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A Content Analysis of Judicial Decision-Making

Introduction

Legal academia is littered with discussions about the techniques of judicial argumentation. It is surprising, then, that there is comparatively little research systematically studying how judges make decisions, upon what grounds, and using what strategies. Empirical research that records what doctrinal strategies judges employ in their decision-making is a valuable tool for enriching legal debate. It offers a fuller picture of the application of the law by the courts, and is capable of informing rich doctrinal debate that is traditionally based on an isolated pocket of lead cases from the highest courts.

The technique of content analysis is one important methodological strategy for evidencing how judges use legal doctrine. Content analysis applies a form of discourse analysis in order to capture more comprehensively the content of judicial decisions. Section I of this chapter will begin by outlining how content analysis studies have been used to date, noting in particular that while the method has been used more readily in the US, its potential has yet to be fully realised in other legal academic markets, particularly the UK.

Section II of the chapter sketches our recent experience in engaging with this methodological approach. The study in question related to a discrete area of judicial practice: judicial review of ombudsman decisions in English public law. We elucidate how we designed a content analysis study to interrogate how judges make decisions, upon what grounds, and using what interpretive strategies in judicially reviewing the decisions of ombudschemes. We designed a coding method that, in particular, sought to test empirically the claim that the courts are generally deferential to the work of ombudschemes. This section concludes by reflecting upon some of the challenges we faced in the design and implementation of the method, and highlighting pitfalls that we would avoid in the future.

Section III reflects upon the wider relevance of this method. The excavation of our methodology in Section II provides helpful introductory guidance of a number of ways to record empirically, for example, judicial approaches to statutory interpretation, or a bench's approach to judicial review or appeal grounds. Such methods are broadly relevant to any socio-legal scholar seeking to capture a rigorous record of judicial practice, and are a mechanism to test doctrinal claims in the field. The chapter concludes by reflecting briefly upon the hitherto unrealised potential and function of content analysis methodologies for the study of law in the UK academy.

Part I: An Introduction to Content Analysis

As part of a broader project examining the mechanics for ensuring decision-making quality in the ombudsman sector,[1] we designed and conducted a discrete study in order to explore what role judicial review plays in maintaining or distilling service standards into ombudschemes. In order to obtain a deeper understanding of the role of the judicial branch in upholding standards in the sector, we conducted a systematic reading of a complete cache of case law relating to the ombudsman, recording and coding targeted aspects of the way the decisions were made. Content analysis is a form of discourse analysis which comprehensively and systematically analyses the content of a sample of documents, in our case judicial decisions, and records consistent or inconsistent features.[2] Content analysis studies have been used to bring a degree of scientific rigour to legal scholarship, creating what has been termed 'a distinctively legal form of empiricism'.[3] Given their familiarity with legal tools of argumentation, it follows that legal and socio-legal scholars are well equipped to employ this social science technique.

In North American scholarship in particular, there have been a number of studies using the method, the diversity of which demonstrates the utility of the approach to legal scholarship across the board. For example, systematic methods have been deployed to capture whether the tools of judicial argumentation indicate activism or restraint on the part of the bench.[4] They have also been used to record empirically the prevalence of particular canons of statutory interpretation.[5] There also exist a number of studies that use content analysis to more broadly shed light on strategies employed in, and the influences upon, judicial decision-making more generally.[6] Further, content analyses have proven useful in assessing judicial argumentation in relation to a variety of areas, including, but not limited to, the use of the death penalty, negligence, labour law, administrative law, antitrust law, and promissory

[1] This Nuffield Foundation- funded project focuses on three mechanisms for monitoring decision-making quality in the sector: internal review, transparency initiatives, and judicial oversight.

[2] Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Decisions' (2008) 96(1) *California Law Review* 63, 64; Melanie Janelle Murchison and Richard Jochelson, 'Canadian Exclusion of Evidence Under Section 24(2) of the Charter: An Empirical Model of Judicial Discourse' (2015) 57(1) *Canadian Journal of Criminal Justice and Criminology* 115, 122-3.

[3] Hall and Wright (n 2) 64.

[4] In 1982, Canon advanced a framework for measuring judicial activism in a book on US Supreme Court activism: B C Canon, 'A Framework for the Analysis of Judicial Activism' in Stephen C Halpern and Charles M Lamb (eds) *Supreme Court Activism and Restraint* (Lexington 1982) 385. This has since been developed and used variously by North American Scholars. See, for example, Margit Cohn and Mordechai Kremnitzer, 'Judicial Activism: A Multi-Dimensional Model' (2005) 18(2) *Canadian Journal of Law and Jurisprudence* 333. Such frameworks have been deployed as a prism through which to systematically measure activism and restraint. See Murchison and Jochelson (n 2); Richard Jochelson, Michael Weinrather and Melanie Janelle Murchison, 'Searching and Seizing After 9/11: Developing and Applying Empirical Methodology to Measure Judicial Output in the Supreme Court's Section 8 Jurisprudence' (2012) 35(1) *Dalhousie Law Review* 179; and Troy Riddell, 'Measuring Activism and Restraint: An Alternative Perspective on the Supreme Court of Canada's Exclusion of Evidence Decisions under Section 2492) of the Charter' (2016) 58(1) *Canadian Journal of Criminology and Criminal Justice* 87.

