Legal Information Management, 23 (2023), pp. 16–20

doi:10.1017/S1472669623000063

MAIN FEATURE

Mission Possible! Free Access to Case Law and The National Archives

Abstract: The National Archives launched a new service called Find Case Law in April of last year. Here **Daniel Hoadley**, **Amy Conroy** and **Editha Nemsic,** of Mishcon de Reya LLP, argue that while this does offer some accessibility and legibility it's perhaps not providing access to the full corpus of law that it could, or even should. Also, on a broader level, they propose that there is a case to be made for access to the law being guaranteed and publicly funded.
Keywords: information architecture; repositories; legal sources; case law; open access; BAILII; ICLR

INTRODUCTION

On 19 April 2022, The National Archives (TNA) announced that it had "taken responsibility for the external publication of court judgments, creating the first publicly available government database of judgments."[1] Launched with an archive of approximately 50,000 judgments dating back to 2003 (provided to TNA by the British and Irish Legal Information Institute [BAILII]), the scope of the new service, known as Find Case Law, currently extends to judgments given in the High Court, Court of Appeal and the Supreme Court, alongside decisions of the Upper Tribunal. TNA plans to work with the Ministry of Justice over time to expand coverage to more courts and tribunals and to increase the volume of historical judgments in the archive.[2]

Find Case Law was greeted with mixed reviews. Commenting on the day the new service launched, Joshua Rozenberg initially observed, "… today's soft launch – while the courts are on vacation – is more of a whimper than a bang. What's on offer is described as an alpha service – not even the beta version – and it failed the simplest test I could think of."[3]

Acknowledging that Find Case Law was in the very earliest stages of development and recognising the broader significance of TNA's endeavour, Rozenberg concluded: "But I wish them [TNA] well … They have had to make new arrangements for collection and checking of judgments, which should be an improvement on the current distribution lists and the occasional ruling that is published despite reporting restrictions. *And it is obviously right, as a matter of principle, that public access to the law is guaranteed by statute and publicly funded.*"[4]

The fact that the alpha-release of Find Case Law had its flaws is not surprising. The initial release of the Find Case Law service in Easter 2022, which broadly comprised the development of the case law database and user-interface on the front-end,[5] along with the backend systems for processing new judgments,[6] commenced a mere 13 weeks prior to launch and Rozenberg's review. The sheer pace of delivery, by any standard, was remarkable.

This article is not concerned with the strengths or weaknesses of Find Case Law as a digital service. The appointment of TNA as the official publisher of judgments and the attendant launch of Find Case Law instead provide an opportunity to think more deeply about a matter of principle to which Rozenberg made glancing reference in his review: the principle that public access to the law should be guaranteed and publicly funded.

In this article, we argue that judgments possess multiple layers of value that the traditional mechanisms for judgment publishing, whether analogue or digital, are poorly optimised to serve. These traditional mechanisms are narrowly focused on advancing two main goals. The first goal is the proper development of the common law through selective coverage of "important" judgments. In this respect the selective process operates via the editorial processes of the case law publisher or further upstream at the court giving judgment, such as where the judge directs that a judgment be published on BAILII or signals the importance of the judgment in some other way. The second goal is to provide the means for potential litigants to assess how their claims might fare in court, by making the existing curated corpus of precedent accessible for legal research. Both are worthy and essential goals of any proper system of judgment dissemination. However, we argue that the goals of judgment publishing do not and should not stop there. A third, equally valuable, goal concerns facilitating transparency around the judicial process and the exercise of judicial power. It is this goal that we argue is under-served by the traditional mechanisms of judgment publishing and we conclude that it is in this regard that the significance of the launch of Find Case Law by TNA comes into focus.

