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Judicial Review in the UK: Constitutional Balance, Parliamentary Sovereignty, and the Rule of Law in the Twenty-First Century

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Abstract

This thesis examines the constitutional balance between the executive, Parliament, and judiciary, focusing particularly on the tension between parliamentary sovereignty and the rule of law within the evolving framework of judicial review. It analyses how the scope of judicial review has expanded substantially over the past five decades, most notably since the millennium, extending beyond traditional boundaries to encompass areas previously considered immune from judicial scrutiny, and parliamentary legislation under the Human Rights Act 1998. The research addresses whether this expansion constitutes legitimate constitutional evolution or represents unwarranted judicial encroachment into the democratic sphere.

The thesis contends that the expansion of judicial review reflects a significant yet principled and evolutionary rebalancing of constitutional relationships rather than a revolutionary shift or simple power transfer. It demonstrates that both common law developments and statutory changes, particularly under the HRA, have enabled courts to exercise enhanced oversight of executive action whilst respecting parliamentary sovereignty. This expanded judicial role has neither resulted in judicial supremacy nor diminished Parliament's ultimate legislative authority, — parliamentary sovereignty and the rule of law mutually reinforced throughout.

Employing doctrinal methodology, the study examines statutes, case law, and legal principles to trace judicial review's development and assess its constitutional implications. It analyses how judicial review's scope has evolved across justiciability, standing rules, remedies, and substantive review standards under the HRA. The thesis specifically examines landmark cases such as GCHQ, Belmarsh, and Miller/Cherry, illustrating how courts have asserted authority and reconfigured the balance of power. It also critically evaluates the Judicial Review and Courts Act 2022, arguing that it challenges orthodox approaches to unlawful acts' legal status and may enhance ouster clauses' effectiveness. The thesis concludes that judicial review's expansion has occurred within constitutional constraints and with careful regard for democratic legitimacy, fostering more robust constitutional accountability whilst preserving parliamentary sovereignty.

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Printed Name: Elif Busra Kaya

Signature :

Introduction

Over the past fifty years, the relationship between the judiciary, the executive, and Parliament has been subject to gradual but significant change, reshaping the constitutional landscape of the United Kingdom. This evolution has become especially pronounced since the turn of the millennium, as judicial review has expanded far beyond its traditional boundaries. No longer confined to questions of procedural regularity and *ultra vires*, judicial review now encompasses a broad spectrum of governmental activity, including areas once considered immune from judicial scrutiny, such as prerogative powers, national security and foreign relations questions, and even, in the context of Convention rights allowing review of parliamentary legislation under the Human Rights Act 1998 ('HRA 1998'). The expansion of judicial review's scope has generated considerable academic debate about whether these changes represent a legitimate constitutional evolution or an illegitimate judicial usurpation of democratic authority.[1] Some argue that the judiciary has assumed a more active and necessary role in upholding the rule of law and protecting individual rights, while others warn that such judicial assertiveness risks undermining the foundational principle of parliamentary sovereignty and encroaching upon the democratic prerogatives of elected institutions. This thesis argues that the expansion of judicial review within the constitutional balance has been neither revolutionary nor constitutionally unwarranted, but rather a principled, incremental and context-sensitive constellation of developments. Moving beyond a simple linear narrative of expansion, this research presents a multifaceted picture of judicial power's dynamic interplay with parliamentary sovereignty across procedural, substantive, and doctrinal grounds, demonstrating that parliamentary sovereignty and the rule of law, far from being mutually exclusive, have been consistently and mutually reinforced through the evolving practice of judicial review.

[1] Joanna Bell, 'The Resurgence of Standing in Judicial Review' (2024) 44 OJLS 313, 340; Aileen Kavanagh, 'Reasoning about proportionality under the Human Rights Act 1998: outcomes, substance and process' (2014) 130 LQR 235, 252; Richard Ekins, 'Protecting the Constitution: How and Why Parliament should Limit Judicial Power' (Policy Exchange 2019) <https://policyexchange.org.uk/wp-content/uploads/2020/01/Protecting-the-Constitution.pdf.> accessed 1 July 2025.

The constitutional implications of the evolution of judicial review extend far beyond the technical realm of administrative law. They reflect deeper shifts in constitutional order, including a heightened emphasis on fundamental rights, growing public expectations for governmental accountability, and the increasing complexity of modern governance. These developments are illustrated throughout this thesis by reference to a wide range of cases examined in detail — among them landmark decisions such as *Council of Civil Service Unions v Minister for the Civil Service*[2] (‘*GCHQ*’), *A v Secretary of State for the Home Department*[3] (‘*Belmarsh*’) and *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland*[4] (‘Miller/Cherry’) — which illustrate how the courts have asserted their authority to review executive action even in sensitive areas. Such increased judicial scrutiny inherently reflects and reconfigures the delicate balance of power between the judiciary and the executive, underscoring a more robust judicial role in overseeing government and ensuring the limits of its authority. Thus, these developments reflect not merely doctrinal evolution, but a deeper recalibration of the separation of powers. The result is a more complex separation of powers dynamic, where constitutional boundaries are continuously negotiated through litigation.

The Research Question and the Argument of the Thesis

The gradual transformation of judicial review from a limited supervisory jurisdiction focused on procedural regularity to a more comprehensive system of governmental scrutiny raises profound questions about the appropriate boundaries of judicial authority in a parliamentary democracy. This thesis addresses one of the most fundamental constitutional questions of contemporary British governance: How has the scope of judicial review evolved over the past fifty years in the UK, with a particular focus on England, through what constitutional and doctrinal mechanisms has this evolution proceeded? It does so not by examining judicial review in isolation, but by using its evolving scope as a lens through which to observe how the constitutional balance between the courts, Parliament and the executive has actually been struck — across

[2] *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374.

[3] *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

[4] *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41.

procedural, substantive, and doctrinal dimensions of public law. This research interrogates whether that balance is constitutionally sound: whether the evolution of judicial review has been principled, anchored to constitutional principles rather than driven by institutional preference, and whether parliamentary sovereignty and the rule of law have been maintained and mutually reinforced rather than placed in fundamental opposition. To answer these questions, this thesis traces the evolution of judicial review primarily through detailed engagement with the case law, examining the reasoning of majority and minority judgments, the relationship between cases across time, and the constitutional logic that connects doctrinal development to broader shifts in the balance of institutional authorities.

The thesis contends that this evolution is constitutionally sound, arguing that the significant expansion in the scope of judicial review — across non-justiciability, standing, substantive review standards and the remedial doctrine — represents not a mere transfer of power from the democratic to the judicial sphere, but a principled and dynamically calibrated evolution, underpinned by respect for constitutional principles and institutional boundaries while ensuring more robust legal accountability. Yet, this evolution does not follow a single, linear narrative line from limited to expansive judicial review. It is better understood as a constellation of developments — some more expansive, some more restrained, each with its own constitutional logic — that, when viewed as a whole presents a coherent picture of judicial review's evolving relationship with parliamentary sovereignty. The field has been shaped by both advances and recalibrations: the progressive narrowing of non-justiciability alongside persistent deference in national security and foreign policy contexts; the liberalisation of standing alongside the principled narrowing evident in the recent case law examined in the first chapter; the deepening of proportionality review alongside context-sensitive deference in *Denbigh*[5] and *Carlile*[6] examined in chapter two; and the statutory introduction of flexible remedies alongside the doctrinal uncertainties those remedies introduce, as demonstrated in chapter three. It is precisely this pattern — expansive in some respects, restrained in others, but anchored

[5] *R (Begum) v Denbigh High School Governors* [2006] UKHL 15.

[6] *R (Lord Carlile) v Home Secretary* [2014] UKSC 60

throughout to constitutional principle — that the holistic judicial review lens of this thesis is intended to capture.

Central to this perspective is the finding that the evolution of judicial review has proceeded not by seeking judicial supremacy, but by deferring to democratic authority where institutional competence and constitutional principle so require, and by preserving the distinction between lawfulness review and full merits review on appeal. Consequently, parliamentary sovereignty and the rule of law are not mutually exclusive: they have been mutually reinforced through the evolving practice of judicial review producing a constitutional settlement that is both more robust and more legitimate than a simple narrative of judicial expansion would suggest.

The argument is developed across three chapters, each examining a distinct dimension of judicial review's evolution through detailed engagement with the case law. The analysis in the first chapter demonstrates that the narrowing of non-justiciability — from *GCHQ's* foundational shift to a subject-matter approach, traced through the incremental case law, including *Everett*,[7] *Bentley*,[8] *Bancoult*[9] and *Miller*[10] — has been principled and constitutionally grounded, sensitive to the institutional limits of judicial competence and calibrated according to the constitutional significance of the subject matter. Yet, *Miller/Cherry*[11] is criticised as a methodological departure from this trajectory — not because it expanded judicial review, but because of the way it did so, collapsing the distinction between existence and manner of exercise. The liberalisation of standing similarly reflects not mere procedural adjustment but a reconfiguration of the constitutional function of judicial review from a mechanism primarily concerned with redressing individual grievances to one increasingly grounded in the judicial function of upholding the rule of law. In national security and foreign policy contexts, nonetheless, the theoretical expansion of justiciability has not translated into intensive judicial intervention

[7] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] QB 811.

[8] *R v Secretary of State for the Home Department ex p Bentley* [1994] QB 349.

[9] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2008] UKHL 61.

[10] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[11] R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland (n 3).

in practice. Courts have maintained a high level of deference, resulting in a scope of review that remains considerably narrower than in other domains. Far from representing a contradiction, however, this evidences the principled character of the expansion, demonstrating that courts remained sensitive to the institutional and democratic constraints that attend executive decision-making in these sensitive areas.

The second chapter examines the HRA's impact on judicial review and on the relationships between the courts and Parliament, and between the courts and the executive. The analysis of sections 3 and 4 demonstrates that courts have navigated the tension between the mandate for human rights compatibility and the institutional constraints of the legislative framework. By balancing the interpretative obligations under the Act with a careful recognition of constitutional limits, judicial intervention remained remedial rather than legislative in character. Similarly, the examination of section 4 case law reveals consistent judicial caution; even though declarations of incompatibility lack binding force on Parliament, the courts' restraint is driven by a commitment to institutional boundaries. The chapter further demonstrated that the recent Rwanda litigation[12] (in which Parliament exercised its legislative supremacy by enacting the Safety of Rwanda Act 2024 in direct response to the Supreme Court's ruling, and the subsequent change of government through democratic election which led to the Act's repeal) confirmed that parliamentary sovereignty retains its constitutional primacy even under constitutional strain. Furthermore, the analysis of proportionality review demonstrates that its deepening has not collapsed the boundary between lawfulness and merits review: rather it highlights that the assessment of proportionality is not an exclusively judicial exercise, as courts give variable weight to executive expertise and democratic mandate based on contextual factors. This contextual weighting — illustrated by the contrasting approaches in *Bank Mellat*,[13] *Denbigh*,[14] and *Carlile*[15] — serves a vital constitutional function.

[12] *R (AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42.

[13] *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39.

[14] *R (Begum) v Denbigh High School Governors* (n 6).

[15] *R (Lord Carlile) v Home Secretary* (n 7).

The third chapter does not merely trace an evolution that has already occurred, but it also offers a prospective analysis of the constitutional implications of the Judicial Review and Courts Act 2022. This chapter demonstrates that the changes within the Act carry constitutional significance that belies the apparent modesty of the legislation. It argues that the Act, by necessitating the recognition of voidable unlawfulness will require a departure from the orthodox *ultra vires* position and that, depending on how courts deploy the new remedial powers, it may simultaneously encourage greater judicial intervention and paradoxically, strengthen ouster clauses, by reviving pre-Anisminic distinctions between types of errors of law. The Act introduces a more doctrinal form of constitutional tension than the evolutionary developments examined in the preceding chapters — one for which the principle of legality may be a significant, however uncertain, countervailing force.

Contributions of the Thesis to the Literature

This thesis contributes to constitutional scholarship by offering a holistic and contemporary analysis of judicial review in the United Kingdom with a particular focus on the English legal framework. First, it provides a comprehensive and integrated account of how the scope of judicial review has changed across diverse domains of public law over the past fifty years, with particular emphasis on the significant developments since the turn of the millennium. Although structured into dedicated chapters that address justiciability, standing, third-party intervention, remedies and ouster clauses — specifically under the Judicial Review and Courts Act 2022 — alongside substantive review standards under the Human Rights Act 1998, the analysis synthesises these areas to demonstrate their collective impact on constitutional principles, namely, parliamentary sovereignty and the rule of law, and the balance between institutions. Crucially, this holistic approach distinguishes itself from prevailing scholarship on constitutional balance, which has predominantly engaged with these questions through the lens of rights protection typically reflecting the broader theoretical tension between legal constitutionalism and political constitutionalism. Using McCorkindale and Goldoni's identification of the 'three waves of political

constitutionalism' as an analytical spine, this thesis maps the existing literature across three periods that reflect the UK's evolving constitutional landscape.[16]

The first wave, in the late 1970s, emerged as a response to various reform proposals including a Bill of Rights, devolution, the creation of a Supreme Court and a more powerful system of administrative law.[17] These arose against the backdrop of the historical transition from a 'minimal state' to an interventionist 'collectivist' state, where the state's role expanded from being merely a 'policeman, judge and protector' to becoming a 'schoolmaster, doctor, and house-builder'.[18] Such reform proposals were perceived by authors such as Griffith as a threat to the political nature of the UK constitution.[19] Griffith's foundational argument was that constitutional law is the very practice of continuous political conflict and resolution.[20] He rejected the Diceyan 'red light' account of this period — as termed by Harlow and Rawlings— which viewed the law as a 'brake' on state action and a protector of individual liberty — arguing instead for a 'green light' view that favoured political accountability and democratic oversight over judicial policing.[21] He maintained that the law should enable government rather than limit it, and that law cannot serve as a substitute for politics; constitutional devices do not eliminate political decisions but merely shift them from accountable, vulnerable politicians to less-diverse and unaccountable judges.[22] From this perspective, rights are inherently contestable rather than objective principles, and their determination is most legitimately made by democratically accountable — and therefore removable —

[16] Marco Goldoni and Chris McCorkindale (2019) Three Waves of Political Constitutionalism, King's Law Journal, 30(1), 74-96.

[17] Carol Harlow and Richard Rawlings, *Law and Administration* (4th edn, CUP 2021) 41

[18] ibid 37-40 citing Cecil Carr, Concerning English Administrative Law (OUP 1941) 10-11.

[19] Goldoni and McCorkindale (n 17) 76; Historical political constitutionalist scepticism toward judicial power was rooted in two main reasons: the fear that courts were inherently conservative and would stifle progressive legislation, and the concern that judicial approval would grant 'legitimacy' to coercive government policies (e.g. R v Shayler [2002] UKHL 11 and the control orders regime), thereby undercutting effective opposition. Adam Tomkins, 'What's Left of the Political Constitution?' (2013) 14(12) German Law Journal 2275, 2290.

[20] JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1.

[21] Harlow and Rawlings (n 18) 6, 35-38.

[22] Griffith (n 21) 16-19, Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2009) 164.

legislatures capable of balancing competing interests and incorporating diverse perspectives.[23]

The second wave, emerging between the 1990s and early 2000s, represents a 'normative turn' in the literature.[24] This era followed the start of the 'blue rinse' in the 1980s, as termed by Harlow and Rawlings, where government functions were widely shifted to the private sector, creating a complex 'contract culture' of outsourced public services.[25] During this period, many of the reforms previously resisted by Griffith came into effect, most notably through the enactment of the Human Rights Act 1998 and the devolution legislation. The resulting rise of legal constitutionalism and the expansion of judicial review post-*GCHQ*,[26] prompted political constitutionalist scholars to justify the value of parliamentary government against this newly established legal background.[27] It is within this normative wave that the core theoretical tension between legal and political constitutionalism was most sharply defined through competing views on the role of institutional competence.