[5] William N Eskridge Jr and Phillip P Frickey, 'The Supreme Court, 1993 Term: Law As Equilibrium: Foreword' (1994) 108(1) *Harvard Law Review* 26; James J Brudney and Corey Ditslear, 'Canons of Construction and the Elusive Quest for Neutral Reasoning' (2005) 58 (1) *Vanderbilt Law Rev*iew 1; Nicholas S Zeppos, 'The Use of Authority in Statutory Interpretation: An Empirical Analysis' (1992) 70(5) *Texas Law Review* 1073; Anita S Krishnakumar, 'Reconsidering Substantive Canons' (2017) 84(2) *University of Chicago Law Review* 825; Thomas W Merrill, 'Judicial Deference to Executive Precedent' (1992) 101(5) *Yale Law Journal* 969.

[6] See, for example, Daved Muttart, *Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada* (University of Toronto Press 2007); Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960); Frank B Cross, 'Decisionmaking in the US Circuit Courts of Appeals' (2003) 91(6) *California Law Review* 1457; and Gregory C Sisk, Michael Heise, and Andrew P Morriss, 'Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning' (1998) 73(5) *New York University Law Review* 1377.

estoppel.[7] Indeed, the method's use has 'accelerated' since the 1990s, with the popularity of such studies now 'widespread' in the US legal academy.[8]

In the UK socio-legal empirical methods are also now commonly adopted. For example, in response to increasing government rhetoric that the courts were flooded with judicial review claims, Bondy, Platt and Sunkin responded with a comprehensive empirical account of the nature of judicial review claims, their outcomes, and the consequences of such findings.[9] Similarly, in a number of specialisms within legal academia there have been empirical studies assessing the impact of systemic changes to the judicial system. Of particular note is literature that records the impact of legal aid cuts on access to justice across various sectors.[10] More generally, there is now a steady use of empirical legal research across UK legal academia.[11] The turn to empiricism provides all-important overarching context to the debates to be had both about doctrine, and the legal system generally. Content analysis is, however, a

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[7] David C Baldus et al, 'Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia' (1998) 83(6) *Cornell Law Review* 1638; Richard Posner, 'A Theory of Negligence' (1972) 1(1) *Journal of Legal Studies* 29; Werner F Grunbaum and Albert Newhouse, 'Quantitative Analysis of Judicial Decisions: Some Problems in Prediction' (1965) 3(2) *Houston Law Review* 201; Peter Schuck and Donald Elliot, 'Studying Administrative Law: A Methodology for, and Report on, New Empirical Research' (1990) 42(4) *Administrative Law Review* 519; Peter J Hammer and William M Sage, 'Antitrust, Health Care Quality, and the Courts' (2002) 102(3) *Columbia Law Review* 545; Robert A Hillman, 'Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study' (1998) 98(3) *Columbia Law Review* 580.

[8] Hall and Wright (n 2) 70, 71. Hall and Wright provide a comprehensive literature review of the development and use of the method in US Legal Scholarship at 67-76.

[9] Varda Bondy, L Platt and Maurice Sunkin, 'The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences' (Public Law Project 2002).

[10] See, for example, Emma Marshall, Sue Harper and Hattie Stacey, 'Family Law Access to Legal Aid' PLP Research Briefing Paper, March 2018 (using questionnaires and interviews to assess the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 upon the availability of legal aid for private family law matters); Sue Arrowsmith and Richard Craven, 'Public Procurement and Access to Justice: A Legal and Empirical Study of the UK System' (2016) 6 *Public Procurement Law Review* 227 (which utilised questionnaires and interviews to isolate factors influencing low levels of supplier complaint litigation in respect of EU public procurement law in the UK); Liz Trinder et al, 'Litigants in person in private family law cases', Ministry of Justice Analytical Series, 2014 (conducting a qualitative study involving court case observation, interviews, focus groups, and use of empirical data sets, in order to understand the challenges and impact of litigants in person in private family law cases); Peter Walton, 'The Likely Effect of the Jackson Reforms on Insolvency Litigation – an Empirical Investigation', April 2014 (employing data collection and conducting interviews in order to assess the nature of insolvency litigation in order to assess the potential impact if the Jackson reforms were extended to cover such litigation); Marie Burton, 'Justice on the Line? A Comparison of Telephone and Face-to-Face Advice in Social Welfare Legal Aid' (2018) 40(2) *Journal of Social Welfare and Family Law* 195 (using interviews and observations to reveal the impact on legal advice of the shift to telephone-services only social welfare legal aid).