ACCESSIBILITY AND LEGIBILITY

In a treatment of the rule of law that instantly became a classic, Lord Bingham stated that the first of eight core principles underpinning the rule of law is that "the law must be *accessible* and so far as possible intelligible, clear and predictable."[7] It is uncontroversial that in a common law jurisdiction such as England and Wales the primary sources of "the law" are the laws enacted by the legislature and the decisions of judges in the courts (i.e. case law or judge-made law).[8]

Some degree of distance between principle and its application in practice is inevitable. In the context of the provision of public access to primary legislation the gap between principle and practice is relatively minor. The process governing the creation of new statutes is well-defined, well-governed and well-understood. There is no ambiguity as to what information is in scope: a given instrument is either a statute or it is not. Statutes are emitted from a single source: Parliament. And, in essence, one statute carries as much legal force as the next. These factors, we argue, mean that the *legibility* of the legislative domain and process is high, which in turn makes the tasks of providing and measuring public access to legislation tractable and manageable. It is easy to achieve a basic level of insight in the state of the statute book. For example, using legislation.gov.uk, it is possible to quickly see that 35 new Acts of Parliament were added to the statute book in 2021, starting with the Pension Schemes Act 2021 and ending with the Armed Forces Act 2021.[9] Similarly, and by the same means, it is straightforward to work out that (at the time of writing) 40 Acts had received Royal Assent in 2022.[10]

The *legibility* of the legislative process, as we have shown, is high. In contrast, where public access to case law is concerned the distance between principle and practice is far greater, because the mechanisms and structures surrounding access to case law are distinctly more complex and difficult to pin down. To illustrate this point, consider how one may set about answering the question "how many judgments were given in the Administrative Court during the pandemic in 2020?" This question is deceptively simple. It assumes that there is a single, comprehensive and authoritative source of truth capable of providing the answer. There isn't one. In reality, there are multiple sources of judgments that vary in coverage and currency, each offering their own respective versions of the truth. And it assumes that all judgments are equal and are to be treated equally. They aren't. Some are handed-down, others are given *ex tempore*. Some are given in respect of the entire, fully argued matter, others are given in respect of minor interim issues and applications. And some are assessed as possessing precedential value, whereas the majority are not.

The point of all of this is to demonstrate that the processes and structures surrounding access to judgments are complex and extremely difficult to measure: the *legibility* of the process by which judgments and their associated metadata are rendered accessible to the public is low. There is no source of ground truth data in the case law realm. The problem is underlined by a recent study focused specifically on quantifying the accessibility gap in public law judgments given in the Administrative Court.[11] That study examined a sample of over 5000 Administrative Court judgments given between 2015 and 2020 held on vLex Justis' commercial research database and measured how many of the judgments were also accessible to the public for free on BAILII. The analysis found that of the 5408 unique judgments given during the period covered by vLex dataset, only 55% were also hosted on BAILII. The remaining 45% were presumed to be available only via subscriber-access platforms.[12] The research suggests that the portion of judgments that were not freely available on BAILII generally represented the quantity of judgments that were given *ex tempore* (where, in the interests of expediency, judges deliver judgment orally into the court recording system immediately after argument has come to an end) rather than in handed-down form.[13] To be rendered publishable anywhere, the recordings of these *ex tempore* judgments must first be transcribed by a transcription company.[14] The research concludes,

> "… the resulting transcripts then need to be purchased from the transcription agency. This is expensive and extremely cumbersome to do on a case-by-case basis. To deal with this, the commercial legal publishers agree annual contracts with the transcription agencies, which are private companies, for the bulk delivery of new judgment transcripts as they become available. BAILII simply does not have the spending power to obtain the transcript of *ex tempore* judgments in the same fashion."

This situation, we argue, is the consequence of the near total absence, until April 2022 with the launch of Find Case Law, of state involvement in judgment publishing since the dawn of common law itself. This, in turn, has resulted in a failure to develop a robust and principled approach to the delivery of open access to case law that takes account of the multiple layers of value held by judgments in the digital age.

JUDGMENTS AND THEIR MULTI-LAYERED VALUE

Judgments have multi-layered value. For the parties to a case, they are an authoritative record of the outcome of a legal dispute, providing reasons for that outcome. For lawyers and judges, they support the provision of advice about the law and become legal authorities that can be used to argue and resolve future disputes. As a part of the wider constitutional system, they bring a degree of transparency to the judicial process and the exercise of

https://doi.org/10.1017/S1472669623000063 Published online by Cambridge University Press

judicial power. For researchers, they form part of the primary materials that can be subjected to different methodologies that seek to advance the understanding and analysis of law and policy. Despite their multi-layered value traditional judgment publishing has been optimised to serve the layers of value most closely aligned to the conduct of litigation. Layers of value that drive at the promotion of transparency in the exercise of judicial power and the use of judgments as a source of evidence to inform policy research on broader societal themes have historically been poorly served.