Legal constitutionalism advocates strong judicial protection grounded in the view that rights are objective principles discernible through rigorous legal and moral reasoning. As articulated by Dworkin, rights function as 'trumps' against majoritarian goals operating as principled constraints meaning that they cannot be overridden simply because the majority prefers a different outcome. The role of the court, therefore, is to identify and apply these objective moral principles.[28] Allan similarly contends that courts are uniquely positioned to apply constitutional principles with the consistency and impartiality that legislative process cannot guarantee. Allan, however, emphasises that the weight of a principle necessarily depends on the concrete circumstances of the particular

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[23] Griffith (n 21) 12; Alison Young, *Democratic Dialogue and the Constitution* (OUP 2017) 7; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (CUP 2013) 232; Goldoni and McCorkindale (n 17); Aileen Kavanagh, *The Collaborative Constitution* (CUP 2023) ch 1; Jeremy Waldron, *Law and Disagreement* (OUP 1999) 116–117; Bellamy (n 23) 20–26.

[24] Goldoni and McCorkindale (n 17) 78.

[25] Harlow and Rawlings (n 7) 44.

[26] Ronald Dworkin, *Taking Rights Seriously* (A&C Black 2013) 110.

[27] Goldoni and McCorkindale (n 6) 79.

[28] Dworkin (n 16) 110.

case before the court. Judges reason from the particular facts of cases rather than from shifting political considerations.[29] Both positions share the view that courts provide a 'safety net' insulated from majoritarian pressures, enhancing substantive justice by focusing on concrete facts that the legislature may not have anticipated.

Political constitutionalism, by contrast, rests on the premise that the rights are inherently contestable. It promotes a form of reasoning unencumbered by the rigid constraints of legal precedent and text, ensuring that constitutional balance is maintained through political responsiveness rather than judicial ruling. In this context, Waldron emphasises the 'dignity of legislation', arguing that parliamentary law-making provides a public, deliberative procedure for settling normative disputes.[30] From a different perspective, Bellamy identifies the legitimacy of a political constitution in an 'equality of input' grounded in the equal vote.[31] Bellamy argues that the constant need for re-election under majority rule compels governments to be inclusive and seek consensus to prevent groups from defecting, ensuring that no group becomes a 'permanent loser' as minorities always retain the potential to form part of a future majority.[32] Despite these theoretical strengths, however, political constitutionalism faces the risk of undermining the rights of minorities due to the very electoral incentives it relies upon, such as the desire for re-election. Moreover, the legislative ideal of public justification can be compromised in practice by factors such as party discipline, time pressures, and political expediency.

The third and most recent shift represents a period where the strict preoccupation with the opposition between the 'legal' and 'political' begins to dissolve, leading to what McCorkindale and Goldoni termed a 'reflexive wave' of political constitutionalism — one that, in their view, points towards a broader

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[29] TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1994) 79-108.

[30] Goldoni and McCorkindale (n 17) 79; Jeremy Waldron, *Political Political Theory* (Harvard University Press 2016).

[31] Goldoni and McCorkindale (n 17) 80; Richard Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9 International Journal of Constitutional Law 89.

[32] Bellamy (n 23) 43.

research agenda beyond court - parliament relationship.[33] In this context, certain political constitutionalists have sought to adapt their frameworks to the contemporary reality of the UK's constitutional landscape. Adam Tomkins, for instance, has refined the political constitutionalist position — which is centred on opening government through legislative accountability — by moving towards a 'mixed constitution' model of the UK constitution.[34] He normatively identifies a positive but bounded role for the judiciary that supplements rather than rivals the political constitution: courts should focus on ensuring legal powers are not exceeded and protecting absolute rights, while leaving the balancing of qualified rights, where competing interests are inherently political, to Parliament.[35] Consequently, he suggests that judicial review should be sensitive to political considerations, being less intensive when an action is backed by a clear democratic mandate yet more robust when reviewing non-elected bodies.[36] Central to this endurance of the political model is the persistence of parliamentary sovereignty; Tomkins concludes that nothing in the UK's constitutional order is beyond Parliament's reach, as any constraints exist only because Parliament wills them to be so.[37] He ultimately suggests that the mixed constitution of the UK is preferable to a purely political one, provided that it continues to safeguard central democratic values.[38]

The current reflexive period of political constitutionalism—marked by the constitutional developments of Brexit, calls for the repeal of the HRA and limitations on judicial review— also accommodates the hybrid normative models of Gardbaum, Young, and Kavanagh. Indeed, rather than being mutually exclusive rivals, as sometimes suggested in older accounts,[39] modern interpretations suggest that neither political nor legal constitutionalism operates on the premise that its respective oversight methods hold a monopoly over the constitutional order.[40] Gardbaum's 'New Commonwealth model', for instance,

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[33] Goldoni and McCorkindale (n 17) 82-90.

[34] ibid 80.

[35] Tomkins (n 20) 2280-2283.

[36] ibid 2283-2290.

[37] ibid 2289.

[38] ibid 2292.

[39] Ronald Dworkin, *A Matter of Principle* (OUP 1985); Waldron (n 24); Kavanagh (n 24) ch 1.

[40] Young (n 24) 69; Tomkins (n 20); Kavanagh (n 24).

occupies an intermediate space between legal and political constitutionalism, taking the UK as one of the primary examples in practice.[41]

The intermediate nature of Gardbaum's new Commonwealth model is derived from a combination of key elements borrowed from both. From political constitutionalism, it adopts an unconstrained legislative style of moral reasoning that takes place before and after judicial review. From legal constitutionalism, it takes the enhanced public rights, ensuring consciousness of a codified charter and the neutral institutional capacity of independent judges to assess public justification for laws. However, he argues, unlike the traditional political or legal constitutionalism where the institution with the final word exercises it almost automatically, the new Commonwealth model creates a discretionary gap. That is to say, in the new Commonwealth model, the legislature has the political discretion whether to exercise its formal power of the final word.

Gardbaum distinguishes the new model by four fundamental features: a codified charter or bill of rights, a mandatory pre-enactment political rights review, a weak form of judicial review that goes beyond an interpretative assumption that the legislature does not intend to violate rights, or ordinary methods of statutory interpretation; linked to this, and lastly, the legislature having the final say in law — an essential institutional check against judicial overreach, and one that is backed by electoral accountability and therefore democratic legitimacy.[42] In this way, the model addresses concerns about the strong form of judicial review, which is 'not the least restrictive way of achieving [the values in rights-protection] with respect to others that are also central and essential within a constitutional democracy'[43] and the concerns as to the strong form of legislative

[41] For the argument that the normative appeal of this model is not universal but depends on contextual factors, including the existence of good faith rights, disagreements among branches of government, legislative competence on rights issues and the absence of a dominant political party, see Scott Stephenson, 'Is the Commonwealth's Approach to Rights Constitutionalism Exportable?', (2019) 17 International Journal of Constitutional Law 884.

[42] Gardbaum (n 24) 33, 37. Although the term 'weak-form' is adopted as a shorthand for this model, the term was coined by Mark Tushnet. For a critique of this label's suitability for the UK, see Aileen Kavanagh, 'What's So Weak about "Weak-Form Review"?' (2015) 13(4) International Journal of Constitutional Law 1008. In response, Gardbaum clarified that while judicial strength is a 'multi-dimensional' spectrum, the model is perhaps better characterised by the distinction between 'penultimate' and 'ultimate' judicial review. See Stephen Gardbaum, ('What's so weak about "weak-form review"? A reply to Aileen Kavanagh' (2015) 13 International Journal of Constitutional Law 1040.

[43] Gardbaum (n 24) 61.

supremacy, which 'needlessly creates a monopoly for elected representatives in terms of whose voice counts or has legal authority on rights issues.'[44] This is achieved particularly through two types of components of the model, namely the pre-enactment rights review and a formal, though not legally final, judicial opinion on rights issues raised by enacted laws.[45] The model operates distinctly from both traditional judicial supremacy, where courts have the final word, and traditional legislative supremacy, which lacks a formal judicial mechanism for rights-based scrutiny.

The new Commonwealth model grounds rights within a comprehensive legal framework, moving beyond their conception as merely moral or political entitlements or the residual space left unregulated by the law. This marks a significant departure from traditional political constitutionalism which historically relied on political culture rather than formal legal instruments. It upholds the principle that rights require judicial protection and enforcement, while importantly maintaining that no law, however fundamental, should be entirely beyond legislative reach.[46] While high compliance rates with judicial rulings — such as the declarations of incompatibility in the UK — might superficially suggest a shift towards judicial supremacy, the model's distinctiveness remains rooted in the realistic political possibility of legislative disagreement, as Gardbaum contends.[47] The emphasis on the pre-enactment political rights review is, furthermore, critical in establishing the distinctiveness of the model, because it forces the executive and the legislature to engage with rights-based arguments during the law-making process, ensuring that rights are not merely an afterthought for courts, but a primary consideration for the elected representative.

Young, on the other hand, advocates 'the democratic dialogue model' and distinguishes it from political and legal constitutionalism by focusing on a different question: how should legal and political controls interact with one

[44] ibid 62.

[45] ibid.

[46] ibid 34.

[47] ibid 190; see Kavanagh (n 43).

another, rather than which form of control is superior at resolving rights issues.[48] Contrary to Gardbaum, she argues that her model of democratic dialogue model is neither a middle ground, nor a distinct foundational assumption between legal constitutionalism and political constitutionalism. Instead, democratic dialogue model focuses normatively on inter-institutional interactions between the legislature and the judiciary, examining how these institutions can collaborate to achieve better constitutional outcomes.

Although Young acknowledges Gardbaum's new Commonwealth model as an example of a system designed to facilitate dialogue, she treats 'democratic dialogue' as the primary normative design of the constitution rather than an additional outcome.[49] As examined in more detail below, while Young accepts that Parliament retains the final word over the content of law, she crucially differs from Gardbaum by arguing for shared sovereignty over constitution's secondary rules —the rules that define how Parliament is composed and how it enacts legally valid legislation.[50] Under the democratic dialogue model, because the modification of these rules cannot occur through the actions of either the legislature or the judiciary acting alone, neither institution should always have the upper hand.[51] Consequently, both branches are constitutionally counter-balanced and effectively compelled to collaborate — the two fundamental components of Young's framework. This ensures that the model is not 'merely replicating the inter-institutional interaction found in theories of political or legal constitutionalism'[52], but constitutes a distinct system of constitutional counter-balancing. According to Young no single branch should the ability to 'consistently [and] authoritatively resolve rights-issues'[53] in order to facilitate better protection of rights.[54]

Young's democratic dialogue model is similar to the new Commonwealth model in that both preserve parliamentary primacy over the content of law while

[48] Young (n 24) 85.

[49] ibid 148-151.

[50] ibid ch 4.

[51] ibid 190.

[52] ibid 179.

[53] ibid 116.

[54] Ibid.

enabling an ongoing exchange between the legislature and courts. The difference lies in how that exchange is secured: Gardbaum sets out a specific institutional structure (a codified Bill of Rights, mandatory pre-legislative review, weak-form of judicial scrutiny and a formal legislative power to give final word) and relies on the 'discretionary gap' for legislative responses to judicial determinations. Young, by contrast, rejects reliance on discretion and embeds dialogue within a framework of constitutional collaboration and counter-balancing through shared sovereignty over secondary rules, ensuring neither branch can act alone in this respect.

More specifically, Young argues that effective democratic dialogue requires two components: constitutional collaboration and constitutional counter-balancing. Constitutional collaboration focuses on 'the means through which the legislature and the judiciary can work together to better protect rights' and ensuring these institutions combine their distinct reasoning capacities to protect rights more effectively; and constitutional counterbalancing mechanisms ensures that 'inter-institutional interactions facilitate collaboration by providing a means of ensuring that no one institution consistently authoritatively resolves rights-issues'[55] and, perhaps most significantly, neither institution possesses an absolute final word. Therefore, she argues that the democratic dialogue model can be found in constitutional systems where strong legal or political rights protection is upheld.[56] The democratic dialogue model analyses whether a constitutional system possesses the specific legal powers designed to facilitate these two essential mechanisms, namely constitutional collaboration and constitutional counterbalancing.[57]

Young argues that the UK constitution is an example of democratic dialogue, primarily because, contrary to the traditional understanding, sovereignty regarding secondary rules is shared between the Parliament and the judiciary, neither can completely override the other.[58] This is what facilitates the constitutional collaboration element of the democratic dialogue model. While

[55] ibid.

[56] ibid 160.

[57] ibid ch 4.

[58] ibid 180-191.

Westminster Parliament holds legislative supremacy over primary rules (the content of laws), it cannot act alone regarding secondary rules.[59] Ensuring constitutional counterbalancing this way, neither institution is sufficiently able to fully make good on their threat, namely, the courts cannot simply strike down primary legislation, and Parliament cannot easily remove the courts' power of judicial review.[60]

Aileen Kavanagh, however, advances a significant cautionary refinement to this debate by criticising the very terminology of *dialogue* itself. Rather than directly targeting Young's democratic dialogue model or Gardbaum's new Commonwealth model — which deliberately avoids the term but nonetheless involves a dialogic reading of constitutionalism — Kavanagh directs her critique at the *dialogue* term/metaphor. She argues that *dialogue* is an over-extended 'metaphor in search of a theory'[61]. She contends that the term has been overloaded with more normative weight than a mere metaphor can bear, leading to an *avalanche* of theories that often obscure more than they reveal.[62] Specifically, Kavanagh observes that the metaphor lacks the analytical resources to distinguish between vastly different power dynamics, it has been invoked to justify diametrically opposed outcomes: 'an emboldened legislature and a chastened court' and, conversely, 'an emboldened court and a chastened legislature'.[63]

On the one hand, Kavanagh nonetheless acknowledges the metaphor's descriptive utility. Dialogue metaphor challenges the exaggerated idea that judges hold an absolute last word when engaging in rights-based review.[64] In the Canadian context, for instance — where the judiciary is empowered to strike down legislation contrary to the Charter — a judicial strike down is rarely an institutional dead-end, rather, it often leaves room for the legislature to

[59] ibid 183, 184.

[60] ibid 191.

[61] Kavanagh (n 24) 60.

[62] ibid 69, 79.

[63] ibid 79, 80.

[64] ibid 74.

respond.[65] Instead of seeing the judiciary and the legislature as isolated rivals fighting for the final say, the metaphor presents them as interactive partners who share a dynamic responsibility for human rights.[66] By suggesting that both courts and legislatures have valuable contributions to make regarding rights, the metaphor helps transcend the dichotomy between legal and political constitutionalism. On the other hand, Kavanagh cautions that even as a descriptive tool, *dialogue* can facilitate distortive inferences. She criticises that the metaphor often collapses into a battle for the last word, simply asking who speaks last word *within the dialogue*, rather than moving beyond the traditional binary supremacies.[67] Furthermore, by framing the relationship as a conversational exchange between equals, the metaphor risks creating 'an abstract and ethereal account of institutional roles of the branches of government' thereby masking the complexities of constitutional practice and creates a false impression that institutional conflicts are resolved, while the institutional distinctiveness of judicial and legislative roles gets lost in conversation.[68]

Ultimately, Kavanagh moves from this critique to her own conceptualisation of the UK's framework as a collaborative constitution. She shifts the focus away from the counterbalancing of powers that Young discusses and towards the internal point of view and relational dynamics between constitutional actors. Rather than asking who has the final say on rights, she focusses on the overall health of constitutional relationships.[69] Consequently, Kavanagh's account of rights protection is essentially relational, revolving around the specific *roles* and interactions between the branches of government — effectively re-envisioning the doctrine of separation of powers.

Under the Kavanagh's collaborative constitution model, the judiciary, legislature and executive are viewed as *partners* in a collaborative enterprise, operating distinctively yet *interdependently* toward the shared goal of protecting rights

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[65] ibid; See the notwithstanding clause (Section 33) of the Canadian Charter of Rights and Freedoms).

[66] Kavanagh (n 24) 75.

[67] ibid 76.

[68] ibid 77, 83.