[11] Some recent examples include: Eleanor Aspey and Richard Craven, 'Regulating Complex Contracting: A Socio-legal Study of Decision-Making Under EU and UK Law' (2018) 81(2) *Modern Law Review* 191 (using interviews to understand factors influencing decision-making of procurement officers); Graham Gee, Robert Hazell, Kate Malleson and Patrick O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (CUP 2015) (conducting over 150 interviews in order to understand interactions between politicians and judges since the introduction of the Constitutional Reform Act 2005, and the implications of the findings for judicial independence); Barry Mitchell and R D Mackay, 'Investigating Involuntary Manslaughter: An Empirical Study of 127 Cases' (2011) 31(1) *Oxford Journal of Legal Studies* 165 (recording basic features concerning convictions for involuntary manslaughter); Brian Opeskin, 'Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges' (2015) 35(4) *Oxford Journal of Legal Studies* 627 (providing a comparative empirical assessment of tenure practices of the Supreme Court of the United States, the High Court of Australia, and the Constitutional Court of South Africa); and Richard Lewis, 'Tort Tactics: An Empirical Study of Personal Injury Stategies' (2016) 37(1) *Legal Studies* 162 (outlining tactics in personal injury litigation drawn from structured interviews with practitioners).

subtly different subset within such empirical legal scholarship. While some basic or general empirical data may well be recorded as part of this method, within it there is a greater focus on finely reading an entire set of documents, usually judgments, in order to draw conclusions about patterns in legal reasoning. Case coding in content analyses goes further than recording basic facts, as it requires an appraisal of the 'substance of judicial reasoning as expressed through the legal and factual content of written opinions'.[12] So far, in the UK there have been surprisingly few studies engaging in this kind of systematic documentary analysis.[13]

Part II: Lessons From Our Experience

Our Project

Our research used a content analysis methodology to interrogate systematically how judges make decisions, upon what grounds, and using which strategies. The technique was applied to a discrete area of case law: that involving ombudschemes operating in the UK. One of the most noticeable features of ombudsman legislation is that it generally confers upon the relevant office wide-ranging discretionary powers with which to conduct its work. Given the ambiguous manner in which much ombudsman legislation is written and the frequent deployment of legal doctrine in ombudsman litigation, this creates a sizeable scope for the judiciary to wield significant judicial discretion in its decision-making. Yet an ombudsman is generally a statutory officer that has been deliberately provided with autonomous powers to deliver a particular form of justice. This background context means that the case law on the ombudsman sector represents an interesting prism through which to view the nature of judicial decision-making, and the strategies that judges deploy in cases involving challenges to administrative discretion.

The aim of content analysis studies is to analyse more comprehensively the content of judicial decisions.[14] Through content analysis 'a scholar collects a set of documents, such as judicial opinions on a particular subject, and systematically reads them, recording consistent features of each and drawing inferences about their use and meaning'.[15] In other words, a fine-grained reading of judgments is attempted to establish the underlying factors used to justify a decision.

In our study, this approach entailed reading a series of cases, and recording and coding targeted aspects of the decisions made. The most thorough and recent doctrinal research shows that judicial oversight of the ombudsman sector exhibits high degrees of deference to

[12] Hall and Wright (n) 72-73.
[13] Notable systematic studies produced in UK legal journals include: Marcella Favale, Martin Kretschmer and Paul C Torremans, 'Is There an EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice' (2016) 79(1) *Modern Law Review* 31 (tracing patterns of legal reasoning in the Court of Justice of the European Union towards copyright and database right cases); Thomas Poole and Sangeeta Shah, 'The Law Lords and Human Rights' (2011) 74(1) *Modern Law Review* 79 (identifying patterns of judicial reasoning in the House of Lords before and after the introduction of the Human Rights Act, in order to assess the potential impact of the Act upon judicial reasoning); and James Goudkamp and Eleni Katsampouka, 'An Empirical Study of Punitive Damages' (2018) 38 *Oxford Journal of Legal Studies* 90 (A systematic study of 146 claims for punitive damages, including classifying claims according to the *Rookes* set of categories of punitive claims, which required a deeper a reading of each case).
[14] Murchison and Jochelson (n 2) 122-3.
[15] Hall and Wright (n 2) 64.

the authority of the original decision-maker, a few outliers notwithstanding.[16] This study sought to test this claim through a more robust empirical approach, and across the entire approach of the bench to ombudsman judicial review. If we take judicial restraint at the basic level to mean that, empirically, there are very few instances where the courts intervene with a decision conducted by an ombudsman, what does this mean for the function of judicial review? What role does judicial review have in respect of the ombudsector? By employing a content analysis methodology we were able to analyse outcomes, types of grounds used, and judicial statements on the legal framework of operation for ombudschemes. Asking such questions in a systematic manner shed light on the role that judicial review plays vis-à-vis the ombudsector.