Since the earliest days of the common law, the function of judgment dissemination has been left to the private and third sector. Until relatively recently with the advent of digital legal research platforms, the main vehicles used to disseminate judgments were monthly printed parts, which would be subsequently combined into a bound volume at the end of each year. An ever-present practical restriction on judgment publishing was the limited capacity of the monthly printed parts and the annual bound volumes – the number of judgments given over a 12-month period naturally exceeded the number of judgments that could be accommodated in a printed work.

The founders of The Incorporated Council of Law Reporting for England and Wales (ICLR), which was established in 1865 to rationalise and centralise judgment publishing in England and Wales in the wake of the era of the Nominate reports, probably viewed the constraints of print as a virtue rather than a limitation. ICLR's canons of reportability,[15] devised in 1863 by Nathaniel Lindley QC (who would go on to become Master of the Rolls and a Law Lord), mandated that cases "which pass without discussion" and "which are valueless as precedent" should be excluded from publication whilst cases that introduce new principles or modify existing rules ought to be included.[16]

Lindley's canons of reportability place the proper development of the common law as the core value to be optimised and promoted by the judgment-dissemination function. Their overriding objective was to harness the strictures of editorial selectivity in order to maintain a lean and heavily curated body of *precedent*. The problem with this model of judgment publishing in the contemporary, data-driven context is the fallacy that cases "which are valueless as precedent" are valueless overall.

The rise of online legal research platforms in the late 2000s and early 2010s, particularly those created and maintained by the various legal information institutes subscribing to the Montreal Declaration on Free Access to Case Law[17] (such as BAILII, CanLII and AustLII) has triggered an important shift in thinking: judgments are not solely a source of authority, but a source of *data*, too.

Researchers are increasingly looking to judgments as a source of empirical evidence for data-driven reform. Recent initiatives at the Ministry of Justice to reform judicial review[18] and the Human Rights Act 1998[19] are excellent case studies of this phenomenon. As Paul Craig observed, both initiatives had "been fuelled prominently, albeit not exclusively, by claims of judicial overreach, but they had not been empirically tested."[20]

The Independent Review of Administrative Law (IRAL), which was tasked with making recommendations for reform to judicial review, was marked by a substantial quantity of data-led submissions during the consultation period from academia, the Bar, law firms and business. The data and statistics appendix accounts for more than 10% of the final report's length.[21] However, the review panel's own use of judgments as a source of data, and the recommendations made on the basis of the panel's ensuing statistical analysis, were a source of serious concern.

A firm recommendation of the review panel was that so-called *Cart*[22] judicial reviews ought to be abolished on the basis that they consumed disproportionate amounts of judicial resources.[23] The central logic of this conclusion, which was based on a manual trawl of cases on WestlawUK and BAILII, was that the number of successful *Cart* reviews was insignificant relative to the number of lodged applications. The empirical foundations for this recommendation were comprehensively dismantled by Joe Tomlinson and Alison Pickup,[24] who identified that not only was the panel's arithmetic flawed and misleading,[25] but also that "*Cart* cases are not generally reported because they go through a specific procedure, the dynamics of which means reported successful cases are unlikely."[26]

The increasing use of judgments as a source of statistical information used to steer high-stakes policy and law reform increases the importance of significantly improving the *legibility* of the processes and structures surrounding judgment publication and public access. IRAL's *Cart* recommendation and their supporting analysis underscores the risks of data-driven reform when we lack a single, transparent and publicly accessible source of truth for case law.

THE SIGNIFICANCE OF FIND CASE LAW AND TNA'S ROLE IN PROVIDING OPEN ACCESS TO CASE LAW

Calls for drastic improvements to the collection of justice data, including judgments themselves,[27] have been steadily gaining traction over the past few years. In 2021, the Constitution Select Committee recognised that the absence of robust, in-depth justice data was a "long-standing problem".[28] The key driver behind the ongoing effort to enhance justice data has been Dr Natalie Byrom's 2019 *Digital Justice* report, which made wide-ranging recommendations to HMCTS for the improvement of the court's data architecture. Her recommendations on judgment access were crucial to the eventual creation of TNA's Find Case Law platform: "On the basis of this report, HMCTS and the MoJ should engage with key stakeholders to develop a publication solution that *delivers free and comprehensive* access to judgments in a structured machine-readable format."[29]

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Fast-forwarding to the end of 2022, much of Byrom's recommendation has been realised. Find Case Law, though still very much in its infancy as a service, is the first centralised and fully state-funded judgment service in the common law world. All of the judgments hosted on the platform are free to access and are published in machine-readable formats, such as XML, which is an essential technical building block for large scale data projects and innovating with legal information in the future.