[69] ibid 7.

within a just government.[70] In this way, Kavanagh replaces the pure, static and functionalist separation of powers doctrine where each branch of government allocated with a single, mutually exclusive function and takes a view that each branch fulfils a distinct but complementary institutional role encompassing multiplicity of overlapping functions. Consequently, the relationship between the branches is neither hierarchical nor formally equal, but rather heterarchical — characterised by a spirit of mutual accommodation.[71] She argues that this interaction is sustained by mutual self-restraint and support, based on unwritten constitutional norms, a constitutional culture of comity and role-recognition.[72] This way, collaborative account differs from dialogue account which Kavanagh suggests is too reliant on 'structural mechanisms and formal powers contained in the texts of the new Commonwealth Bills of Rights'.[73] Ultimately, Kavanagh defines the collaborative separation of powers as an internalised ethos of self-restraint rather than a system of external policing.[74]

Prior to situating the specific contributions of this research, it is worth noting that the mapping of the 'three waves' demonstrates that constitutional debates have consistently evolved in tandem with the doctrine. The normative models of Gardbaum, Young and Kavanagh, situated within the era of what McCorkindale and Goldoni identified as reflexive wave of political constitutionalism, reflect the underlying doctrinal shifts of their era, just as the two prior waves did in theirs. As the doctrine continues to evolve, as it inevitably will, these debates will continue to reflect future shifts – shifts that, in the coming decades, may increasingly be shaped by the constitutional challenges posed by artificial intelligence, cybersecurity, and digital governance, potentially necessitating new forms of institutional calibration that the existing frameworks will be called upon to accommodate.

Gardbaum, Young and Kavanagh maintain that rights protection is most effectively achieved through institutional interaction — a position that,

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[70] ibid 101.

[71] ibid 97-106.

[72] ibid 117.

[73] ibid.

[74] ibid.

alongside Tomkins' mixed constitutionalism, reflects a shared rejection of both pure judicial supremacy and pure legislative supremacy. Each conceptualises the relationship between courts and Parliament not as a zero-sum contest for institutional dominance but as one of interaction and mutual constraint. However, they diverge significantly in how they conceptualise this engagement. Gardbaum frames his model as weak-form judicial review, characterised by twin mechanisms of political and judicial scrutiny where the legislature's final word is retained as a matter of political discretion rather than legal duty. Young advocates a model of democratic dialogue grounded in constitutional collaboration and counter-balancing, reframing sovereignty as shared in a certain aspect where neither branch dominates authoritatively the other in the protection of rights. Kavanagh, on the other hand, moves beyond the dialogue metaphor to advocate for collaboration, viewing the branches as partners performing distinctive, complementary roles within a framework of constitutional comity and mutual respect, focusing on role-based account of separation of powers.

Their theoretical foundations therefore diverge: Young reframes sovereignty conceptually, Gardbaum preserves the parliamentary final word while designing specific structural checks, and Kavanagh reconstructs the separation of powers through a role-based account. While these three perspectives offer a valuable account of rights protection, each is comparatively limited by this primary focus when addressing the broader balancing and calibration of constitutional institutions and principles. It is here that this thesis seeks to provide a novel contribution. By shifting the lens of inquiry from rights protection to the evolution of the scope of judicial review, this research offers a distinct, however relevant, perspective on how constitutional balance is maintained.

The novelty of the thesis lies in its reorientation of constitutional analysis. Rather than asking how rights are best protected, it examines how judicial review has reshaped —and simultaneously been reshaped by — constitutional balance across domains of public law and whether the evolution is constitutionally sound. This perspective reveals several dynamics that rights-centred accounts cannot fully capture: The expansion of standing rules reflects a fundamental reconfiguration of the constitutional function of judicial review —

from a mechanism primarily concerned with redressing individual grievances to one increasingly grounded in the judicial function of upholding the rule of law. A rights-centred account, organised around the question of whose rights have been violated and how they are best protected, provides limited analytical traction in cases where executive action engages no identifiable right and affects no individual more than any other citizen — yet where the courts have nonetheless found sufficient constitutional justification for intervention. The recalibration of justiciability from categorical immunity to subject-matter sensitive review across prerogative powers, national security and foreign policy reveals a pattern of incremental institutional negotiation that a rights-centred account, focused on whether particular rights claims are justiciable, cannot fully trace: namely, how courts asserted their constitutional reach over formerly excluded domains while simultaneously calibrating the intensity of that reach according to the democratic and institutional stakes involved. The outsourcing of remedial responsibility to the judiciary, as argued in the third chapter, under the Judicial Review and Courts Act 2022 discloses a form of remedial responsibility-shifting that the human rights lens, focused on whether rights are adequately protected, cannot fully capture — namely, that Parliament may itself contribute to the reconfiguration of constitutional boundaries by delegating to the judiciary decisions that democratic accountability would otherwise require it to confront directly. It is by attending to these dimensions, procedural, substantive and doctrinal, that this thesis demonstrates how constitutional balance is continuously negotiated through the evolving scope of judicial review and why that negotiation examined as a whole is constitutionally sound.

Kavanagh's work provides a particularly clear framework for this comparison. Engaging with her relational account of constitutional collaboration, one can see most clearly the salient differences between a human rights lens and a holistic judicial review lens. Specifically, for instance, in her examination of the legislative branch, she addresses Mark Tushnet's twin concerns: policy distortion (where judicial norms replace legislative ones) and democratic debilitation (where the legislature abdicates its responsibility for rights to the courts). Kavanagh argues these are hypothetical speculations that do not reflect the actual position within the UK. By looking through the human rights lens, she

demonstrates that the legislature has not 'vacated the field'.[75] Instead, mechanisms such as the work of the Joint Committee on Human Rights and Section 19 statements under the HRA 1998, embedded rights-based accountability within Parliament. For Kavanagh, this evidences collaboration rather than debilitation, as political actors actively engage with rights rather than outsourcing them to judges.[76]

While Kavanagh's findings may be correct regarding human rights claims, one of the central contributions of this thesis is to show that a judicial review lens reveals a different institutional dynamic. One such example is that, by moving beyond the right-centred debate, I argue in the third chapter that the Judicial Review and Courts Act 2022 introduced *a form of responsibility outsourcing* that the human rights lens fails to capture. Specifically, I criticise the legislature for shifting the burden of addressing unlawfulness to the judiciary. By statutorily conferring suspending orders and more importantly prospective-only overruling, the Act directs the judiciary to perform quasi-legislative functions to remedy the legal consequences of invalidity. Therefore, while the democratic debilitation may be overdone regarding human rights norms, I suggest that a similar concern has emerged regarding remedial responsibility, where the legislature relies on judicial discretion to address the unlawfulness that it should fundamentally confront itself.

Additionally, in her role-based account of separation of powers, Kavanagh echoes a foundational concern of political constitutionalism — that judges are typically confined to adjudicating bivalent disputes in an impartial manner, they are restricted to a narrow range of evidence presented by the immediate parties.[77] On her account this created an 'epistemic blindfold' which prevents the judiciary from addressing the wider social context.[78] This concern is significant, but it applies with particular force to rights-based adjudication, where the courts' inquiry is structured around the rights of identifiable parties. A rights-based perspective necessarily constrains attempts to understand the

[75] ibid 186.

[76] ibid ch 6.

[77] ibid 208. Griffith (n 21) 12, Waldron (n 24) 116–117, Bellamy (n 23) 20–26.

[78] Kavanagh (n 24) 208.

shifting balance between institutions and individuals, as it remains focused on whether identifiable rights have been violated and, where the HRA applies, tethered to the victim test under section 7, rather than attending to the broader constitutional function of ensuring executive action remains within lawful limits. Viewed through a holistic lens of judicial review, in contrast, the broader evolution of standing in public law — the transition from restricted title and interest to a broader understanding of sufficient interest and public interest standing — reflects significant recalibration of the institutional relationships that the epistemic blindfold concern cannot fully account for: courts have increasingly been called upon to adjudicate matters of broad constitutional significance, drawing on a wider range of perspectives through third-party interventions and public interest standing. Consequently, adopting a judicial review lens provides a more expansive perspective on how constitutional balancing is negotiated, encompassing areas beyond human-rights protection and capturing a systemic recalibration of powers.

Ultimately, the thesis contributes a new account of constitutional balance by demonstrating that judicial review is not a mere mechanism for rights protection but a systemic practice that continuously renegotiates the limits of institutional authorities. In doing so, it offers a novel framework for understanding how constitutional principles are maintained in the UK: not through a monopoly of legal or political supremacy, but through the evolving scope of judicial review as a dynamic instrument of constitutional calibration.

Finally, this thesis holds particular personal and professional significance, as the research has been financially supported by Türkiye, with the aim of contributing to the country's academic development. While the thesis itself does not engage in comparative analysis and remains focused solely on British public law, it is hoped that its examination of how judicial review operates as a mechanism for maintaining constitutional balance between the judiciary, the executive , and the legislature in the UK may offer perspectives of potential relevance to future academic discussions in Türkiye on analogous questions of institutional balance and the appropriate boundaries of judicial authority.

Conceptual Framework

Throughout this thesis, 'scope of judicial review' refers specifically to the boundaries within which courts examine the lawfulness of decisions by public bodies — including government departments, local authorities, and institutions exercising statutory or prerogative powers. For the purposes of this analysis, ‘executive acts’, ‘executive decisions’, and ‘executive action’ are used broadly to encompass any act, decision, or measure taken by public authorities exercising executive functions, including administrative decision-making, policy implementation, regulatory enforcement, and the exercise of discretionary powers, as well as the making of secondary legislation, unless otherwise specified. This encompasses both what types of governmental actions courts may scrutinise and the intensity of that scrutiny, as well as the constitutional limits of such oversight. This includes the threshold of justiciability (which matters are appropriate for judicial resolution), standing requirements (who has the right to bring a challenge), intensity of the scrutiny (the depth of the court’s intervention once jurisdiction is established). The scope, therefore, operates as a multidimensional constitutional space where boundaries shift dynamically. Expansion can be procedural (for example, through broader standing rules or new grounds for challenge) or substantive, involving scrutiny of areas previously treated as non-justiciable or a more intensive standard of review, as exemplified by proportionality analysis. As this thesis demonstrates, these shifts often happen simultaneously across both dimensions, though not necessarily in the same direction or at the same pace.

The scope of judicial review has expanded beyond the traditional grounds of illegality, irrationality, and procedural impropriety identified in *GCHQ,*[79] extending well beyond their original scope but remaining constrained by core constitutional principles such as parliamentary sovereignty and separation of powers; the latter in the sense that courts remain sensitive to the distinct institutional competences of the judiciary, the executive and the legislature, and calibrate the intensity of their review accordingly. Crucially, courts now review domains previously deemed non-justiciable — including prerogative powers, human rights compliance, and certain policy choices — applying varying standards of scrutiny from anxious scrutiny to proportionality. Yet the intensity

[79] *Council of Civil Service Unions and others v Minister for the Civil Service* (n 3).

of scrutiny varies significantly based on the subject matter and institutional competence, reflecting the context-sensitive calibration that this thesis traces. While particularly proportionality analysis enables deeper scrutiny of governmental decisions, courts maintain substantial deference in areas requiring executive expertise or democratic legitimacy, particularly national security and foreign policy.

The contemporary framework thus embodies a context-sensitive approach where courts increasingly intervene where constitutional principles or fundamental rights are engaged yet consciously limit their scrutiny in principle in areas where the executive possesses democratic accountability or institutional competence. This calibrated expansion of judicial scrutiny reinforces governmental legal accountability while respecting the institutional boundaries, thereby demonstrating enhanced judicial power can coexist with parliamentary sovereignty.

The constitutional implications of this expanded judicial scope are most clearly understood through examination of its interaction with parliamentary sovereignty. Parliamentary sovereignty remains the foundational principle of the British constitutional system, traditionally understood as the doctrine that Parliament has unlimited legislative power and that no other body has the authority to override or set aside parliamentary legislation. Dicey's classical formulation established Parliament's right to make and unmake any law, the absence of any overriding or disapplying authority, and its inability to bind successors.[80] The Human Rights Act 1998 has introduced a complex interaction between parliamentary sovereignty and human rights protection — one that preserves Parliament’s legal supremacy while enabling rights-based judicial scrutiny.

Under section 3 of the HRA, courts must interpret legislation compatibly with Convention rights ‘so far as possible’, enabling rights-consistent judicial modification of statutory meaning (e.g. *Ghaidan v Godin-Mendoza*[81]). Where interpretation proves not possible, section 4 permits declarations of

[80] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915).

[81] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

incompatibility — generating a form of constitutional dialogue rather than judicial supremacy, as Parliament retains authority to amend or uphold disputed legislation. This framework recalibrates parliamentary sovereignty: Parliament remains legally supreme, but its legislative choices now operate within a rights-influenced environment shaped by judicial interpretation and political accountability mechanisms.

This recalibration reflects a principled recognition of institutional boundaries. Courts acknowledge areas demanding executive deference (i.e. national security) while intensifying scrutiny where rights are engaged. The proportionality test — developed particularly under the ECHR and applied domestically via the HRA — exemplifies this balance: it facilitates deeper rights protection than *Wednesbury* unreasonableness yet remains context-specific and shaped by deference to institutional and constitutional constraints. Judicial authority thus expands within democratically sanctioned limits; it bears emphasis that Parliament itself authorised this framework through the HRA itself. Consequently, while the HRA enables courts to adjudicate politically sensitive matters and modifies the practical operation of parliamentary sovereignty, it upholds rather than displaces it by operating through parliamentary-designed mechanisms: interpretation under section 3, declarations under section 4, ministerial statements under section 19 that require parliamentary consideration of rights-compatibility during the legislative process, and executive restraint under section 6.

This recalibrated relationship between parliamentary sovereignty and judicial oversight operates within the broader framework of the rule of law, which both constrains and legitimises judicial intervention. The rule of law also constitutes one of the fundamental pillars of the British constitutional system,[82] though its precise content and implications remain subject to considerable debate. At its core, the rule of law requires that 'the government may act only where it has the legal power to act,' as Tomkins emphasises, grounding this principle in the

[82] *R (UNISON) v Lord Chancellor* [2017] UKSC 51; *Jackson v Attorney General* [2005] UKHL 56; *R (Cart) v Upper Tribunal* [2011] UKSC 28; the Constitutional Reform Act 2005

celebrated cases such as *Entick v Carrington*[83].[84] However, broader formulations encompass both formal and substantive dimensions, including requirements that governmental power be exercised according to law, that the law be accessible and predictable, compliant with international law obligations, and that legal remedies be available for violations of human rights.[85] However, while these various elements of the rule of law are recognised in constitutional theory, they operate differently in judicial practice, with some functioning as directly enforceable legal requirements and others serving primarily as interpretative principles or constitutional values. For the purposes of this thesis, unless otherwise indicated, the rule of law is understood primarily in its formal sense, requiring that governmental action be grounded in legal authority and subject to judicial oversight, though its substantive dimensions are engaged where the case law so demands. In this sense, where this thesis concludes that the rule of law has been strengthened through the evolution of judicial review, this refers specifically to the expansion of legal accountability over executive action — and, where the HRA applies, over parliamentary legislation. This coincides with the strengthened role of judicial review as the primary mechanism for maintaining the rule of law within the UK constitutional order.

In judicial practice, the legally enforceable dimension of the rule of law has found its clearest expression in the context of *access to justice*. Courts have repeatedly affirmed that access to the courts is not merely an aspirational ideal, but a fundamental legal right that public authorities must respect. The Supreme Court in *R (UNISON) v Lord Chancellor*[86] demonstrates how executive action which restricts access to the courts may be struck down as incompatible with the rule of law. Similarly, in *R (Daly) v Secretary of State for the Home Department,*[87] the courts reinforced the necessity of judicial oversight to ensure that individuals' rights of access to legal remedies are protected, even in sensitive contexts such as prison administration. By contrast, other features of the rule of law — such as legal certainty, protection of democratic values and

[83] *Entick v Carrington* [1765] EWHC KB J98.

[84] Adam Tomkins, *The Constitution after Scott: Government Unwrapped* (Oxford University Press 1998) 45-46.

[85] Tom Bingham, *The Rule of Law* (Penguin Books 2010).

[86] *UNISON* (n 83).

[87] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26.

human rights, compliance with international law obligations, as formulated by Lord Bingham[88] — are more commonly invoked to guide statutory interpretation or constitutional reasoning, rather than providing independent grounds for challenging governmental action.