In order to frame our approach to coding design, we drew upon previous research aimed at isolating factors that indicate judicial activism or restraint. This approach went some way to answering our first research question (whether the bench adopts a policy of deference towards the ombudsector), but also acted as useful framework to design a coding system that would comprehensively capture the modes of judicial reasoning employed. We hypothesised that judicial activism may be indicated by a judgment that:

1) *Readily circumvents 'threshold' hurdles*: where the court is willing to wield its discretion to get around barriers to hearing the case, such as out of time applications;
2) *Quashes or supersedes the decision of a public authority, or majoritarianism*: where policies or, for our purposes, schemes adopted through the democratic process are rendered invalid;
3) *Employs non-traditional approaches to legislative interpretation, or interpretive fidelity:* the degree to which legislation is interpreted beyond its 'ordinary meaning';
4) *Departs from precedent, also known as interpretive stability:* judicial activism can be measured by the degree to which earlier court decisions or interpretations have been departed from;
5) *Reliance on substantive, rather than, procedural, judicial reasoning*: greater readiness to rely upon substantive grounds, such as irrationality, over procedural grounds, implies a greater degree of activism;
6) *Develops the common law*: the judicial fleshing out of an area of law, particularly in relation to the restrictions and obligations upon a public authority, may well indicate a degree of judicial policy-making. [17]

The general tenor of these indicators formed the basis for our approach to designing coding to capture the decision-making approach of the bench in navigating oversight of ombudschemes.

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[16] See Richard Kirkham and Alexander Allt, 'Making sense of the case law on Ombudsman Schemes' (2016) 38(2) *Journal of Social Welfare and Family Law* 211; Richard Kirkham, 'JR55, judicial strategy and the limits of textual reasoning' [2017] *Public Law* 46.

[17] Cohn and Kremnitzer (n 4); Brice Dickson, 'Activism and Restraint within the UK Supreme Court' (2015) 21(1) *European Journal of Current Legal Issues*; Bradley C Canon, 'Defining the Dimensions of Judicial Activism' (1983) 66(6) *Judicature* 236; and Keenan D Kmiec, 'The Origin and Current Meanings of Judicial Activism' (2004) 92 *California Law Review* 1441, 1463-1476. This list was adapted from, and influenced by, these studies, taking into account relevance for the purpose of our research question. For example, Canon's work also includes separate indicators on the bench's involvement in establishing and making policy (Canon, 239). This is unlikely to be relevant for a study of the courts in England and Wales. We take great inspiration from Cohn and Kremnitzer's traditional vision of activism, though our list is not as extensive as theirs. Ours is more limited, as we believed some aspects were captured under the broader headings we provided, and some by our mixed methods approach of combining content analysis with doctrinal analysis.

In terms of case selection, a number of challenges and choices were taken away from us by virtue of our choice of the discrete area of ombudsman case law. As well as raising a number of bespoke points of analysis connecting to the ombudsman institution, this choice of research focus offered the advantage of avoiding the need for sampling, which is required where the field of study deployed is too wide. Thus, as there were only X cases, the full dataset was manageable, given that the case range needed to study comprehensively one well-defined subset of cases is relatively limited.

The purpose of the content analysis method is to provide a systematic way in which to empirically record/test the questions that the study has, or the position of 'conventional' scholarship that the researcher wishes to either prove or refute. The code system focuses the attention of the researcher while they read the cases.[18] In order to address our research questions, our coding was required to record:

(i) the core outcomes of ombudsman judicial reviews, appeals, and permission hearings;
(ii) the grounds of review used by the judiciary to resolve cases;
(iii) the judicial strategies deployed in decision-making.

(i) CORE OUTCOMES

These coding questions involved recording basic facts about the cases in the data set, and required little by way of interpretation. Non-coded fields entailed recording: the case name, the date of the case, and the interested party. Coded fields included recording the type of claimant; the court; whether the parties had representation; whether the decision was judicial review, appeal, or permission; what stage of the ombudsman process was being challenged; whether permission to apply was granted; why permission was not granted; the outcome of judicial review; and the remedy.

