ADMINISTRATIVE SILENCE AND UK PUBLIC LAW

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Abstract: *This paper tells an increasingly familiar tale about UK public law: that, while UK public law often appears to approach things very differently, it faces essentially the same challenges as other systems and frequently – though not always – arrives at the same endpoints.*[1] *The tale could be told about many aspects of public law*[2]*, but administrative silence – here taken to correspond with the administration's delay, failure to act, give reasons, etc – provides a particularly strong example. For instance, while many other legal systems have developed principles and practices to address the problem of "administrative silence", UK public law doesn't even use the term.*[3] *This may, at a superficial level, be taken to mean that the difficulties in administrative culture that cause silence – inefficiency, misfeasance, etc – are absent in the UK. However, the reality is very different indeed, and there are many statutory mechanisms and judge-made doctrines in the UK that seek to address the consequences that can follow from the administration's inaction and failure to act. The language and normative bases for redress may therefore be different; but the mischief and corresponding challenges for public law are undoubtedly similar.*

The paper begins by examining more closely the rationale for redressing administrative silence, and by linking that rationale to some key precepts of UK public law. It then considers the relative significance of two statutory schemes that address silence, namely, provision for the Parliamentary Commissioner for Administration (the Ombudsman), and the default control mechanisms that underlie planning legislation. The paper next surveys the protection offered to the individual by judicial review proceedings, focusing in particular on remedies and a number of general principles of law that cluster around notions of transparency, legality, and fairness.[4] *These principles, which can raise difficult questions about the separation of powers, are sourced in the common law, although they have been developed with part reference to the general principles of European Union (EU) law and the European Convention on Human Rights (ECHR). The paper thus includes a final section that analyses more generally the significance of European influences on the domestic approach to administrative silence, before concluding with some evaluative comments on the existing statutory and judicial schemes.*

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[1] For a past example of differences on the question of the appropriate intensity of judicial review of administrative decisions see *R v Ministry of Defence, ex p Smith* [1995] 4 All ER 427 and *Smith and Grady v UK* [2000] 29 EHRR 493. But see now also *R v Secretary of State for the Home Department, ex p Daly* [2001] 3 All ER 433, accepting the *Smith and Grady* standard.

[2] See, e.g., BS Markesinis, J-B Auby, D Coester-Waltjen and SF Deakin, *Tortious Liability of Statutory Bodies* (Hart Publishing, Oxford, 1999).

[3] A lexis search brought forward only one UK case in which the term "silence of the administration" was used, namely, *La Banque Jacques Cartier v La Banque D'Pargne de la cit et du District de Montreal* [1887] 13 App Cas 111. But note that the term "UK case" is apt to mislead, as the case in fact originated in Canada and was heard on appeal by the Privy Council.

[4] M Fordham, 'The Judge Over Your Shoulder: New Principles of Governmental Accountability' [2004] *Judicial Review* 122.

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