The principle of legality, developed in cases such as *R v Secretary of State for the Home Department, ex parte Simms,*[89] represents a particularly significant judicial tool for protecting rule of law values in the context of judicial review — one that, as examined in detail in the third chapter, assumes particular significance in the context of the Judicial Review and Courts Act 2022. This principle requires clear parliamentary authorisation for measures that interfere with fundamental rights or constitutional principles, creating a presumption that Parliament does not intend to authorise violations of fundamental constitutional values unless it does so explicitly. Through this, the rule of law operates as a constraint on executive power, demonstrating the dynamic relationship between constitutional principles and judicial review doctrine: while constitutional principles shape the scope and intensity of judicial review, judicial review decisions simultaneously develop and refine the content of those very constitutional principles.

Methodology

This thesis primarily uses a doctrinal methodology, engaging broadly and deeply engagement with statutes, case law, and legal principles to trace how judicial review has developed and to assess its constitutional implications. The research is grounded in a thorough examination of primary legal materials — a vast range of case law and statutes — which serve as the essential foundation for understanding constitutional change. Key judicial decisions are analysed not only for their immediate legal holdings but also for their constitutional methodology and broader implications for institutional relationships. Statutory developments, particularly the Human Rights Act 1998 and the Judicial Review and Courts Act

[88] Lord Bingham's articulation of the rule of law in *The Rule of Law* (2010) identified eight sub-rules, including accessibility of the law, application of law rather than discretion, equality before the law, and protection of human rights. See also Joseph Raz, 'The Rule of Law and its Virtue' in *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979).

[89] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115

2022, are examined in depth — both as legal instruments and as indicators of Parliament's approach to constitutional governance.

Where relevant, the doctrinal analysis is supported by normative evaluation, considering whether legal developments align with core constitutional values, principally the rule of law and parliamentary sovereignty. Where differences between English and Scottish law shed light on particular debates within the thesis, the thesis occasionally employs comparative analysis to clarify the underlying reasoning for jurisdictional variations and their significance for constitutional theory.[90]

Structure of the Thesis

The first chapter examines how the progressive narrowing of non-justiciability and of procedural access boundaries has affected the constitutional balance between judicial and executive power. The chapter is divided into three main sections. The first section analyses the justiciability of prerogative powers, demonstrating how the boundaries of non-justiciability have gradually narrowed following the GCHQ's foundational shift to a subject matter approach, through the incremental case law of both administrative-type and high policy prerogative decisions, as judicial oversight over previously immune domains has increased. This trend reflects growing judicial confidence in defining the constitutional limits of executive power, particularly in areas involving fundamental rights, procedural fairness, and constitutional principles. While this expansion generally reflects a careful recalibration of constitutional boundaries, the chapter criticises *Miller/Cherry* for standing out as a methodological departure from this principled trajectory not because it expanded judicial review, but because of the way it did so, recasting what was essentially a question about the manner of exercise of a high-level prerogative power as one of existence and scope, thereby collapsing the distinction between existence and manner of exercise that the *GCHQ* framework established. By blurring these doctrinal lines, the

[90] This study focuses primarily on English public law as the dominant UK model. Where relevant, I incorporate insights from Scottish law, given my academic location in Scotland and access to Scottish legal materials. These occasional comparative observations enhance understanding of key concepts without detracting from the study's primary focus.

decision risks destabilising the *GCHQ's* principled framework, which grants judicial intervention its constitutional legitimacy.

The second section examines the justiciability of statutory powers in the context of national security and foreign relations. The analysis demonstrates that the judiciary has confirmed theoretical reviewability while maintaining substantial deference in these contexts. This results in a scope of review in these domains that remains considerably narrower compared to the substantial broadening of judicial review in other areas. The coexistence of theoretical reviewability and substantial practical deference illustrated in this section is not a contradiction; it reflects a context-sensitive understanding of the judicial role that is consistent with, rather than in tension with, both the rule of law and the principle of parliamentary sovereignty. This differential approach is consistent with the central argument that contemporary constitutional evolution represents balanced institutional relationships rather than simple judicial supremacy.

The third section analyses the evolution of standing rules and third-party interventions, which have gradually reconfigured the constitutional function of judicial review from a mechanism primarily concerned with redressing individual grievances to one increasingly grounded in the judicial function of upholding the rule of law while maintaining constitutional balance. The analysis covers the liberalisation of standing through the 'sufficient interest' test, strategic approaches to standing in constitutional litigation, legislative and judicial responses to standing expansion, and the role of third-party interventions and crowdfunding in diversifying public interest litigation. It argues that while these developments have strengthened the capacity to uphold the rule of law in judicial review, recent cases mark a discernible recalibration of these boundaries against further expansion.

The second chapter demonstrates, through a careful analysis, how the HRA 1998 has incrementally transformed judicial review without destabilising the institutional boundaries, both in relation to parliamentary legislation and executive decision-making. The chapter is divided into two main sections, each examining different aspects of the HRA's impact. The first section analyses the HRA's impact on the principle of parliamentary sovereignty through the interpretative duty under section 3 and the declaratory power under section 4.

The analysis argues that while courts may now depart from legislative intent through interpretation, parliamentary sovereignty has been preserved in its legal force against claims of judicial supremacy, while its practical operation has been modified through creating political and constitutional costs for legislating contrary to the Convention, coupled with the judiciary's enhanced role in scrutinising statutory compatibility. This section examines the extent of interpretive power under Section 3 of the HRA, analysing landmark cases beginning with *R v A (No 2)*[91] as representing the high-water mark of expansive interpretation. It considers institutional competency as a limiting factor and analyses the approach to declarations of incompatibility in cases such as *Nicklinson*[92] and the Northern Ireland abortion case[93] in 2018. The analysis explores how courts balance legislation's interpretative modification with parliamentary sovereignty, examining concepts such as the 'grain of the legislation' and 'fundamental feature of legislation' as limiting principles.

The second section examines the impact of the HRA on judicial review of executive decisions primarily through the proportionality framework. The analysis argues that the HRA's proportionality framework has created a more intrusive form of judicial review that allows courts to scrutinise the merits of executive decisions to a greater degree than traditional principles would permit. However, proportionality assessment is not an exclusively judicial exercise, as courts remain mindful of their institutional, constitutional and practical limitations. This section traces the evolution from the pre-HRA framework of *Wednesbury* review and executive deference to the introduction of proportionality analysis under the HRA, examining also the *Rwanda litigation*[94] and the repeal of the Safety of Rwanda Act 2024 which demonstrated the resilience of parliamentary sovereignty along with the rebalancing power of democratic accountability mechanisms within the constitutional framework. Finally, the analysis also considers the extension of proportionality principles to common law.

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[91] *R v A (No 2)* [2001] UKHL 25

[92] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38

[93] *Re an application by the NIHRC for Judicial Review (NI)* [2018] UKSC 27.

[94] R (AAA and others) v Secretary of State for the Home Department [2023] UKSC 42

The third chapter does not merely trace an evolution that has been occurring through the decades but also offers a prospective analysis of the doctrinal, thereby constitutional, implications of the Judicial Review and Courts Act 2022, the full consequences of which remain to be determined by future litigation. The chapter argues that the 2022 Act has introduced new tensions in the constitutional framework for judicial review, creating a complex and somewhat contradictory framework that has the potential to narrow the scope of review by reviving aspects of the pre-*Anisminic* approach whilst simultaneously introducing more flexible remedial powers that may encourage increased judicial intervention. The chapter begins by examining the legal status of unlawful acts, tracing the evolution from the traditional distinction between jurisdictional and non-jurisdictional errors through to the post-*Anisminic* orthodoxy that all errors of law render decisions null and void *ab initio,* although the chapter argues this orthodoxy was always more doctrinally unstable than its apparent clarity suggested. The analysis examines competing theories concerning the legal status of unlawful acts, including the orthodox *ultra vires* doctrine and alternative theories that recognise voidable unlawful acts.

The central focus of the chapter is the analysis of how the JRCA 2022's statutory introduction of suspending and prospective quashing orders challenges the orthodox administrative law theory of the legal status of unlawful acts by recognising that unlawful decisions may have legal effect until quashed. The chapter examines the background to the JRCA 2022, the operation of the new remedial powers, and their implications for understanding the nature of administrative unlawfulness. The chapter also examines the revival of the principle of legality as a potentially significant counterweight to the risks posed by the Act. The analysis traces the emergence and contemporary application of the principle, examining how it operates as a mechanism for ensuring that Parliament enacts clearly when it intends to authorise interference with fundamental rights or constitutional values.

This thesis contends that the evolution of judicial review over the past fifty years — particularly since the turn of the millennium — reflects a principled, incremental and dynamically adjusted recalibration of the constitutional balance between the judiciary, the executive and Parliament. This evolution, when

viewed as a whole, presents a coherent picture of judicial review's evolving relationship with parliamentary sovereignty, manifested through advances and retreats. Rather than representing a revolutionary shift or a simple transfer of power, these developments illustrate a gradual and context-sensitive adjustment of institutional roles. The thesis demonstrates that both common law and statutory changes, especially under the Human Rights Act 1998, have enabled courts to exercise greater oversight over executive action, while consistently respecting the foundational principle of parliamentary sovereignty.

Importantly, this expanded judicial role has not resulted in judicial supremacy, nor has it diminished Parliament's ultimate legislative authority. Instead, the current constitutional framework demonstrates that judicial review operates as a robust mechanism for legal accountability and rights protection, while preserving the distinction between lawfulness review and merits review on appeal, and deferring to democratic authority where institutional competence and constitutional principle so require. Within this evolution, the principle of parliamentary sovereignty and the rule of law are not in fundamental opposition: they coexist in a mutually reinforcing relationship. The rule of law has been strengthened through expanded judicial review, parliamentary sovereignty has been preserved in its constitutional primacy throughout, because the courts have calibrated their expanded role with reference to constitutional principle rather than institutional preference. What redeems the inevitable variability and occasional inconsistency in this jurisprudence is not its uniformity but its justification: in each domain examined, the judicial decisions have been grounded in articulable constitutional and institutional principles. Ultimately, the expansion of judicial review has taken place within constitutional constraints and with careful regard for democratic legitimacy, producing a constitutional settlement that is both more robust and more legitimate than a simple narrative of judicial expansion would suggest.

Chapter 1. Expansion of Justiciability and Standing Rules

1 The Evolving Scope of Justiciability in Judicial Review

1.1 Introduction

The section examines the evolving scope of non-justiciability of prerogative powers in judicial review, analysing how courts have incrementally expanded their oversight of executive action in the 21st century. This analysis explores how the progressive narrowing of non-justiciability boundaries has affected the constitutional balance between judicial and executive power, and what are the implications of the methodological shift demonstrated particularly in *Miller/Cherry*[1]. It demonstrates that the boundaries of non-justiciability have gradually narrowed, as judicial willingness to review previously immune domains such as prerogative powers has increased. This trend reflects growing judicial confidence in defining the constitutional limits of executive power, particularly in areas involving fundamental rights, procedural fairness, and constitutional principles. While this expansion generally reflects a careful recalibration of constitutional boundaries, it is argued that *Miller/Cherry* stands out as exceptional and problematic in this evolution due to its strategic reframing of justiciability constraints. The decision suggests that judicial expansion can occur through methodological shortcuts that bypass non-justiciability constraints, potentially undermining the careful constitutional balance.

The examination proceeds through three sections, tracing doctrinal evolution through landmark cases. Firstly, this section will examine how the evolution of justiciability concerning prerogative powers demonstrates the shift in approach by courts from formal non-interference to judicial review based on subject matter rather than the source of power, while also analysing how the courts have defined the existence and scope of such powers. Secondly, the next section analyses justiciability within specific contexts such as national security and foreign relations — areas typically considered ill-suited to judicial decision-

[1] *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41.

making — examining how contextual factors now determine reviewability across both prerogative and statutory powers. It demonstrates that while absolute 'forbidden areas' have diminished, the judiciary remains mindful of its institutional limits and continues to afford deference to the executive in these sensitive domains. Thirdly, the next chapter completes the discussion by demonstrating how the Human Rights Act 1998 intensified judicial review while preserving parliamentary sovereignty through its carefully designed framework.

In this section, the analysis begins by defining non-justiciability. It then traces the progressive reduction in the range of non-justiciable prerogative powers, focusing particularly on how the landmark *Council of Civil Service Unions and others v Minister for the Civil Service*[2] ('*GCHQ*') decision transformed the judicial approach towards prerogative powers by shifting the inquiry from the source of power to its subject matter. The analysis then proceeds through two categories of post-GCHQ developments: individual administrative-type prerogative decisions, such as *Everett*[3] and *Bentley*,[4] demonstrating judicial willingness to review prerogative exercises resembling administrative actions, and higher-level constitutional challenges, including *Bancoult*,[5] *Miller*[6] and *Miller/Cherry*,[7] which reveal the courts' increasing readiness to scrutinise prerogative powers with significant constitutional implications. The section concludes by critically evaluating *Miller/Cherry*'s problematic departure from traditional constraints through its strategic reframing of scope and manner distinction.

1.2 Defining Non-justiciability

Non-justiciability is a fundamental legal doctrine that guides courts in deciding whether they have the institutional competence and constitutional authority to adjudicate on a particular issue. It recognises that certain subject areas, traditionally including foreign policy, defence decisions, and military

[2] *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374.

[3] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] QB 811.

[4] *R v Secretary of State for the Home Department ex p Bentley* [1994] QB 349.

[5] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2008] UKHL 61.

[6] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[7] *Miller/Cherry* (n 1)

deployment, constitute 'forbidden areas'[8] where judicial intervention would be constitutionally inappropriate, irrespective of the legal merits of the claims. The scope of these *forbidden areas* has, however, evolved considerably from the categories originally identified by Lord Roskill in 1984, which included 'those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers.'[9] Courts now recognise that justiciability is a context-dependent and mutable concept, and where even within traditionally shielded areas from review, amenability of a claim to judicial determination may vary depending on its particular features. Recent developments suggest that what once appeared constitutionally unreviewable may no longer be immune from judicial scrutiny.

In order to clarify what is meant by justiciability, I will start by defining non-justiciability. Non-justiciability was recently defined by the Supreme Court in *Shergill v Khaira*,[10] though a case addressing non-prerogative matters, meaning either that an issue is inherently unsuitable for judicial determination by reason of its subject matter alone, or that there are constitutional limits on the jurisdiction of the courts.[11] In the former, there are no judicially cognisable standards to assess the legality of the challenged issue, and the issue is not amenable to the judicial process. In general, issues of international law, or cases which engage no right in private or public law or concern no reviewable question of public law, fall within this category.[12] These include proceedings in Parliament or transactions of foreign states.[13] In other situations, as in the latter definition, a question may be within the jurisdiction (as in the former

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[8] *R (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 [85], [106].

[9] *GCHQ* (n 2) 418 (Lord Roskill).

[10] *Shergill & Ors v Khaira & Ors* [2014] UKSC 33.

[11] ibid [41]; Dominic McGoldrick, 'The Boundaries of Justiciability' (2010) 59 ICLQ 981: 'Justiciability may be a consideration of policy that goes to whether or not a court considers that it has jurisdiction at all. The weight of that policy may vary from context to context. Justiciability may also be a consideration of law about whether or not it exercises that jurisdiction.'

[12] *Shergill v Khaira* (n10) [43]; *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin); *R (Gentle) v Prime Minister* [2008] 1 AC 1356; *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910.

[13] *Shergill v Khaira* (n 10) [42]; *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888; *Prebble v Television New Zealand Ltd* [1995] 1 AC 321.

definition)[14] of a court to adjudicate by its subject matter, but the Court may decide not to intervene, depending on the context, judicial deference and the weight to be given to the executive in certain matters under principles such as the separation of powers.[15] Examples include certain national security decisions where courts have jurisdiction but exercise restraint, or planning policy matters where judicial deference to executive expertise is appropriate.

