quite easily complied with. However, in more complicated cases (like those related to the notion of 'intentionality'), they found that the level of implementation was 'legally dubious' (Hunter et al., 2016: 86).

Limited legal knowledge is also an important feature of much empirical research which focuses on (the use of) administrative justice review mechanisms. As indicated earlier, procedural complexity and legal ignorance can be important barriers for the use of administrative justice systems (see Halliday and Scott, 2010: 477). Genn's (1999: 247) study, for example, revealed 'a depth of ignorance about the legal system' among users of the civil justice system in England and Wales. Moreover, she signalled 'a lack of sympathy with the jargon of the law, the mystifying procedures of the courts, [and] the closed world of the profession' (Genn, 1999: 247). Or, as one of her respondents commented after a court procedure: 'It was a bit of a mystery to me. I mean it was just like going into some sort of a puzzle and coming out' (Genn, 1999: 223). Likewise, a European survey found that most people (57%) in the EU generally feel 'not informed' about what to do if they need to go to court (Flash Eurobarometer, 2013: 19). Also, most people (67%) feel 'not informed' about the alternatives for court (e.g. mediation) (20). According to this study, respondents' perceptions of the functioning of justice is very similar regardless of the type of cases (civil and commercial, administrative or criminal) dealt with by the courts (4). The limited legal knowledge among the users of administrative justice systems is also reflected in empirical research on the ombudsman. As part of the 'Matthew-effect' in the

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profile of complainants, most ombudsman offices only reach those people with a high education and with a sufficient level of bureaucratic competence (see Hubeau, 2018).

Finally, the limits of legal knowledge and legal communication are clearly demonstrated in empirical research which examines the impact of review mechanisms on administrative decision-making. For example, based on his extensive empirical study of the implementation of English homelessness law by various local authorities, Halliday (2004) has proposed a framework for assessing the extent to which judicial review will influence administrative decision-making. Among other things, influence is determined by the extent to which decision-makers learn about the decisions of external redress mechanisms and decision-makers are competent in translating such knowledge into administrative action. However, in everyday practice these conditions are rarely met. To illustrate the limited legal knowledge in one of the agencies of his study ('Eastbank'), Halliday writes:

Although Eastbank had experienced 11 judicial reviews ... over the period of seven and a half years (some of which were significant legal cases from a doctrinal perspective) individual officers in the casework team knew very little indeed about its history of litigation.

(Halliday, 2004: 48)

As a result, 'Eastbank's direct experience of judicial review was of little relevance to their routine decision-making' (Halliday, 2004: 48). In some cases, public officials only have limited legal knowledge. Moreover, good legal communication is often difficult because of the organizational complexity of the government agency. As one of the caseworkers in Halliday's study explains:

The knowledge is not shared. You're only told if it's your case. And the rest of the unit ... don't even know why [team leader A] is flying out the door to go to court.... Our communication channels at times are not very good.

(cited in Halliday, 2004: 49)

The administrative impact of judicial review also depends on the clarity of the court decision. As discussed before, Hertogh's study (2001) showed that during the first phase of the implementation process of court decisions, it is important that officials are confronted with clear and well-formulated rulings. However, many officials in this study indicated that often they struggle with the right interpretation of a decision. In one of the interviews, an experienced policy adviser explains:

It goes without saying that you want to follow the court. But that becomes very difficult if you can't tell what it is exactly the court wants you to do, or what is wrong with your policy. I sometimes just want to ask the court: What do you mean? Tell me what you want. Perhaps it is some sort of advanced mathematics, but I don't appreciate it.

(cited in Hertogh, 2001: 61-62)

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Konstant and Vance (2015) have applied Hertogh's (2001) analytical framework in their study of 'executive acquiescence' to constitutional norms and judicial decision-making in South Africa. Based on a detailed analysis, they found that the decisions of the South African Constitutional Court only have a limited impact on the Department of Home Affairs, local governments, and the National Defense Force. Their general conclusion is that '[t]he effectiveness of reception, understanding, and to a large extent, compliance rests on the quality of communication' (Konstant and Vance, 2015: 132). More specifically, they conclude that '[a] lack of clarity in a judgment can provide a recalcitrant state ... the opportunity to justify non-acquiescence' (Konstant and Vance, 2015: 132).

### **4.3 Law Has to Compete with Other Social Norms**

Contrary to the ideas of legal instrumentalism, empirical research also shows that new laws and court rulings do not land in a normative vacuum. Legal norms have to compete with other social norms.

Empirical studies about the everyday practice of administrative decision-making suggest that front-line officials' own perceptions of justice play a significant role in administrative decision-making. Mashaw (1983: 15), for example, wondered whether in a bureaucratic operation there might be 'not merely the pure play of ambition, self-interest, or inertia that confounds our collective ideals but also a striving for normative goodness'. Following his general idea that 'organisations and the bureaucrats who inhabit them have their own goals, desires, [and] motivations' (68), Mashaw found that the Social Security Administration had generated its own 'internal law of administration' (213). Several years earlier, Kagan (1978) had reached a similar conclusion in his analysis of the implementation of a wage-price freeze. He found that the agencies involved had developed a strong preference for deciding cases speedily and efficiently as well as correctly and fairly. Yet, according to Kagan, this 'compulsion' was not the product of 'a bureaucratic love of efficiency for its own sake, or of the desire of officials to go home early' (141), but 'it was rooted in the notion that prompt decision making is an important component of doing justice.' Officials themselves 'felt that citizens had a basic right to a prompt answer' (127). Also, Maynard-Moody and Musheno (2003) found that street-level decisions and actions are guided less by rules or procedures and more by officials' own beliefs and norms about what is fair. Likewise, Hunter et al. (2016) concluded in their study of UK housing officers that 'legal provisions that militate against cultural norms are less likely to attract compliance' (90). But these are not the only obstacles:

In addition to cultural morality, there are other normative systems within the environment, such as performance audit, financial management, and local political accountability that may similarly dislodge a street-level bureaucratic inclination toward legal compliance.