(ii) GROUNDS OF REVIEW

In order to code upon what basis judges quash ombudsman decisions, this required some consideration of methods for choosing a taxonomy of administrative law. As a starting point, we relied upon Sarah Nason's study of 482 cases heard in the Administrative Court during two periods, from 1 January 2013 to 31 July 2013, and from 1 January 2015 to 31 July 2015.[19] Instead of applying a prescribed taxonomy, Nason applied a method of constructive interpretation to 'look from the bottom up and peel off a taxonomy of grounds by considering the legal arguments advanced and reasons for deciding in a sample of cases'.[20] In other words, she interrogated the grounds that the Administrative Court actually used in deciding cases, and from that derived a workable taxonomy. As Nason's method most approximated are own, we used her taxonomy as a starting template for our study. Mirroring the best practice guidance on designing coding, as outlined above, we refined and added to the categories by subjecting them to a pilot test, and revised the codes, by subtly adapting it to the findings derived and the detail of case law on the ombudsman. In some respects, we mirrored the approach of Nason, by tweaking categories based upon the actual reasons and language

[18] Hall and Wright (n 2) 80-81.
[19] Sarah Nason, *Reconstructing Judicial Review* (Hart 2016) 25, 146.
[20] Ibid 146.

advanced by the court. Table 1 summarises the coding scheme developed. A full defence and description of the coding scheme can be found at www.xxx

Table 1: Coding scheme for the grounds used in ombudsman case law

1. Ordinary common law statutory interpretation	**2. Mistake**	**3. Discretionary impropriety**	**4. Quality of decision**
1.1 Did the Ombudsman act within their statutorily delegated power/jurisdiction (including abuse of discretion) 1.2 Did the Ombudsman misinterpret statute/law	2.1 Error of fact 2.2 Mistaken	3.1 Relevant/ irrelevant considerations 3.2 Failure to exercise discretion 3.3 Fettering discretion	4.1 No reasons given 4.2 Inadequate reasons given 4.3 Incorrect remedy 4.4 Irrational 4.5 Incorrect application of fair and reasonable test
5. Procedural impropriety		**6. Significant claims based on common law constitutional values, rights, or allocation of powers**	**7. Breach of ECHR**
5.1 Unfair Hearing 5.2 Lack of hearing 5.3 Bias 5.4 Independence 5.5 Undue delay	5.6 Inadequate notice 5.7 Refusal to review decision 5.8 Right to reply 5.9 Bad service 5.10 Legitimate expectation 5.11 Duty to disclose	6.1 Breach of fundamental constitutional values (e.g. democracy, dignity, access to justice, judicial independence, rule of law) 6.2 Turns upon allocation of powers between particular institutions of the state (Abuse of Power)	

(iii) MODES OF JUDICIAL REASONING

Overlaying the doctrinal grounds deployed in administrative law cases, our study sought to examine the modes of judicial reasoning adopted within judgments. The most relevant prior content analysis study for this purpose is that conducted by Favale et al into the decision making of the Court of Justice of the EU on copyright law.[21] Through coding, Favale et al

[21] Favale, Kretschmer and Torremans (n 13) 52.

capture two sources of information: (a) the extent to which the CJEU used precedent in its decision-making and (b) the interpretive techniques it used to apply legislation within its decisions. Both questions we explored in this study through the coding scheme outlined in Table 2.

Table 2: Coding scheme for recording modes of judicial reasoning deployed in ombudsman case law

Cases cited	**Case law interpretation**	**Statutory interpretation**
1.General legal principle case law (non ombudsman) only 2.Ombud Scheme (OS) specific case law only 3. Other ombudsman case law only 4. 1+2 5. 1+2+3 6. 1+3 7. 2+3	1. Confirm case law 2. Distinguish 3. Reject/reverse	1. Literal 2. Textual 3. Contextual
Judicial strategy	**Any authoritative judicial statements**	
1. Judicial guidance with finding against Ombudsman 2.Judicial guidance without finding against Ombudsman	1.Law 2. Good practice	

Overall, the categories of coding that we deployed strived to record interim conclusions on the way judicial reasoning, and decision-making strategy, has been exercised in the case, and whether it displays any obvious indicators of activism.

The value of recording the types of case law relied upon allowed a picture to be painted about the approach of the bench towards jurisprudence relating to the ombudsman sector. Is it treated rather simply as a public authority capable of judicial review, with reliance on general administrative law? Is there jurisprudence relating to the ombudsman sector developing? Does this jurisprudence capture the entire sector, or are different approaches advocated for each specific scheme? Kirkham and Allt have found, through traditional doctrinal analysis, that there is a 'unified interpretation of the powers of ombudsman schemes across the sector'.[22] This coding empirically tested that conclusion.