A crucial distinction in this analysis lies between the existence and scope of prerogative (or, more generally, executive power), which courts frequently review, and the manner of its exercise, where judicial deference is more common. Traditionally, the former is a legal question suitable for legal adjudication, while the latter — particularly in sensitive areas such as national security or parliamentary procedure — is viewed as a matter better left to political accountability. However, the Supreme Court's unanimous decision in *Miller/Cherry* has, as argued, blurred this boundary. As contended below, the Court reframed judicial intervention in terms of determining the scope of a power, while functionally addressing matters that might otherwise have been considered questions of political judgment.[16]

Beyond judicial evolution of these boundaries, Parliament can also legislate to make previously non-justiciable matters reviewable by the courts, thereby expanding the scope of judicial review. The Human Rights Act 1998 provides a clear example of this, as it imposes a statutory duty on courts to assess the

[14] Ivan Hare KC, Catherine Donnelley SC and Joanna Bell, *De Smith's Judicial Review* (9th edn with 1st supplement, Sweet & Maxwell 2024), [3-016]: 'The term jurisdiction means that the "courts have power to enquire into such a claim and consider whether any relief is called for."'

[15] Lady Hale, 'Principle and Pragmatism in Public Law' (Sir David Williams Lecture, 18 October 2019); Paul Craig, 'The Supreme Court, Prorogation and Constitutional Principle' (2019) Oxford Legal Studies Research Paper 57/2019, <https://ssrn.com/abstract=3477487> accessed 18 June 2025; Hare KC and others (n 14) [1-041]; *Reference by the Attorney General for Northern Ireland* [2019] UKSC 1 [28]: 'In general, it is desirable that legal questions be determined against the background of a clear factual matrix, rather than as theoretical or academic issues of law.'

[16] Mark Elliott, 'Prorogation and Justiciability: Some Thoughts Ahead of the Cherry/Miller (No 2) Case in the Supreme Court' (Public Law for Everyone, 12 September 2019) https://publiclawforeveryone.com/2019/09/12/prorogation-and-justiciability-some-thoughts-ahead-of-the-cherry-miller-no-2-case-in-the-supreme-court/ accessed 18 June 2025: 'The justiciability doctrine is, however, logically incapable of biting upon questions about whether a given power exists and, if so, what its legal boundaries are'.

compatibility of public acts with Convention rights — areas that might once have been considered beyond the reach of judicial oversight.[17]

The determination of what constitutes a justiciable matter involves several competing considerations. Justiciability sometimes suggests inadequate expertise or specialised knowledge on the part of the court,[18] a lack of democratic legitimacy and accountability to the electorate,[19] practical incompetence,[20] or the unsuitability of a moral decision to be judged by the courts[21].[22] As will be seen, these are not automatically applied categories used to defer to the primary decision-maker. The political nature of the issue does not automatically exclude judicial review.[23] As a matter of fact, many judicial review cases are concerned with questions possessing a political aspect. These are dynamic factors that are balanced according to the context.[24]

The practical consequences of these justiciability determinations are significant. Non-justiciability creates a gap in legal accountability before the courts, though alternative accountability mechanisms such as elections or confidence motions may provide alternative oversight. These alternative forms of accountability, however, function according to political rather than legal criteria, lacking, in principle, the capacity to provide immediate legal redress for unlawful conduct. In this sense, this is a threat to judicial oversight of executive action and ultimately to the rule of law in the meaning that requires the government to act

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[17] Gentle (n 12); *R (Lord Carlile) v Secretary of State for the Home Department* [2014] UKSC 60 [28] (Lord Sumption): 'However, traditional notions of the constitutional distribution of powers have unquestionably been modified by the Human Rights Act 1998. In the first place, any arguable allegation that a person's Convention rights have been infringed is necessarily justiciable.'

[18] *Secretary of State for The Home Department v Rehman* [2001] UKHL 47 [50] (Lord Hoffmann).

[19] *Carlile* (n 17) [105] (Baroness Hale); *Campaign for Nuclear Disarmament* (n 12).

[20] *Carlile* (n 17) [71],[72] (Lord Neuberger); *A and others v Secretary of State for the Home Department* [2004] UKHL 56 [29] (Lord Bingham); *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712.

[21] *Nicklinson v Ministry of Justice* [2014] UKSC 38 (Lords Sumption, Reed and Hughes).

[22] Craig (n 15), Hale (n 15).

[23] Martin Loughlin, 'The Case of Prorogation' (Policy Exchange 2019) <https://policyexchange.org.uk/wp-content/uploads/2019/10/The-Case-of-Prorogation.pdf> accessed 18 June 2025.

[24] *Carlile* (n 17) [72] (Lord Neuberger), [106] (Baroness Hale); *Nicklinson* (n 21) [296] (Lord Reed).

according to the law. If a matter is not justiciable, it is possible that, for this reason, an unlawful act will remain untouched by the courts.

1.3 The Progressive Narrowing of Non-Justiciability

1.3.1 Prerogative Powers

Prerogative power derives from common law and was defined by Dicey as 'the name for the remaining portion of the Crown's original authority, and is therefore, […] the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his ministers'.[25] The two kinds of prerogative powers are, therefore, personal prerogative powers and ministerial prerogatives, which are used by the ministers on behalf of the Crown. Wade criticises the judicial tendency to describe as prerogative 'any and every sort of government action which is not statutory'[26] arguing that this represents a misapplication of the term. He contends that this broad characterisation, which he traces to Dicey's expansive definition, conflates genuine prerogative powers with ordinary Crown capacities. Despite Wade's critique of this terminological imprecision, this thesis adopts a functional approach that examines justiciability across all forms of non-statutory executive action. This broader analytical framework facilitates examination of how courts have expanded judicial oversight regardless of whether the power in question constitutes a genuine prerogative or merely represents ordinary governmental activity conducted without statutory authority.

The transformation of judicial attitudes towards prerogative powers can be demonstrated through an analysis of the constitutional significance of *GCHQ*[27]. Despite acknowledging a considerable degree of deference to the executive in national security matters, *GCHQ* establishes the first key step that eventually resulted in greater reviewability and hence a wider scope of judicial review of

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[25] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 421.

[26] HWR Wade, *Constitutional Fundamentals* (Stevens 1980) 49; Ministry of Justice, *The Governance of Britain: Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice 2009).

[27] *GCHQ* (n 2).

prerogative powers. It paved the way for the review of exercises of prerogative powers, which may have been unexpected by the judges when deciding the case. *GCHQ* established that the justiciability of a matter is determined more by the nature of the subject matter itself rather than its source of power, whether statutory or prerogative.

The traditional view until the case of *GCHQ* was that any abuse of prerogative powers was to be remedied in the political field and not in the courts.[28] One of the historical reasons for the immunity of the royal prerogative from public law remedies was that the monarch was the source of executive, legislative and judicial power[29] and that 'there would be an incongruity in the Queen commanding herself to do an act, and also because the disobedience to a writ of mandamus is to be enforced by attachment'.[30] Another view also suggests that the immunity comes from the belief that King could do no wrong.[31] However, the immunity granted to the Crown itself is relatively minor in modern times, as most of the Crown's prerogative powers are now exercised by ministers on behalf of the Crown.[32] According to the traditional view, the courts could determine whether a particular prerogative power exists and its scope.[33] Yet they would not review how these powers were exercised.[34]

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[28] *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508; Robert Hazell and Timothy Foot, *Executive Power: The Prerogative, Past, Present and Future* (Bloomsbury 2022); *Bancoult* (n 5); *The Zamora* [1916] 2 AC 77; *Chandler v Director of Public Prosecutions* [1964] AC 763; *GCHQ* (n 2) 398 (Lord Fraser); Dyson Heydon, 'Enclaves and Exclaves: Limits and Exceptions to the Doctrine of Judicial Review' (Policy Exchange, 22 January 2018) <https://policyexchange.org.uk/events/enclaves-and-exclaves-limits-and-exceptions-to-the-doctrine-of-judicial-review/> accessed 1 July 2025: 'The powers in that second category are often called prerogative powers; traditionally they were thought to be immune from judicial review, and that immunity is now under growing challenge'; Independent Review of Administrative Law, *Independent Review of Administrative Law: Report* (Ministry of Justice 2021) [2.12]: 'before GCHQ, it was understood that the exercise of an acknowledged prerogative power would not be subject to judicial review on any ground.'; AW Bradley and KD Ewing, *Constitutional and Administrative Law* (12th edn, Longman 1997) 280–285; Craig (n 15).

[29] John Stanton and Craig Prescott, *Public Law* (3rd edn, OUP 2022) ch 6.

[30] *R v Powell, Steward of the Manor of Richmond* (1841) 1 QB 352, 361 (Lord Denman CJ), quoted with approval by Lord Woolf in *M v Home Office* [1994] 1 AC 377, 415.

[31] Heydon (n 28).

[32] Hare KC and others (n 14) ch 3.

[33] *Case of Proclamations* (1610) 12 Co Rep 74; *De Keyser* (n 28); see *Miller/Cherry* (n 1) [52]].

[34] *Duncan v Theodore* (1917) 23 CLR 510, 544; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1; *The Zamora* (n 28); *De Keyser* (n 28); *GCHQ* (n 2), 719 (Lord Fraser); Stanton and Prescott (n 29) 228; William Blackstone, *Commentaries on the Laws of England* (15th edn, Cadell & Davies 1809) 251.

In addition to these formal barriers, substantive policy arguments for judicial restraint were particularly strong in areas such as foreign relations and treaty-making. Blackstone, for example, explained the rationale for vesting such powers in a single authority: 'for the sake of unanimity, strength, and despatch. Were it placed in many hands, it would be subject to many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford.'[35] Judicial intervention in such matters, therefore, would be both inappropriate and impractical. As a result, courts traditionally confined themselves to determining the existence and scope of prerogative powers, but not their exercise.

1.3.2 The *GCHQ* Transformation: From Source to Subject Matter

In the case of *GCHQ*, the House of Lords was asked to review the instruction of the Prime Minister made under prerogative power, and decided on, first, whether the instruction was justiciable at all, and second, if it was, whether it could be held justiciable in the specific context of national security. The House of Lords established that the exercise of prerogative powers is amenable to judicial control; however, the Court recognised that some executive powers are non-justiciable by their subject matter. In particular, in *GCHQ*, an exercise of the prerogative under an Order in Council — specifically, deciding to prohibit employees of Government Communications Headquarters (GCHQ) from belonging to a trade union - was challenged on the ground of procedural irregularity (that is, on grounds of the procedural obligation on the part of the decision-maker to act fairly by consulting the persons concerned). The government advanced three arguments: that prerogative powers were generally unreviewable and subject only to parliamentary accountability; that the decision was non-justiciable due to national security considerations; and that even if reviewable, prior consultation would have compromised security by potentially disrupting GCHQ operations and revealing operational vulnerabilities.

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[35] William Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1765-1769) Book I, ch 7; *Miller* (n 6) [160] (Lord Reed).

The House of Lords departed from the previous law that prerogative powers were not reviewable except as to their existence and scope.[36] The Court held that the manner of exercise of prerogative powers can be subject to judicial review, in other words, may be justiciable on the common law grounds of illegality, irrationality, and procedural impropriety.[37] However, the court ruled that questions of national security are not appropriate for the courts to decide and are non-justiciable.[38] The Court dismissed the appeal and held that the order was lawful, not because the source of the power was prerogative, but because the evidence was submitted that the Minister had considered the national security risks, and it was for the Government to determine whether the requirements of national security outweighed the duty of fairness.[39] As the national security concerns, such as potential disruption to GCHQ's activities that would make national security vulnerable, were put forward by the Government, the Court dismissed the appeal.[40] The Court did not question whether the concerns are real, accurate or proportionate; instead declined to intervene because it was for the government to identify and assess national security concerns.[41] Nonetheless, the Courts' reluctance to intervene in matters of national security, as well as in other contexts such as foreign policy or high politics, has changed over the years, as will be demonstrated below. The *GCHQ* case marked a pivotal development in the doctrine of justiciability, moving beyond the traditional focus on the existence and extent of prerogative powers

[36] Chandler (n 28); House of Commons Library, 'The Royal Prerogative' (Briefing Paper No 03861, 17 August 2017) 7; Independent Review of Administrative Law (n 28) 32; Hare KC and others (n 14) [3-039].

[37] *GCHQ* (n 2) 398 (Lord Fraser), 410–411 (Lord Diplock).

[38] ibid 412 (Lord Diplock): 'The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer' and 'National security is the responsibility of the executive government; what action is needed to protect its interests is… a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word.'

[39] ibid 403 (Lord Fraser), 423 (Lord Roskill).

[40] ibid 402 (Lord Fraser): 'But if the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the Government is under an obligation to produce evidence that the decision was in fact based on grounds of national security'; 406 (Lord Scarman): 'where a question as to the interest of national security arises in judicial proceedings the court has to act on evidence.'

[41] ibid 410 (Lord Diplock).

to recognise that courts may also review their exercise — yet the scope of review depends on the nature and subject matter of the power in question.[42]

When deciding that the source of power could not be the only reason for a power to be non-susceptible to judicial review,[43] the House of Lords referred, with approval, to the Court of Appeal case *R* v *Criminal Injuries Compensation Board, Ex parte Lain*.[44] The case was about whether decisions of the Criminal Injuries Compensation Board, which had been established under prerogative powers, were subject to judicial review. Lord Parker, at page 881, stated that 'I can see no reason either in principle or in authority why a board set up as this board was set up is not a body of persons amenable to the jurisdiction of this court. True it is not set up by statute but the fact that it is set up by executive government, i.e., under the prerogative, does not render its acts any the less lawful.' House of Lords, agreeing with Lord Parker in Court of Appeal, ruled that there was no logical reason why a prerogative power should not be subject to judicial review just because it came from a prerogative source and while the same power created by statute could be subject to it.[45] The difference in the source of power, either statute or prerogative, cannot reasonably deprive citizens of the right of challenge that would be available under statutory powers. The Court may intervene to correct excess or abuse of power in certain situations 'if the subject matter in respect of which prerogative power is exercised is justiciable'[46].[47] Although it was not the language any of the judges actually used in the case, *GCHQ* has contributed to upholding the rule of law, which prohibits the arbitrary exercise of power, by serving as a criterion that limits prerogative powers in a manner similar to statutory powers, depending on the subject matter. The House of Lords' decision to reject the absolute immunity

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[42] Nick Barber, 'Prorogation, Prerogative and the Supreme Court' (Harvard Law Review Blog, 3 October 2019) <https://harvardlawreview.org/blog/2019/10/prorogation-prerogative-and-the-supreme-court/> accessed 1 May 2025.

[43] GCHQ (n 2) 407 (Lord Scarman): 'Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter'; 410 (Lord Diplock): 'My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review.'

[44] *R v Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 QB 864.

[45] *GCHQ* (n 2) 398 (Lord Fraser), 406 (Lord Scarman), 410-411 (Lord Diplock), 417 (Lord Roskill).

[46] ibid 407 (Lord Scarman).

[47] ibid 406 (Lord Scarman).

of the exercise of the prerogative powers restricted the potential for arbitrary use of such discretionary powers, at least in cases that are justiciable by virtue of their subject matter.

Although Lord Roskill agreed with the other judges in *GCHQ* that certain exercises of some prerogative powers may be subject to judicial review, he explicitly recognised some prerogative powers as excluded categories, which, depending on the subject matter of the prerogative, would not be appropriate for judicial review. These include 'those related to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers.'[48] Lord Fraser expressed a similar view, where he recognised that some prerogative powers, such as foreign policy and armed forces, are reasonably unsuitable for judicial review.[49] Judges decided that the subject matter of the power determines the immunity from review by acknowledging that some areas of prerogative would remain immune. However, as will be shown in detail below, the categories determined by Lord Roskill and the powers expected to be immune from review by Lord Fraser were also held to be susceptible to judicial review in later cases such as *Everett*,[50] *Bentley*,[51] *Bancoult*,[52] *Miller*[53] and *Miller/Cherry*[54].

The *GCHQ* case is also of importance to demonstrate the Court's approach to executive decisions concerning national security. The degree of deference has undergone incremental yet significant change following the Human Rights Act 1998, which has created a more balanced approach that permits greater scrutiny where Convention rights are engaged. This will be shown in the next part; the expertise, democratic legitimacy, institutional and constitutional competence,

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[48] ibid 418; see *Miller* (n 6) concerning the use of the prerogative power on treaty making.

[49] *GCHQ* (n 2) 398 (Lord Fraser).