(Hunter et al., 2016: 90)

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The relation between legal norms and other social norms is also evident in empirical studies that examine the impact of redress mechanisms on administrative decision-making. As indicated before, Halliday (2004) has proposed a framework by which to study the administrative impact of judicial review. According to this framework, the effects of court decisions are not only determined by the legal knowledge of (public) officials (which was discussed before), but also by their 'legal conscientiousness'. In other words, are decision-makers conscientious about complying with the legal rules, and does their organizational environment privilege compliance with the law over other demands? In Halliday's (2004: 60) study, 'decision-makers ... reject the normative authority of law' and display 'a lack of faith in law's ability to provide the right decision outcome'.

In their study of the South African Constitutional Court, Konstant and Vance (2015) discuss several examples in which the executive branch has failed to comply with important judicial decisions in the field of immigration, domestic violence, and HIV discrimination in employment. In their view, one of the key explanations for the lack of compliance is the 'divergence between constitutional or legal norms and social norms' (Konstant and Vance, 2015: 89). Based on their study in South Africa, they conclude:

[S]treet-level bureaucrats constitute a community and are strongly influenced by the norms prevalent in that community, often more than they are influenced by those created by the judiciary.

(Konstant and Vance, 2015: 122)

These findings correspond with studies which focus on the general 'legal consciousness' of street-level bureaucrats (see also the chapter by Cowan and Harding in this volume). These studies suggest that when public officials feel that their own social norms are not sufficiently reflected in the law, legal provisions may lead to feelings of 'legal cynicism' and 'legal alienation', and, ultimately, to limited legal compliance (Cooper, 1995; Hertogh, 2010; 2018).

### **4.4 Rethinking Administrative Law and Administrative Justice**

According to a legal instrumentalist view, more administrative law will lead to more administrative justice. However, the findings from empirical legal research make us rethink this relationship. Empirical studies show that communication of legal information is always problematic. Contrary to a simple and straightforward transmission process, as pictured by the instrumentalist paradigm, legal information is subject to a complex transformation process. In other words, 'the message about the law that ultimately comes to an actor's attention—if any message gets through at all—is thus seldom the same as what the legislator [or the court] "intended"' (Griffiths, 2003: 18). Empirical research also contradicts the assumption that the state (and the courts) have a monopoly over the regulation of interaction. In everyday administrative practice, 'the state is but one of many sources of regulation' (Griffiths, 2003: 18). In other words, for many public officials the expectations of public law are frequently 'less well known, less clear, and in any case less

pressing than those of other sources of regulation that are closer to the scene' (Griffiths, 2003: 18).

## 5. Conclusion: Challenges for Future Empirical Research

This chapter has provided an overview of empirical administrative justice research in three fields: administrative decision-making, redress mechanisms, and the impact of redress mechanisms on administrative practice. In legal doctrine, legal instrumentalism has become central to thinking about administrative justice. However, the findings from empirical research provide little support for the underlying assumptions of instrumentalism. In this way, empirical legal research forces us to rethink the relationship between administrative law and administrative justice. While in some cases law and legal institutions may be an effective instrument to promote administrative justice, in other cases the direct impact of law is severely limited and sometimes law may even have a negative effect on the overall level of administrative justice.

In overview, this chapter poses two important challenges for future empirical administrative justice research. The first is to look beyond administrative law—and the law in general—as the primary tool to achieve administrative justice. Traditionally, most empirical work has focused on administrative courts, tribunals, ombudsmen, and other accountability institutions. However, since the line between the 'private' and the 'public' has become increasingly blurred, there is no reason why studies should be limited to public law and should not also include *civil law* institutions. In future studies, empirical administrative justice research may also look at how, for example, a private ombudsman oversees the activities of powerful but private institutions such as banks and financial institutions (see Halliday and Scott, 2010: 486). Moreover, considering the limits of legal instrumentalism that were discussed in this chapter, administrative justice research should also consider *non-legal* mechanisms to improve the performance of public organizations. Given the limited effects of, for example, judicial review what could be other effective means to influence administrative decision-making? How do some these alternative approaches (that, for example, focus on the training, the organizational culture or the financial structure of a public agency) compare to traditional legal mechanisms?

The second challenge is to broaden the focus of empirical administrative justice research. Against the background of legal instrumentalism, empirical studies have focused largely on legal effectiveness (Feeley, 1976; Sarat, 1985). In most of these studies, the research questions are 'whether administrative law has any discernible impact on bureaucratic organization and practice and, if so, what that impact is' (Cane, 2011: 410). However, many of the findings that were discussed in this chapter are not only related to legal efficacy, but also highlight the importance of the (perceived) *legitimacy* of law. Following up on this, future empirical research should not only focus on the impact of law, but also on the way that both public officials and the general public understand and perceive courts and other administrative justice systems. These studies may draw from the growing literature



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on procedural justice (Tibaut and Walker, 1975), legal consciousness (Chua and Engel, 2019), and legal alienation (Hertogh, 2018). In this way, future administrative justice research will not be limited to studying the old gap between the 'law in the books' and the 'law in action', but it can also analyse the development of a possible new gap between official administrative law and people's own beliefs about what is fair and unfair in a government bureaucracy.

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