In relation to statutory interpretation, generally, instances of the last category, *contextual*, would indicate a greater degree of 'activism' on the part of the court, for it gives the bench considerable space in their interpretations, and leaves the court open to criticism over the wielding of this interpretive power. Such decision-making strategy may be by fleshing out the contours of the obligations upon the ombudsman to conform to a particular standard in a judicial review grounds, or it may involve taking a contextual or purposive approach to the statutory parameters of the ombudsman's powers and obligations. This initial finding was then fact-checked with a more doctrinal reading of the judgment. The coding also records

[22] Kirkham and Allt (n 16) 211.

instances where the court has given authoritative statements on the law, and on good practice, relating to the ombudsman sector. Statements on the law may take the form of conclusive interpretations of the ombudsman's power, as outlined by its constitutive legislation. It can also be witnessed through common law development of the ombudsman's obligations under various review grounds, for example by fleshing out to what extent the ombudsman is required to comply with the duty to give reasons. Statements on good practice may not carry the same authoritative weight, but take a more speculative tone about the standards that the ombudsman may be expected to reach, dicta. Such coding gave an indication of the role or function of judicial review in respect of ombudschemes. If there was evidence of statements of law or practice, the coding acted as a flag in order for us to return to the case to give it a more doctrinal reading.

Overall our findings were that in ombudsman case law, the general picture is one of deference. In most instances ombudsman case law is best characterised as providing a 'safety valve' for managing dissatisfied users of ombudsman services and applying thin interpretations to the rule of law. However, our study also demonstrates that there is a significant strand of ombudsman case law in which thicker interpretations of the rule of law are developed. This limited tendency towards what some might describe as 'activist' decision-making, however, is generally concentrated around probing the quality of reasoning in ombudsman decision-making and encouraging higher standards in operational practice, areas which match traditional judicially claimed expertise. Further, judicial messages are more likely to be delivered through subtle dicta and in cases upholding ombudsman decisions, than in those quashing ombudsman decisions.

Lessons learned

We encountered a number of challenges and learned a number of lessons in the practical application of our coding scheme. In designing the methodology, we spent many hours carefully delineating judicial review grounds for coding. It is inevitable that some measure of ambiguity will remain in how coding categories should apply to particular cases. Often, there is no obvious right way to resolve these judgement calls but such ambiguity is not disabling as long as coders are reasonably consistent in how they apply coding categories across a range of cases.[23] In our study, to establish 'reasonable consistency' in application a few ground rules were applied. First, in the event of ambiguity, either because of the nature of the facts or an apparent vagueness in the judge's application of the law to the facts, to decide which category to code a judgment we followed Nason's constructivist example. In other words, we chose to be true to the wording of the judgment, rather than favouring our own intuition about the dividing line between the two grounds (which is inherently more subjective). Second, we captured all the arguments that were considered in depth within the judgment, noting those which were successful and those which were not. This allowed us to avoid reliance upon multiple and potentially repetitive grounds that may have been put forward by the claimant, and to focus only on the way in which they were demarcated by the court. Where the wording of the judge was directly synonymous with one of the above grounds, it would be recorded expressly. For example, the right to make representations obviously correlates to the right of reply. Third, where there were two separate submissions, both of which relied upon the same ground, these were recorded as two separate grounds. Where a case concerned multiple respondents, including an ombud scheme, the only grounds recorded would be those so far as they relate to the ombudsman. Finally, to add confidence to

[23] Hall and Wright (n 2) 109.

the results, we both coded a pilot set of cases separately. On comparison, the differences in the coding of the grounds deployed by the judiciary were extremely low, and were resolvable by way of subsequent discussion.

Painstaking detail was therefore taken to ensure that exact judicial review grounds were recorded in a manner as consistent and as independently reproducible as possible. When we came to analysing the data, however, it became apparent that the level of detail that we had entered into in our coding exercise was perhaps not necessary. What was most interesting about the types of grounds being recorded was the kind of ground, i.e. was there error of law, or was it reviewed on a substantive ground, or a procedural ground. The analysis therefore did not necessarily require such specific demarcations between 'lack of hearing' or 'fair hearing'. While this does not necessarily undermine the set of rules we established to ensure that the findings could broadly be reproduced by another coder, it nonetheless would have greatly sped up the data gathering process.

The above example relates to a situation whereby we realised we had perhaps coded in too much detail. An alternate problem we faced, upon reaching the point where we analysed our findings, was realising that, in relation to coding on the type of statutory interpretation, we had perhaps provided too little detail. It was only upon reaching the data analysis stage of the study that we realised that between us we had inconsistently recorded the types of statutory interpretation. Whereas Elizabeth left out instances where it appeared that there had been no real attempt at an interpretive exercise, Richard recorded such instances as 'literal'. This required us to return to all the data, inputting an extra code, that of 'no interpretation approach applied'.