[50] *Everett* (n 3) where the prerogative of granting passports is held to be susceptible to judicial review.

[51] *Bentley* (n 4) where the prerogative of mercy was held to be susceptible to judicial review. See *R (on the application of Shields) v Secretary of State for Justice* [2009] 3 All ER 265.

[52] Bancoult (n 5) Orders in Council, a prerogative legislation, was held to be susceptible to judicial review.

[53] Miller (n 6) the prerogative power to make and unmake treaties was held to be susceptible to judicial review.

[54] Miller/Cherry (n 1) prorogation was held to be susceptible to judicial review.

as well as context — determine the weight to be given to decision-makers, either by statute or by prerogative, in various contexts, including national security. However, I will now continue with presenting how the reach of justiciability has been expanded in several example cases.

1.4 Expanding Justiciability After *GCHQ*

The *GCHQ* case, here, represents the first step in relation to prerogative powers, establishing that the exercise of at least some prerogative powers will at least sometimes be subject to judicial review. In later cases, as we shall see, such as *Everett*[55] the court held that the prerogative power to grant passport is justiciable. In *Bentley*,[56] the prerogative power to (refuse to) grant mercy was again found justiciable. In *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)*[57], (‘*Bancoult*’) the prerogative power (2 Orders in Council themselves) is held to be justiciable. In *Miller*,[58] the prerogative power to make and unmake treaties was held to be susceptible to judicial review. Again, in *Miller/Cherry*[59] the Order in Council to prorogue parliament for five weeks was found justiciable. It is worth mentioning, however, that the court did not necessarily hold that all of the challenged powers were unlawful. The Court recognised the jurisdiction of the Court to review prerogative powers that were once claimed to be excluded.[60]

This expansion of justiciability following *GCHQ* will be addressed in two distinct categories to better reflect the evolving nature of judicial intervention. The first category below concerns administrative-type prerogative decisions, such as the issuance of passports or the exercise of the prerogative of mercy. In these instances, the courts’ reasoning primarily focusses on individual justice and procedural fairness, ensuring that prerogative power is not immune from judicial oversight when it directly affects personal rights. The second category involves higher-level prerogative powers, such as the power to make treaties or prorogue

[55] Everett (n 3).

[56] Bentley (n 4).

[57] Bancoult (n 5).

[58] Miller (n 6).

[59] Miller/Cherry (n 1).

[60] See Lord Roskill in GCHQ (n 2).

Parliament. These powers are inherently more constitutionally sensitive, as they relate to core constitutional functions where the issues are often political in character, implicate institutional competence, or engage sensitive policy judgments and thus traditionally attract a greater measure of judicial restraint. Crucially, however, the reasoning that justifies judicial oversight in this category differs markedly from that applicable in the first. The courts have increasingly grounded their intervention in the latter category in fundamental constitutional doctrines, most notably Parliamentary sovereignty and accountability, to define the legal limits of executive power. Distinguishing between these two categories is therefore essential to understanding how judicial review operates across different dimensions: addressing the exercise of power in individual cases while also safeguarding the constitutional balance of power.

1.5 Administrative-Type Prerogative Decisions: Individual Justice and Procedural Review

In *Everett*, the individual exercise of a prerogative power – the refusal to renew a passport to a British citizen on the ground that a warrant has been issued for him – was challenged. Although the government claimed that the issue of passports was a prerogative power concerning foreign policy and therefore not justiciable, the Court of Appeal held, in the light of *GCHQ*, that the court had the power to review the withdrawal or refusal to grant or renew a passport. Taylor LJ, with whom the other judges agreed, distinguished the prerogative powers exercised in the context of high policy and the ones similar to administrative decisions that affect certain individuals, like immigration cases. Although he did not define what constituted high policy, except to give examples such as making treaties, making war, dissolving parliament and mobilising the armed forces, he suggested that the high policy decisions were not justiciable.[61] On the other hand, the challenged decision held to be reviewed by the courts, as it is similar to an administrative decision. It is worth noting that in terms of justiciability, both the government and the court agreed that high policy decisions require a certain degree of judicial deference. However, the court rightly distinguished between the issue of an individual's passport and

[61] *Everett* (n 3) 820; *Gentle* (n 12) [8] (Lord Bingham): 'restraint traditionally shown by the courts in ruling on what has been called high policy -peace and war, the making of treaties, the conduct of foreign relations'.

high policy decisions regarding foreign relations, though both of them are necessarily foreign policy matters.

Five years later, in *Bentley*, the Home Secretary's decision to decline to grant (a posthumous) pardon, based on a policy that the courts would only grant pardons where there was technical as well as moral innocence, was challenged. Iris Bentley's brother, who was mentally weak, was sentenced to the death penalty. His sister claimed that he was innocent, ran campaigns and sought a pardon for her brother based on both technical and moral grounds. After the refusal of a pardon by the Home Secretary, applying a policy that pardons would only be granted where there was both technical and moral innocence, she applied for judicial review on the ground that the Home Secretary erred in law and did not appreciate that a pardon could take various forms, not all of which necessitated a presumption of innocence. Although the Government claimed the prerogative of mercy is an unreviewable power, as listed by Lord Roskill in *GCHQ*, the High Court decided that it had the jurisdiction to review the decision, an exercise of royal prerogative.

The court's approach was, in fact, a nuanced one. It distinguished different aspects of the decision: the formulation of the general policy for granting pardons was held to be a non-justiciable matter of policy, but the application of that policy in individual cases could be reviewed.[62] The court held that the Home Secretary had erred in his decision-making process by failing to consider that different forms of pardon existed, including conditional pardons that did not require a presumption of complete innocence. This represented a procedural failure rather than a challenge to the policy itself. Lord Justice Watkins also acknowledged, in obiter, that certain grounds for refusing pardons would be justiciable, such as decisions based solely on discriminatory factors like race, sex, or religion.

The approach in both cases, follows Lord Diplock's reasoning in *GCHQ* about what courts can and cannot do effectively. His point that judges are 'ill-qualified' to weigh competing policy considerations[63] is reflected in *Everett's* acceptance that

[62] See Lewis v Attorney-General of Jamaica [2001] 2 AC 50 (PC).

[63] *GCHQ* (n 2) 411.

high policy decisions remain non-justiciable, and *Bentley's* acknowledgement that the formulation of general pardon policy was non-justiciable. Both courts avoided areas where judicial procedures would be inadequate. Instead, both courts limited themselves to areas where, unlike policy-laden decisions, the judicial process is genuinely capable of providing the right answer — checking whether established policies were applied correctly to individual cases and whether proper procedures were followed.[64]

Indeed, refusing to renew a passport or to grant a prerogative of mercy are about individual grievances, not high policy decisions, not one of those decisions made based on the public interest or not one of the decisions that carries constitutional importance. There is no particular reason for the government to be immune from judicial control, such as being better-equipped or more democratically legitimate. These decisions are not subject to questions of preference or relevant to the allocation of resources. Rather, the challenges in each case were to the implementation of a particular policy, like an administrative decision, not to the policy itself. Thus, there are no relevant concerns regarding the Government's right to administer its policies. The decisions made in both cases were sound and serve as an example of why a categorical approach to justiciability would be misguided. It will now be seen that the cases which are relatively more problematic to ascertain the justiciability, because of being more relevant to the public-interest feature of the royal prerogative or carry constitutional importance.

1.6 Constitutional Challenges to High-Level Prerogative Powers

1.6.1 Prerogative Legislation: *Bancoult*

The *Bancoult*[65] case carries significant weight despite its diverse context. The case presented a challenge to colonial law and concerned the use of prerogative powers in a colonial setting. I argue, nevertheless, that it effectively challenges the notion of prerogative powers being immune to judicial review. The case

[64] ibid.

[65] *Bancoult* (n 5).

concerns the use of prerogative power itself in the form of legislation in a colony, which I see as the *strongest* constitutional position a prerogative power can take in terms of functioning as primary legislation rather than mere administrative action. Nevertheless, as will soon be observed, the House of Lords unanimously determined that that power is subject to judicial review on the ordinary grounds of review, although by majority they found that the exercise of prerogative power was neither unreasonable nor an abuse of power in the circumstances. The decision's reasoning is considered here to be one of the incremental steps that has indirectly widened the scope of judicial review, albeit in a different context from domestic law.

In *Bancoult,* an Order in Council[66] preventing the Chagossians from returning to the Chagos Islands, a British Indian Ocean Territory ('BIOT'), and removing their right to enter and reside in the BIOT was held to be justiciable. Previously, in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*,[67] Chagossians challenged the Order in Council that forcibly deported and relocated the inhabitants of Chagos Island in the 1960s for the purposes of global politics and to allow an American military base. In this first litigation, the Divisional Court held the immigration order to expel the inhabitants unlawful since such an order could not be within the power to make law for 'the peace order and good government' as stated in section 1 of the British Indian Ocean Territory Order 1965.[68] The government did not appeal the ruling and released a statement announcing the completion of a feasibility study, as well as plans to introduce a new immigration ordinance. This legislation would allow the Chagossians to relocate to the outer islands while adhering to the treaty obligations of the UK. The BIOT Commissioner created the Immigration Ordinance in 2000, and it was determined that the restrictions on entry would not be applicable to the affected residents of the BIOT.

In June 2004, two Orders in Council (the Constitution and Immigration Orders) were issued. They reinstated full immigration control. The decision to do so, it

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[66] Section 9 of the British Indian Ocean Territory (Constitution) Order 2004.

[67] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067; see subsequently *Bancoult* (n 5).

[68] ibid.

was claimed, was based primarily on a feasibility report, which had concluded that expensive settlements would be required in order for resettlement to occur. International relations and security concerns were also taken into account. Bancoult challenged the Constitution Order on the basis that in 2000, the then Foreign Secretary's statement had given rise to a legitimate expectation on the part of the Chagossians that they would be allowed to return to live on the outer islands. The British Indian Ocean Territory (Constitution) Order 2004, however, defeated this legitimate expectation without sufficient policy reasons.[69] It was also argued that the Chagossians' right of abode was violated.

The importance of *Bancoult* is that the House of Lords extended the reviewability of prerogative powers on the grounds of ordinary principles of legality, rationality and procedural impropriety from the review of ministerial and official decisions taken under prerogative powers to the review of prerogative legislation.[70] Although prerogative powers are now accepted to be susceptible to judicial review depending on the nature of the subject matter, Orders in Council in BIOTs have the unique characteristic of being primary legislation, in other words, are 'enacted under original rather than conferred authority.'[71] Accordingly, the government argued that the Order in Council fell within an area of legislative activity for the colony[72] and that there were no substantive limits to the royal prerogative in this regard. Since the Crown was acting in the field of defence of the realm, diplomatic relations and the use of public funds, it was further argued that the Court should not interfere.[73] On the contrary, Bancoult argued that since the Order in Council affected the

[69] *Bancoult* (n 5) [77].

[70] ibid [105] (Lord Rodger), [131] (Lord Carswell).

[71] Aileen McHarg, 'What is Delegated Legislation?' [2006] PL 539, 541; Mark Elliott and Amanda Perreau-Saussine, 'Pyrrhic Public Law: Bancoult and the Sources, Status and Content of Common Law Limitations on Prerogative Power' (2009) 52 SSRN Electronic Journal 707 <https://ssrn.com/abstract=2199349> accessed 18 June 2025.

[72] *Bancoult* (n 5) [44]: 'In a ceded colony […] the Crown has plenary legislative authority. It can make or unmake the law of the land.'

[73] Government also claimed that section 3 of the Colonial Laws Validity Act 1865 that is 'no colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid.' ousted the review.

Chagossians' right of abode, the Court had to scrutinise the Orders in Council anxiously.

Although Orders in Council are primary legislation like Acts of Parliament[74] and the Crown has plenary legislative authority over the colony,[75] they are not "regarded as an equivalent or parallel power, but rather as subordinate, to the Crown's power to legislate in Parliament".[76] Orders in Council do not have the representative character of Acts of Parliament.[77] While parliamentary sovereignty protects the Acts of Westminster Parliament from being repealed or overridden, the Court submitted that the Order in Council is still an exercise of power by the executive alone.[78] Following *GCHQ*, the Court in *Bancoult* held that there was no reason in principle why a prerogative statute should be immune from judicial review in the same way as the exercise of prerogative powers.[79] Indeed, the justiciability of a power is determined by its subject matter and the nature of the power exercised, rather than its formal source or classification. As *GCHQ* rejected immunity for prerogative powers based purely on their historical categorisation, *Bancoult* decision rejected immunity for Orders in Council based solely on their legislative form. Instead, the Court focused on the essential character of the Orders in Council, concluding that they did not possess parliamentary legitimacy and therefore remained subject to judicial review as executive actions, despite their legislative function.

The *Bancoult* case, unlike *Everett* and *Bentley*, concerned prerogative power exercised in legislative form rather than administrative decision-making. It necessarily involved a public interest concern, although in a distinct (colonial) setting, unlike *Everett* and *Bentley*. However, even in the form of legislation, the prerogative power could be subject to judicial review. This was because the prerogative power to legislate lacks the democratic legitimacy of statutes, does not have a representative character, lacks full parliamentary scrutiny and the

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[74] See Human Rights Act 1998, section 21(1).

[75] *Bancoult* (n 5) [124].

[76] ibid [149] (Lord Mance); Campbell v Hall (1774) 1 Cowp 204.

[77] Bancoult (n 5) [35] (Lord Hoffmann).

[78] ibid.

[79] ibid [35] (Lord Hoffmann), [71] (Lord Bingham), [105] (Lord Rodger).

protection of the parliamentary sovereignty principle.[80] The Court assessed the nature and subject matter of the power, and rightly decided that regardless of the form (legislation or executive decision / direct or delegated) of the power, prerogative powers could be subject to judicial review. Although this case arose out of colonial law in a BIOT, the reasons on which the Court based its decision, the characteristics of the Orders in Council, such as lack of protection of parliamentary sovereignty, lack of representative character and lack of democratic legitimacy, will still be relevant in domestic law.

The majority ruling, however, has been subject to significant academic criticism for its approach to prerogative powers. A central concern was that, despite the democratic deficit inherent in prerogative powers, the majority judges treated such legislation with the same level of deference typically accorded to Acts of Parliament. Lord Rodger exemplified this approach in his judgment:

> 'It cannot be open to the courts to substitute their judgment for that of the Secretary of State advising Her Majesty as to what can properly be said to conduce to the peace, order and good government of BIOT. This is simply because such questions are not justiciable. The law cannot resolve them: they are for the determination of the responsible ministers rather than judges. In this respect, the legislation made for the colonies is in the same position as legislation made by Parliament for this country […] In both cases, the sanction for inappropriate use of the legislative power is political, not judicial.'[81]

This is controversial. Although the judges unanimously accepted that prerogative orders differed from Acts of Parliament and were therefore subject to judicial review, the majority's approach was criticised for applying a level of deference based on the premise that Orders in Council were equivalent in scope to Parliament's legislative power.[82] More fundamentally, the majority's decision that there are no substantive limits to the colonial power to legislate and that "peace, order and good government" is not a substantive constraint on the prerogative power has been considered "an unfortunate regression"[83] from the

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[80] Elliott and Perreau-Saussine (n 71).

[81] *Bancoult* (n 5) [109] (Lord Rodger).

[82] Elliott and Perreau-Saussine (n 71).

[83] Margit Cohn, 'Judicial Review of Non-Statutory Powers after Bancoult: A Unified Anxious Model' [2009] PL 260.

GCHQ ruling, which established that the prerogative should, in principle, be subject to review in the same way as statutory powers and "a dismally modest check on the Executive's extra-territorial exercise of prerogative power"[84]. However, despite these criticisms of the majority's approach to deference, *Bancoult* represents another incremental step in the careful expansion of justiciability, demonstrating judicial willingness to question prerogative immunity while maintaining significant deference in matters of colonial governance and national security. Bancoult confirmed the principle that justiciability is predicated on the nature and subject matter of a power rather than its source or classification- applies bot only to executive decisions but also to prerogative powers exercised in legislative form, extending the reach of judicial review to its most constitutionally potent manifestation while remaining grounded in constitutional principles.