There is a symbolic significance to Find Case Law, too. TNA's assumption of responsibility for judgments publishing drives home a subtle but important legal reality: judgments are *public records*.[30] Each judgment, regardless of whether it was handed down or given *ex tempore*, is a record of the exercise of state power, exerted through the judiciary, that should be preserved for the benefit of the public. For the first time, judgments co-exist digitally with records from the other two organs of the state: the legislature (legislation.gov.uk) and the executive.

One aspect of Byrom's recommendation is yet to be realised: Find Case Law needs to be comprehensive. Here, comprehensiveness potentially runs along two dimensions. The first is temporal, the second concerns the volume of coverage. At present, Find Case Law's collection reaches back to 2003 – the origin year in the bulk collection of approximately 50,000 judgments BAILII donated to TNA in 2021 when the plans for Find Case Law were first reported.[31] Without doubt it is desirable for TNA to find a way to "backfill" their archive with older cases, particularly the seminal ones. But we argue that the more important priority is for TNA, the courts, Ministry of Justice, and HMCTS to tackle the very large gaps in *current* public access. At present, Find Case Law's coverage broadly aligns with the practice followed since the early 2000s whereby judgments handed down would find their way on to BAILII while the larger number of supposedly less important judgments that were given *ex tempore* would be picked up by the commercial publishers. It is this model that has created such a vast disparity in access to public law judgments given in the Administrative Court.[32]

It is surely the time, in 2023, to begin the transition to a new paradigm of judgment publishing that is truly comprehensive, where all judgments given in open court (handed-down *and* ex tempore), are made freely available to the public regardless of opaque estimations as to their value as precedent. Selectivity – the act of highlighting cases of wider significance – has its place in the modern era, but as an *overlay* only, a filtered view, on the comprehensive corpus of judgments. It is in this direction, we argue, that TNA should now proceed to move in.

Footnotes

[1] The National Archives, 'The National Archives to publish court judgments' <www.nationalarchives.gov.uk/about/news/the-national-archives-to-publish-court-judgments/> accessed 10 October 2022.

[2] ibid.

[3] Joshua Rozenberg, 'Find Case Law' (*A Lawyer Writes*, 19 April 2022) <https://rozenberg.substack.com/p/find-case-law> accessed 10 October 2022. The failed test Rozenberg mentions refers to the difficulty he experienced locating the Supreme Court's decisions in *R (Miller) v Secretary of State for Exiting the European Union)* [2017] UKSC 5; [2018] AC 61, SC and *R (Miller) v Prime Minister* [2019] UKSC 41; [2020] AC 373, SC.

[4] ibid (authors' emphasis).

[5] Digital Marketplace, 'The National Archives: Developing a Public Access Service for Court Judgments with a Publishing and Editorial System' (*gov.uk*, 30 November 2021) <www.digitalmarketplace.service.gov.uk/digital-outcomes-and-specialists/opportunities/16224> accessed 10 October 2022.

[6] Digital Marketplace, 'The National Archives: Enriching Court Judgments and Legislation Documents, Adding Hyperlinks and Creating Linked Data' (*gov.uk*, 30 November 2021) <www.digitalmarketplace.service.gov.uk/digital-outcomes-and-specialists/opportunities/16014> accessed 10 October 2022.

[7] Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 37 (authors' emphasis). Also see *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869, SC at para 68.

[8] ibid, p 42.

[9] <www.legislation.gov.uk/ukpga/2021?page=1> accessed 10 October 2022.

[10] <www.legislation.gov.uk/ukpga/2022> accessed 10 October 2022. At the time of writing, the most recent Act of Parliament is the Energy (Oil and Gas) Profits Levy Act 2022.

[11] Daniel Hoadley, Joe Tomlinson, Editha Nemsic and Cassie Somers-Joce, 'How Public is Public Law? The Current State of Open Access to Administrative Court Judgments' (2022) 27 Judicial Review 95.