The above hiccups perhaps hint at the presence of an internal researcher bias in our approach to designing the coding. Given that we are both administrative lawyers, it follows that perhaps we naturally gravitated towards focussing more heavily upon the role of 'grounds' in judicial decision-making. This highlights the importance of revisiting the coding exercise, and in particular cross-checking a portion of each researcher's findings, in order to identify and iron out deviation in the application of the codes.

More generally, this demonstrates that content analysis studies do raise significant "methodological concerns".[24] A key challenge with some of the more ambitious models is its manageability.[25] On a practical level, the complexity of the method can risk over burdening the researcher and large scale studies require considerable background support and funding. More fundamentally, if the method is overloaded with research questions it comes to rely upon multiple points of input judgements being applied to the analysed text and requires a process of relative weighting of the different parameters being tested.[26] Some of those judgement calls may be relatively straightforward (eg what was the result of the case), others, though, will require technical resolution (eg what weight to give dissenting judgments). Such resolution may be rationally explainable, but the more criteria deployed, so too the numbers of judgement calls being made will increase, creating entry points for subjectivity to in the research. This is by no means a fatal problem - empirical research in the social sciences often

[24] Jochelson, Richard, Michael Weinrath, and Melanie Janelle Murchison, 'Searching and seizing after 9/11: Developing and applying empirical methodology to measure judicial output in the Supreme Court's section 8 jurisprudence'. *Dalhousie Law Review* 35 (2012): 179–213, 191-5; Muttart in his SSRN published paper reveals that his 'article was rejected for such reasons. Muttart, Daved M. 2011 *One step forward, One step back: Measuring activism in the Supreme Court of Canada*. SSRN working paper. http://dx.doi.org/10.2139/ssrn.1470709, 29

[25] Canon 386; Muttart (2011) 30.

[26] Cohn and Kremnitzer (n 4) 337.

has to face such dilemmas - but where the variables are numerous, then the ability of the researcher to be clear about the choices being made is reduced. In turn, the sceptic's ability to offer differing interpretations of the final results will also increase.[27]

Given these methodological challenges, we posit that the argument for systematic empirical scholarship is primarily a supportive one, as the method has weaknesses that render it incomplete as a tool to explain in full the nature of judicial reasoning. Any endeavour to reduce the meaning of a large body of cases to a uniform system of coding will always risk losing the full subtleties and nuances upon which a judicial decision is balanced. However, the method is of value in order to offset the various shortcomings of conventional legal scholarship. For example, in relation to the research questions in our study, it must be noted from the outset that judicial activism 'cannot be synonymous with merely exercising judicial review'.[28] By this, we mean that it cannot be taken that any instance of a finding against a decision-making authority, in this case an ombudsman, is evidence of judicial activism. There is, then, a need to blend the coding approach with a more doctrinal reading of the cases, which inevitably entails an exercise of judgment on the part of the analyser. The coding we used, therefore, registers the grounds and the judicial tools of argumentation pursued in judicial review, which in turn will reveal more context to the question of how interventionist the courts are in relation to the ombudsector.

Part III: The Value of the Method

Content analysis studies have rich potential in offering a complementary role to broader doctrinal studies aimed at making sense of judicial practice. In particular, systematic studies can provide an objective means by which to critique conventional and alternative positions, and identify 'anomalies which may escape the naked eye'.[29] In this regard empirical research has a powerful role in forcing us to consider revising our theories in the face of evidence which contradicts pre-held positions, or isolating incorrectly decided cases.[30]

There is no question that doctrinal legal scholarship is highly adept at interrogating judicial reasoning and the doctrinal grounds employed in leading cases; there exists a substantial literature on the topic. There is also a very active theoretical debate on the legitimate approaches that the judiciary should employ.[31] In public law for example,[32] there are significant differences of viewpoint, based upon underlying principle, as to the extent to and manner in which the judiciary should exercise restraint when deciding legal disputes.[33] Within this debate, forceful claims about the practice of the judiciary are sometimes made. For instance, it has been suggested that there is an increasing tendency for the judiciary to

[27] See, for example, Riddell's Response to Murchison and Jochelson.
[28] Keenan D Kmiec, 'The Origin and Current Meanings of Judicial Activism' (2004) 92(5)*California Law Review* 1441, 1464.
[29] Alan L Tyree, 'Fact Content Analysis of Case Law: Methods and Limitations' (1981) 22(1) *Jurimetrics* 1, 23.
[30] Ibid.
[31] See, for example, 'Special Issue: The Role of the Courts in Constitutional Review' (2010) 60(1) *University of Toronto Law Journal*.
[32] On private law see Paul Craig, 'Limits of Law: Reflections from Private and Public Law' in Richard Ekins, Paul Yowell, and NW Barber (eds), *Lord Sumption and the Limits of Law* (Hart 2016) 175.
[33] Jeff A King 'Institutional Approaches to Judicial Restraint' (2008) 28(3) *Oxford Journal of Legal Studies* 409.