1.6.2 Treaty Powers and Parliamentary Sovereignty: Miller and Constitutional Constraints

In the context of Brexit, the Courts were called upon to address the extent of executive power in relation to parliamentary sovereignty, the rule of law, and the separation of powers in the case of *Miller*.[85] The question was whether, without statutory authorisation, the process of withdrawing from the EU can be initiated with the notice given by the executive under the prerogative power to (un)make treaties; since the notice irrevocably triggers a process leading to a change in domestic law, in particular, changes in the fundamental rights of individuals.

It is important to situate *Miller* within the analytical evolution traced in this section. In *Everett*, *Bentley*, and *Bancoult*, the courts applied the *GCHQ*'s subject matter framework to determine whether a given prerogative decision was justiciable at all. *Miller* operates on a different but connected plane. The treaty-making prerogative was listed on Lord Roskill's list of excluded categories in *GCHQ*, yet by the time *Miller* was decided, the central question was not whether the courts could examine the legal limits of that power. It was what

[84] Elliott and Perreau-Saussine (n 71).

[85] *Miller* (n 6).

those limits were. This is because questions of existence and scope have always been, since at least the *Case of Proclamations*, matter of law for the courts. They do not require a prior subject matter justiciability analysis of the kind seen in *GCHQ* and the following case law. In this sense, *Miller* represents a natural progression. *GCHQ* established that subject matter determines whether manner of exercise is reviewable, *Miller* confirmed that existence and scope questions remain reviewable regardless of subject matter, and answered them by reference to established constitutional principles, most notably, that the prerogative cannot alter statute law and cannot be exercised where Parliament has regulated the field. While dissenting judges invoked the foreign affairs character of the treaty-making prerogative as a reason for restraint, even they did not dispute the court's jurisdiction to examine these constitutional limits. Their disagreement was with the majority's reading of the relevant Act. This application of settled doctrine to a novel constitutional context is, as this thesis argues, precisely what distinguishes *Miller* from *Miller/Cherry* — where, as will be seen, a similar existence and scope framing was deployed to reframe and effectively bypass justiciability constraints that would otherwise have applied.

After the 2016 European Union Referendum resulted in a 51.9% vote to leave, Gina Miller argued before the Court that since triggering Article 50 of the Treaty on European Union would alter or end the rights conferred to individuals by EU membership, such an irrevocable triggering by the prerogative would require statutory authorisation. The Government's position was that the Parliament had not created a statutory power to trigger Article 50 in the Referendum Act 2015, as it was clear that the prerogative could be used for this purpose. Secondly, the European Communities Act 1972 ('1972 Act' or 'ECA') — which gave effect to the UK's membership of the European Union — did not expressly remove the prerogative power to withdraw from the treaty despite the fact that other controls on the exercise of the prerogative power in relation to EU treaties were introduced.

The case mainly rested on two fundamental constitutional constraints on prerogative power. First, accordingly with the *Case of Proclamations*, the prerogative cannot be used to alter the law of the land.[86] Second, as established

[86] *Case of Proclamations* (n 33).

in *De Keyser,* the prerogative cannot be exercised where statute covers the same area.[87] Both these constraints substantially serve to protect parliamentary sovereignty. The question put to the Court was therefore concerned with how these established principles applied to two arguments: first, entering into and withdrawing from treaties is a matter of foreign relations which falls within the competence of the Government. The second was that the executive cannot unilaterally change substantive law made by an Act of Parliament or the common law.[88] The High Court held that the 1972 Act created a range of EU rights[89] and that the exercise of prerogative powers cannot change these rights, which were, according to the High Court's judgment, part of the domestic law, with the result that the government needed parliamentary authority to trigger Article 50.[90] In the Supreme Court, a majority of eight to three (Lords Reed, Carnwath, and Hughes dissenting) dismissed the Government's appeal, although the reasoning of the Supreme Court was different from that of the High Court.

In the Supreme Court, the majority of the judges acknowledged that the 1972 Act authorised a dynamic process.[91] By way of doing this, it made EU law a source of UK law without further legislation being needed. Contrary to the decision of the High Court, these rights were not assessed as *created by the 1972 Act*, by either the majority or the minority judges.[92] The 1972 Act, as an Act of Parliament, was the legislation that made EU law a source of the UK, like a 'conduit pipe.'[93] As long as the 1972 Act remained in effect, EU law, therefore, functioned as a source of domestic law, a status conferred through parliamentary sovereignty. The majority decision held that there is a vital difference between changes arising from the EU law and withdrawal. Although

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[87] *De Keyser* (n 28).

[88] Prerogative power cannot change statute or common law without primary legislation permitting it. *Miller* (n 6) [50],[51]: 'Further, ministers cannot frustrate the purpose of a statute or a statutory provision, for example by emptying it of content or preventing its effectual operation'; *Case of Proclamations* (n 33); Bill of Rights 1689, art 1; *De Keyser* (n 28); *The Zamora* (n 28).

[89] *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) [64], [66].

[90] The High Court's decision faced strong criticism in the media, with headlines such as 'Enemies of the People' (Daily Mail), 'Who do EU think you are?' (The Sun), and 'The judges versus the people' (Daily Telegraph).

[91] *Miller* (n 6) [60].

[92] ibid [65]; see also Lord Reed [216].

[93] ibid [65].

any notice issued under Article 50 did not in fact amend or repeal the 1972 Act itself, it would trigger an irrevocable process resulting in EU rights being altered or even terminated. The majority concluded that modifications of the rights, obligations, and liabilities by EU institutions under EU law are in line with the 'conduit pipe' qualification of the Act. However, the withdrawal of unilateral executive action would result in a fundamental change in the constitutional arrangements of the United Kingdom; thus, these changes arising from the ordinary operation of EU law within the conduit pipe framework cannot be treated in the same category as the unilateral executive termination of the UK's membership of the EU itself.[94]

Lord Reed dissented on this as there is no basis for such a difference in the language of the 1972 Act.[95] He pointed out that the effect of EU law depended on the act, and since the notification did not repeal the 1972 Act, Ministers were entitled to give notification under the Crown's prerogative powers concerning foreign affairs.[96] He argued that the 1972 Act recognised there could be changes of rights and obligations arising from EU law 'from time to time'[97] and there is no distinction, such as vital or not, between the changes, in the language of the Act.[98] Lords Carnwath and Hughes also dissented, stating that parliamentary sovereignty does not require prior legislation to withdraw from the EU because the application of EU law in the UK under the 1972 Act is inherently conditional on membership of the EU.[99]

The majority applied arguably a novel principle by asserting that prerogative powers cannot effect such *far-reaching constitutional changes*.[100] However, this approach is based on established constitutional rules rather than creating entirely new ones: the *Proclamations* and *De Keyser*. Both serve the same

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[94] ibid [78].

[95] ibid [187] (Lord Reed).

[96] ibid [177] (Lord Reed).

[97] European Communities Act 1972, section 2(1): 'rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and [...] remedies and procedures from time to time provided for by or under the Treaties.'

[98] *Miller* (n 6) [186] (Lord Reed).

[99] ibid [177] (Lord Reed), [256]-[259] (Lord Carnwath); [281] (Lord Hughes).

[100] Hazell and Foot (n 28) 254.

fundamental purpose: protecting parliamentary sovereignty by ensuring Parliament remains the legitimate legislator within the UK. While the *De Keyser* principle was not directly applicable, since the 1972 Act did not regulate withdrawal, the Court's reasoning extended the underlying idea. The reasoning in *Miller* demonstrates how these constitutional constraints operate in different ways to protect Parliament's authority. The *Proclamations* principle protects parliamentary sovereignty directly by preventing the executive from changing the law through prerogative power. *De Keyser* protects sovereignty indirectly by stopping the executive from circumventing legislation that Parliament has already crafted, even where that legislation formally remains intact. *Miller* approach is based on this reasoning: preventing the executive from using prerogative power to undermine Parliament's constitutional settlement regarding EU law, even though the 1972 Act itself would not be formally repealed.[101] By triggering Article 50, the executive would render the 1972 Act's 'conduit pipe' effectively inoperative, undermining Parliament's constitutional settlement regarding EU law integration.

Therefore, although the *Miller* case, especially the High Court's decision, drew many criticisms, mostly politically, the question was a legal one.[102] The court was asked to review and determine the extent of prerogative power to enter into and withdraw from treaties. The question was not whether the UK should leave the EU or not. Several commentators, however, including Lord Reed, criticised *Miller* for legalising political issues.[103] Nevertheless, *Miller* is an important case demonstrating that the prerogative power to make and unmake treaties, which was one of the categories that Lord Roskill in *GCHQ* considered

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[101] Paul Craig, 'Epilogue: Miller, the Legislature and the Executive' in Satvinder Juss and Maurice Sunkin (eds), *Landmark Cases in Public Law* (Hart 2017) 311.

[102] Ailsa McNeil, 'Miller and the Media: Supreme Court Judgement Generates More Measured Response' (The Constitution Unit, 9 February 2017) <https://constitution-unit.com/2017/02/09/miller-and-the-media-supreme-court-judgement-generates-more-measured-response/> accessed 1 June 2025; Timothy Endicott, 'Parliament and the Prerogative: From the Case of Proclamations to Miller' (Policy Exchange 2016) <http://judicialpowerproject.org.uk/wp-content/uploads/2016/12/Endicott-2016-Parliament-and-the-Prerogative.pdf> accessed 1 July 2025.

[103] *Miller* (n 6) [240] (Lord Reed): 'for a court to proceed on the basis that if a prerogative power is capable of being exercised arbitrarily or perversely, it must necessarily be subject to judicial control, is to base legal doctrine on an assumption which is foreign to our constitutional traditions. It is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary'; See Craig (n 15).

to be immune from review by virtue of its subject matter, can be subject to review and be found to be unlawful. The subsequent unanimous decision of the *Miller/Cherry* case, on the other hand, is problematic and rightly criticised not only for deciding a political question, but also for reviewing the manner of the exercise of prerogative power, although the Supreme Court claimed that they are not reviewing the manner of prorogation.

1.6.3 Reframing Justiciability: The *Miller/Cherry* Controversy

Miller/Cherry is the most striking case for the purposes of this section, as it is seen as an unforeseen extension of the scope of judicial review, bypassing the issue of justiciability of the subject matter and instead using the courts' power to review the existence and scope of public powers. Although it is unlikely that the courts will be willing to apply the reasoning of the case in the near future, given the widespread criticism of the decision by both legal and political commentators, I argue that it has provided the necessary legal authority to pave the way for even wider judicial review.

After the European Union (Notification of Withdrawal) Act 2017 entered into force on 16 March 2017, approximately 2 months after the *Miller* decision. The UK's formal notice of its intention to leave the European Union was given under Article 50 TEU on March 29, 2017. The Act itself was brief and straightforward, containing only one operative clause that granted the Prime Minister the precise power that the Supreme Court had determined required parliamentary authorisation.[104] Significantly, as Craig observes, despite the constitutional significance attributed to parliamentary involvement in *Miller*, the legislation passed through Parliament with minimal opposition and without amendment, suggesting limited deliberation in the actual legislative process.[105] After two extensions, the exit date for the UK to leave the European Union has been set as 31 October 2019 without a withdrawal agreement, with the possibility of the UK

[104] European Union (Notification of Withdrawal) Act 2017 section 1: '(1) The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.'

[105] Craig (n 101) 311; Mark Elliott, 'The Supreme Court's Judgment in Miller: In Search of Constitutional Principle' (2017) University of Cambridge Faculty of Law Legal Studies Research Paper No 23/2017.

leaving earlier.[106] Over those two years, attempts by Prime Minister Johnson to secure a withdrawal agreement had been rejected three times by the House of Commons. Mr Johnson was accused of supporting a no-deal exit, unlike the majority of the House of Commons, who did not support leaving the Union without a deal.[107]

In *Miller/Cherry*, the Supreme Court was asked whether it was lawful for the Prime Minister and the Queen, on the advice of the Prime Minister, in the form of an Order in Council, to prorogue Parliament for five weeks, between 9 and 12 September until 14 October 2019. Prorogation is a personal prerogative and suspends the operation of the Lords and Commons, and means that 'neither House can meet, debate and pass legislation. Neither House can debate Government policy. Nor may members of either House ask written or oral questions of Ministers.'[108] Prorogation usually lasts for a few days, usually after around a one-year session of Parliament.[109] However, the current session at the time had lasted over two years[110] and the prorogation being challenged was to last five weeks, as opposed to the usual period of a few days. Moreover, it was

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[106] Later exit day was changed as 31 January 2020; The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No 3) Regulations 2019, SI 2019/859; House of Commons Library, 'Brexit delayed again: until 31 October 2019?' (Research Briefing CBP-8549, 17 April 2019) <https://commonslibrary.parliament.uk/research-briefings/cbp-8549/> accessed 18 June 2025; House of Commons Library, 'The Prorogation Dispute of 2019: one year on' (Commons Library Briefing 9006, 24 September 2020) <https://researchbriefings.files.parliament.uk/documents/CBP-9006/CBP-9006.pdf> accessed 18 June 2025; House of Commons Library, 'Brexit timeline: events leading to the UK's exit from the European Union' (Briefing Paper 7960, 6 January 2021) <https://researchbriefings.files.parliament.uk/documents/CBP-7960/CBP-7960.pdf> accessed 18 June 2025.

[107] Sky News, Interview with Boris Johnson, Prime Minister (30 August 2019) ('the more our friends and partners think at the back of their minds that Brexit could be stopped, that the UK could be kept in by Parliament, the less likely they are to give us the deal that we need and so that is why I really hope that MPs will allow the UK to do a deal'); *Cherry v Advocate General for Scotland* [2019] CSOH 70 [5]; 'For Boris Johnson, Another Bad Day and Another Big Defeat in Parliament' New York Times (New York, 9 September 2019) https://www.nytimes.com/2019/09/09/world/europe/brexit-johnson-parliament.html accessed 18 June 2025.

[108] *Miller/Cherry* (n 1) [2].

[109] House of Commons Library, 'Is This the Longest Parliamentary Session Ever?' <https://commonslibrary.parliament.uk/is-this-the-longest-parliamentary-session-ever/> accessed 20 December 2024: 'Throughout the twentieth century the general pattern was for sessions to begin and end in October or November'; *Miller v The Prime Minister* [2019] EWHC 2381 (QB) [13]: 'There had been five occasions since 1980 when Parliament stood prorogued for more than ten days, the longest being 21 days'.

[110] House of Commons Library (n 109): "On 7 May 2019 the current parliamentary session reached a striking landmark. It became the longest session by sitting days since the English Civil War (1642-51)."

three weeks before the end date of the Brexit process. This five-week prorogation, therefore, was claimed to be a respite for Mr Johnson from a troublesome legislature.[111]

The prorogation was challenged both before the English High Court[112] and the Scottish Court of Session[113]. The claimants argued that the Prime Minister's advice to the Queen to prorogue Parliament was ‘an unlawful abuse of power [considering the timing and duration], substantially influenced by extraneous and improper[/irrelevant] considerations’[114] such as ‘to strengthen the Government's negotiating position with the European Union by frustrating Parliamentary activity to 'block' a 'no-deal' exit from the European Union.’[115] It was also claimed that it violated the principle of parliamentary sovereignty by depriving Parliament of its ability to legislate and scrutinise executive action, particularly in relation to the arrangements for Brexit.[116]

Although the prorogation was made by Order in Council, it was clear that it was not immune from judicial review on that basis.[117] Nonetheless, both the English High Court and the Outer House of the Court of Session held that the issue was not justiciable because it was a political question in the absence of a judicial or legal standard by which to assess the legality of it; under the principle of the separation of powers, the courts must and do refuse to consider political questions, as long as and to the extent that the issue does not affect the duty under the HRA 1998 relating to individual rights.[118]

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[111] Nick Barber, 'Prorogation, Prerogative and the Supreme Court' (Harvard Law Review Blog, 3 October 2019) <https://harvardlawreview.org/blog/2019/10/prorogation-prerogative-and-the-supreme-court/> accessed 1 June 2025; *Miller v The Prime Minister* (n 109) [20].

[112] *Miller v The Prime Minister* (n 109).