[12] ibid at 96.

[13] ibid.

[14] Government procures the services of a panel of commercial agencies to perform transcription services in the courts, including the transcription of judgments given ex tempore both onsite and off-site. The current procurement contract can be found here: <www.contractsfinder.service.gov.uk/notice/b6e8435f-5804-4c3b-ac2b-2d739397526a?origin=SearchResults&p=1>.

https://doi.org/10.1017/S1472669623000063 Published online by Cambridge University Press

[15] 'The ICLR Guide to Reportability' (ICLR Knowledge) <www.iclr.co.uk/knowledge/guides/the-iclr-guide-to-reportability> accessed 10 October 2022.
[16] WTS Daniel QC, *History of "The Law Reports"* (William Clowes and Sons 1884) 63-65.
[17] CanLII, 'Montreal Declaration on Free Access to Case Law' <www.canlii.org/en/info/mtldeclaration.html> accessed 11 October 2022.
[18] Independent Review of Administrative Law (Cm 407, 2021).
[19] Independent Human Rights Act Review (Cm 586, 2021).
[20] Paul Craig, 'Judicial Review, Methodology and Reform' [2022] PL 19.
[21] Independent Review of Administrative Law (Cm 407, 2021) 159.
[22] [2011] UKSC 28; [2012] 1 AC 663, SC(E).
[23] Independent Review of Administrative Law (Cm 407, 2021) 70.
[24] Joe Tomlinson and Alison Pickup, 'Putting the *Cart* before the Horse? The Confused Empirical Basis for Reform of *Cart* Judicial Reviews' (U.K. Const. L. Blog, 2021) <https://ukconstitutionallaw.org/2021/03/29/joe-tomlinson-and-alison-pickup-putting-the-cart-before-the-horse-the-confused-empirical-basis-for-reform-of-cart-judicial-reviews/> accessed 12 October 2022.
[25] The panel reported that there had been 5502 applications for *Cart* judicial reviews between 2012 and 2019. Their trawl of Westlaw and BAILII revealed 45 *Cart* review judgments, of which 12 were decided in the applicant's favour. On this basis, the panel reported that the *Cart* success rate was 0.22%. Tomlinson and Pickup note the 0.22% "figure being relied on artificially deflates the actual success rate by taking 5457 cases — where we have no data on the outcomes — and assuming they were all failures. There is no basis for that assumption."
[26] ibid (n 25).
[27] Dr Natalie Byrom, *Digital Justice: HMCTS Data Strategy and Delivering Access to Justice: Report and Recommendations* (October 2019), paras 4.47–4.60: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835778/DigitalJusticeFINAL.PDF> accessed 12 October 2022.
[28] Constitution Select Committee, *Covid and the Courts* (HL 2019-21, 257) para 243.
[29] Dr Natalie Byrom, *Digital Justice: HMCTS Data Strategy and Delivering Access to Justice: Report and Recommendations* (October 2019), para 4.59: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835778/DigitalJusticeFINAL.PDF> accessed 12 October 2022 (authors' emphasis).
[30] Public Records Act 1958, s 8(1).
[31] Michael Cross, 'Government Considers Plans to Create National Hub for Court Judgments' (*Law Society Gazette,* 10 May 2021) <www.lawgazette.co.uk/news/government-considers-plans-to-create-national-hub-for-court-judgments/5108426.article> accessed 15 December 2022.
[32] Daniel Hoadley, Joe Tomlinson, Editha Nemsic and Cassie Somers-Joce, 'How Public is Public Law? The Current State of Open Access to Administrative Court Judgments' (2022) 27 Judicial Review 95.

Biographies

Daniel Hoadley LLM, Amy Conroy LLB and **Editha Nemsic LLB** work at Mishcon de Reya LLP. Daniel is a non-practising barrister and head of Data Service and Analytics at the firm, who presented a version of the argument outlined here at the BIALL Conference in July of last year. He is also a regular contributor to LIM. Amy has an MSc in Computer Science and is a data scientist at Mishcon de Reya LLP, while Editha has a MSc in Business Analytics and is a data scientist at the firm, and also a teaching assistant at the UCL School of Management.

https://doi.org/10.1017/S1472669623000063 Published online by Cambridge University Press