rule upon matters that should be better left to the political branches of the state, implying that the judiciary are prone to overreach.[34]

The difficulty is that in understanding the import of these debates, empirical conclusions are often drawn from a narrow methodological approach based upon selected high profile cases, rather than a more widespread systematic empirical analysis of how the judiciary rationalise their decision-making function. The absence of an offsetting field of systematic empirical analysis exposes the legal discipline to several risks. First, it is possible that a wider understanding of judicial decision-making is warped by the selective focus of legal commentators. Some cases, particularly strong precedent setting cases, might deserve enhanced attention, but individual cases are perhaps explainable as one-off instances of a certain judicial strategy being employed, and do not by themselves demonstrate the existence of a systematic practice. A linked problem is the potential for abstract arguments about the law to become informed and driven more by conscious or unconscious biases, than by the real practice of the law. In studies that do not offer a systematic or holistic overview of court practice, it is also plausible that cases that do not fit the argued for pattern are deliberately excluded.[35] A further problem in not analysing legal decision-making systematically is that without the full evidence being tested, it is difficult to ascertain whether or not accounts of the law represent an accurate portrayal of practice, or whether they are being shaped by selective, and skilfully argued, references to case law. Even with extensive supporting citation, the claims made in doctrinal scholarship are supported by variable theoretical preferences and the extent of the supporting evidence is 'unclear or difficult for others to probe or falsify'.[36] Without an agreed method to distinguish between rival interpretations of case law, readers might be tempted to rely in part on the author's reputation as a proxy for accuracy.[37]

The value of the content analysis method, then, is its capability to more comprehensively test assumptions that exist in doctrinal legal scholarship about the practical application of the law. While such assumptions can often be confirmed or disputed through other kinds of empirical research, content analysis provides a method that interweaves doctrinal tools of legal scholarship into the exercise, thereby ensuring that the study captures nuances that purely numerical appraisals may overlook. It therefore better fits the legal 'toolkit' that legal scholars have acquired through years of doctrinal legal study, by importing legal methods into an empirical exercise, rather than drawing down on methods and approaches that have been developed in other fields.

Content analysis is also a valuable mechanism for addressing the aforementioned risks that may come with doctrinal study. Indeed, it is a common claim in socio-legal circles – one that has been flagged again in recent American scholarship – that academic commentary on the law would benefit from a more rigorous approach towards evidencing doctrinal claims.[38]

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[34] Richard Ekins and Christopher Forsyth, *Judging the Public Interest: The Rule of Law vs The Rule of Courts* (Policy Exchange 2015) 22; Lord Sumption, 'The Limits of Law' in Richard Ekins, Paul Yowell, and NW Barber (eds), *Lord Sumption and the Limits of Law* (Hart 2016) 15.

[35] Adam S Chilton and Eric A Posner, 'An Empirical Study of Political Bias in Legal Scholarship' (2015) 44(2) *Journal of Legal Studies* 277, 286–93.

[36] Will Baude, Adam S Chilton, and Anup Malani, 'Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews' (2017) 84(1) *University of Chicago Law Review* 37.

[37] Ibid 43.

[38] Max Besbris and Shamus Khan, 'Less Theory. More Description.' (2017) 35(2) *Sociological Theory* 147; William Baude, 'Is Originalism Our Law?' (2015) 115(8) *Columbia Law Review* 2349.

Rather than seeking meaning of the law through a focus on a few isolated lead cases, the approach advocated through content analysis to study the application of the law by the courts through a study of an entire body of decided cases. The benefit of doing so is demonstrated by a number of key examples in existing content analyses. For example, one recent study claims to have debunked several prevalent assumptions about the manner in which the judiciary deploy substantive canons, including the assumption that the canons were used to displace legislative preferences with those of the judiciary.[39] Another study of the controversial private law remedy of punitive damages found that their use in practice was 'contrary to textbook gospel'.[40] More studies of this kind would therefore make an important contribution to the field. Such studies allow doctrinal claims about the status and practice of the law, upon which much implications are discussed, to be tested. The sheer variety of its use in North American legal scholarship demonstrates just how far-reaching the potential utility of the method. This under-used approach in the UK has a function in any corner of the legal academy.

[39] Krishnakumar (n 5).
[40] Goudkamp and Eleni Katsampouka (n 13) 92.