[113] *Cherry v The Advocate General for Scotland* [2019] CSIH 49; *Cherry v Advocate General for Scotland* [2019] CSOH 70

[114] *Miller v The Prime Minister* (n 109) [23].

[115] ibid [30].

[116] ibid [23], [29]; *Cherry v Advocate General for Scotland* (n 113, CSOH) [5].

[117] *Bancoult* (n 5).

[118] *Miller v The Prime Minister* (n 109) [42], [47], [60]; *Cherry v Advocate General for Scotland* (n 113, CSOH) [27]; see *A and others v Secretary of State for the Home Department* (n 20) [29] (Lord Bingham); *Gibson v Lord Advocate* 1975 SC 136, 144 (Lord Keith); *Shergill v Khaira* (n 10) [40].

The Inner House of the Court of Session, on the other hand, by looking into the manner of the exercise of prerogative power, held that the issue was justiciable. The Inner House reviewed whether it was a *proper exercise* of the power of prorogation.[119] Lord Carloway, at paragraph 51, held that the challenge to the prorogation decision did not in this case involve a question of high policy or politics. Lords Brodie and Drummond Young, similarly, held that the Executive's use of prerogative power to avoid being held accountable is justiciable and unlawful.[120] The prerogative must be exercised lawfully and for a proper purpose. In this case, the exercise of the prerogative constituted an abuse of power for an improper purpose. The purpose of the prorogation, having regard to its effect on Parliament's ability to hold the executive to account and, in particular, its length, was improper.[121]

Remarkably, however, the Supreme Court saw the issue as one of existence and scope, rather than examining the manner in which the exercise was conducted. At least, this was the court's claim regarding the issue. The Supreme Court expressly stated that it excluded from its review the Prime Minister's motive in advising the Queen.[122] As no reasonable justification for the five-week prorogation was put before the Court, the Court held that the prorogation was unlawful.[123] The Court bypassed the question of whether the nature and subject matter of the prorogation were justiciable. Without delving into the issues of legality, reasonableness, and procedural propriety regarding the exercise of prerogative power, this decision focused instead on the existence and scope of the power to prorogue.[124] As such, it looked only at the limits of the power and whether the prorogation was exercised within those limits. In other words, the Court determined whether the five-week prorogation was within the lawful

[119] *Cherry v The Advocate General for Scotland* (n 113, CSIH) [109], [124].

[120] ibid [75].

[121] ibid [91], [115], [124].

[122] *Miller/Cherry* (n 1) [58].

[123] ibid [61].

[124] Barber (n 111).

scope of the power to prorogue.[125] This framing was remarkable and has been criticised by several commentators.[126] I turn to that criticism below.

As was established in the *Case of Proclamations* in 1611 and approved in *Bancoult*, courts have the jurisdiction to review the limits of the prerogative. Claiming to exercise no more than this jurisdiction, the Supreme Court in *Miller/Cherry* unanimously held that the prerogative is constrained by fundamental constitutional principles, specifically parliamentary sovereignty and arguably a newly recognised principle of parliamentary accountability.[127] It was held that prorogation must not 'frustrat[e] or prevent, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.'[128]

This constraint derives from the fact that prerogative power, being rooted in common law, must be compatible with fundamental constitutional principles, including parliamentary sovereignty and parliamentary accountability.[129] Parliamentary sovereignty in this context was claimed to mean both the supremacy of Acts of Parliament as the highest form of law and the limitation on the prerogative powers not to impede Parliament from exercising its legislative authority.[130] Along with the fact that the five-week prorogation had 'an extreme effect on the fundamentals of [the UK's] democracy'[131] the prerogative power

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[125] Hare KC and others (n 14).

[126] Stephen Laws, 'The Supreme Court's Unjustified Lawmaking' (Policy Exchange, 4 October 2019) <https://policyexchange.org.uk/blogs/stephen-laws-the-supreme-courts-unjustified-lawmaking/> accessed 20 December 2024; Michael Sexton, 'Judicialising Politics' (Policy Exchange, 3 October 2019) <https://judicialpowerproject.org.uk/michael-sexton-judicialising-politics/> accessed 1 July 2025; Paul Yowell, 'Miller (No 2) and Political Questions' (Policy Exchange, 30 September 2019) <https://judicialpowerproject.org.uk/paul-yowell-miller-no-2-and-political-questions/> accessed 1 July 2025.

[127] *Miller/Cherry* (n 1) [38], [40], [41], [46].

[128] ibid [50].

[129] Ibid [41, 49].

[130] ibid [40, 41]; *Case of Proclamations* (n 33); *De Keyser* (n 28); *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] UKHL 3; see also Aileen McHarg, 'The Supreme Court's Prorogation Judgment: Guardian of the Constitution or Architect of the Constitution?' (2020) 24 ELR 88: 'The use of parliamentary sovereignty to argue that the government had a duty not to frustrate, not merely the expressed will of Parliament, but also Parliament's ability to express that will, was entirely unprecedented'; cf Alex Powell, 'Miller/Cherry and the Justiciability of Prerogative Powers' (Trinity College Law Review Online) <https://trinitycollegelawreview.org/miller-cherry-and-the-justiciability-of-prerogative-powers/> accessed 18 June 2025.

[131] *Miller/Cherry* (n 1), [56, 58]

was being used to prevent the Parliament from legislating and scrutinising functions without *reasonable* justification. Therefore, there was no justification submitted to the Court, and the Court held that the advice was outside the lawful limits of the Prime Minister; both the advice and the Order in Council proroguing parliament made on that unlawful advice were unlawful.

Crucially, however, the question remains unanswered whether the Court would evaluate the reasonableness of any justification if one had been submitted, and if so, according to which standards. While the Court asserted its power to define the scope of the prerogative, assessing the reasonableness of a prorogation would require examining the manner in which the power was exercised. This raises important questions about justiciability that the Court did not need to fully resolve given the absence of any government justification.

The Supreme Court, in fact, avoided the question of justiciability by examining the existence and extent of the prerogative power and deciding whether the prorogation was lawful. At paragraph 36 of the unanimous judgment, it was stated that: '[N]o question of justiciability, whether by reason of subject matter or otherwise, can arise in relation to whether the law recognises the existence of a prerogative power, or in relation to its legal limits. Those are by definition questions of law.' The Supreme Court shifted the focus from the legality of the manner of prorogation to the non-contentious duty of the court to ascertain the lawful boundaries of a power. And the scope of the power here, the Supreme Court stated, was to be ascertained by the common law, in the absence of statutory limits in this particular case.[132] Therefore, the Court examined whether the prerogative was employed within the limits set by the constitutional principles of the common law.[133]

The Supreme Court's reasoning in the case that questions of existence and scope are for the courts to answer, and that the courts can and do examine challenged decisions to see whether they exist in law, is, however, potentially problematic.

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[132] ibid [50]: 'a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.'

[133] McHarg (n 130).

This approach risks becoming a tool for courts to review the manner in which prerogative powers are exercised — traditionally a non-justiciable area. Because all unlawful decisions would be necessarily *ultra vires* and beyond their lawful limits, framing review in terms of 'scope' can effectively enable judicial scrutiny of matters of high policy or political questions that would otherwise be immune from review.[134] As authors including D. Tomkins, Finnis, and McHarg have argued, the reasoning of the Supreme Court potentially collapses the distinction between review of existence and scope, and review of the manner of the exercise of a power.[135] This undermining of the 'extent' versus 'manner of exercise' distinction results in significantly more intensive judicial review of prerogative power.[136] While the Court asserted that 'if the issue before the court is justiciable, deciding it will not offend against the separation of powers,'[137] such a broad approach to questions of existence and extent arguably breaches the separation of powers by expanding judicial scrutiny into areas that would otherwise be plainly non-justiciable executive acts.

Notably, several authors, contradicting what the Supreme Court claimed, rightly commented that *Miller/Cherry* amounted to an examination of the manner of exercise of the power to prorogue, without the Court ever confronting in terms the justiciability of that examination.[138] The Court simply skipped the question of justiciability by framing its judgment exclusively in terms of scope and extent, rather than manner of exercise.

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[134] ibid: '[I]ts reasoning appears to collapse the distinction between review of the scope of prerogative power and review of its exercise, since any constraint on the exercise of power can potentially be recast as a limit on its scope." Jane Smith, 'The Demise of Non-Justiciability' (Policy Exchange, 29 September 2019) <https://policyexchange.org.uk/blogs/jane-smith-the-demise-of-non-justiciability/> accessed 20 December 2024; Independent Review of Administrative Law, Independent Review of Administrative Law (n 28) [2.36]: "it creates the potential for the courts to circumvent the 'no-go' signs currently mounted around the exercise of prerogative powers in relation to 'matters of high policy [... such as] making treaties, making war, dissolving Parliament, mobilising the Armed Forces'.'

[135] David Tomkins, 'The Anisminic of Justiciability' (Judicial Power Project, 30 September 2019) <http://judicialpowerproject.org.uk/dr-david-tomkins-the-anisminic-of-justiciability/> accessed 20 December 2024; McHarg (n 130); John Finnis, 'The Unconstitutionality of the Supreme Court's Prorogation Judgment' (Policy Exchange 2019) <https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf> accessed 1 July 2025.

[136] Loughlin (n 23).

[137] *Miller/Cherry* (n 1) [24].

[138] Loughlin (n 23); Richard Ekins, 'Parliamentary Sovereignty and the Politics of Prorogation' (Policy Exchange 2019).

The Supreme Court also faced widespread criticism for converting what was traditionally non-justiciable political *convention* (the Government's accountability to Parliament) into justiciable law.[139] The Court's application of the principle of parliamentary sovereignty, i.e. the legal supremacy of statutes, to encompass the protection of Parliament's legislative and oversight functions, in addition to the ordinary meaning of the legal supremacy of statutes, was said to be unprecedented.[140] However, this criticism is contested. Based on cases such as *Miller*, *Proclamations* and *De Keyser*, in which the principle of parliamentary sovereignty was either directly or indirectly applied, Craig argued that the legislative and scrutiny functions of Parliament are essential to the concept of parliamentary sovereignty and, consequently, to the constitutional order. As such, these functions must be, and were rightly interpreted in a manner that is both meaningful and effective in order to exercise the total legislative authority.[141]

One other possible criticism is the treatment of the Court to the political accountability mechanisms. In addition to the main criticism, here it is argued that the Supreme Court refrained from addressing the potential argument that prorogation falls under high policy decision-making; the Supreme Court's decision also pays relatively little regard to the Prime Minister's political accountability to Parliament for his actions and can be held responsible for proroguing Parliament. The Court ruled that such accountability could only be exercised after the prorogation had taken place and that ministerial accountability is not a substitute for judicial review. However, this view arguably undervalues the significance of political accountability, specifically the fact that Parliament did not exercise its power to pass a vote of no confidence, despite having the option to do so.

The fundamental constitutional tension lies in the Court's strategic reframing of justiciability concerns. By characterising the case as concerning the existence and scope of prerogative power rather than the manner of exercise, the Court effectively bypassed traditional justiciability constraints that would have

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[139] Finnis (n 135) 14; Loughlin (n 23) 18.

[140] Ekins (n 138) 14.

[141] Craig (n 15).

required explicit consideration of whether judicial review was appropriate for what was essentially a political decision about the timing of parliamentary sitting. As Endicott observes, '[e]xecutive action uncontrolled by law is not generally arbitrary. Legal control always needs the justification that it can help the executive to act with justice and in the public interest.'[142] The Court provided insufficient justification for why judicial intervention was more appropriate than the political accountability mechanisms that Parliament possessed but chose not to deploy.

1.7 Conclusion

The trajectory traced through these landmark cases illustrates how the courts have moved beyond the formal constraints of source-based immunity to develop a more nuanced understanding of their institutional competence. The evolution from individual administrative-type decisions in *Everett* and *Bentley* to higher-level constitutional challenges in *Bancoult* and *Miller* demonstrates judicial confidence in addressing matters of increasing constitutional significance, while generally maintaining appropriate deference to executive expertise and democratic accountability.

However, the *Miller/Cherry* methodology raises significant constitutional concerns. By reframing questions about the appropriateness of executive action as matters concerning the legal limits of executive power, the approach suggests that virtually any executive decision could become subject to judicial review. While the Court maintained it was merely defining the scope of prerogative power, assessing whether a five-week prorogation exceeded lawful boundaries inevitably required evaluating how that power was exercised. This development is both potentially far-reaching and constitutionally problematic. It represents a departure from the established evolution of prerogative power justiciability, which has generally demonstrated careful expansion that respects constitutional boundaries while upholding parliamentary sovereignty. The *Miller/Cherry* approach therefore risks (though this remains uncertain rather than inevitable) disrupting the delicate constitutional balance between the executive,

[142] Timothy Endicott, 'The Reason of Law' (2003) 48 American Journal of Jurisprudence 83, 94: 'Executive action uncontrolled by law is not generally arbitrary. Legal control always needs the justification that it can help the executive to act with justice and in the public interest.'

Parliament, and the judiciary that has developed over time. Indeed, it is one of the cases that led to the Government's launch of the Independent Review of Administrative Law in July 2020, aiming to restrict judicial review based on perceived concerns about judicial overreach, although the review ultimately resulted in only limited legislative changes.[143]

This constitutional transformation supports the thesis' argument that enhanced judicial power can coexist with parliamentary sovereignty, but only when judicial expansion proceeds in a principled and constitutionally grounded manner. The *Miller/Cherry* methodology illustrates the fragility of a constitutional settlement of that sort. The other cases examined here demonstrate that when judicial review operates within appropriate constitutional boundaries, focusing on legality rather than political choices, and maintaining deference to democratic processes, it serves to strengthen fundamental principles such as parliamentary sovereignty, the rule of law, and executive authority rather than undermine them. The courts' willingness to review previously immune prerogative powers has enhanced legal accountability while preserving Parliament's ultimate authority over fundamental constitutional questions and maintaining appropriate deference to executive decision-making in areas of legitimate governmental discretion. By contrast, *Miller/Cherry*'s strategic reframing of justiciability constraints represents a departure from this balanced approach, suggesting that judicial expansion through methodological creativity rather than principled constitutional development risks disturbing the delicate equilibrium between judicial oversight and democratic governance. The next section examines the judiciary's treatment of executive action in foreign affairs and national security contexts, where justiciability remains contested.

[143] For a more detailed analysis of the Act see ch 3.

2 The Changing Scope of Non-Justiciability: Deference to The Executive in The Contexts of National Security and Foreign Relations

2.1 Introduction

This section examines the question of non-justiciability in the UK within two specific contexts: national security and foreign relations. These domains are inherently linked and cannot be separated without an artificial division, and both fall within the constitutional competence of the executive branch.[1] This section explores how non-justiciability relates to deference and depends upon factors such as expertise, the political accountability of decision-makers, the process of information gathering and the allocation of powers.[2] In the context of national security and foreign policy, it is observed that the judiciary in general showed a great degree of deference, resulting in a minimally changed scope specifically in these contexts, in contrast to the incremental but substantial broadening of the scope of judicial review in other areas such as prerogative powers and human rights which are examined in the other chapters of this thesis. This differential approach is consistent with the central argument of the thesis that contemporary constitutional evolution represents balanced institutional governance rather than simple judicial supremacy. In this regard, courts recognise the continuing primacy of parliamentary and executive authority in relation to certain core governmental functions. This illustrates the intricate nature of the constitutional evolution under discussion, where the tension between parliamentary sovereignty and the rule of law is resolved in a variety of ways across distinct governmental domains, thereby maintaining institutional and constitutional balance rather than pursuing a complete

[1] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [53] (Lord Hoffmann): 'I agree with the Court of Appeal that it is artificial to try to segregate national security from foreign policy. They are all within the competence of responsible ministers and not the courts'; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [194] (Lord Reed): '[I]t is a basic principle of our constitution that the conduct of foreign relations, including the ratification of treaties, falls within the prerogative powers of the Crown.'

[2] Aileen Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape' (2011) 9 International Journal of Constitutional Law 172; See Alison L Young, 'In Defence of Due Deference' (2009) 72(4) Modern Law Review 554.

transformation of the separation of powers as understood in the United Kingdom.

Non-justiciability here means either that an issue is held to be inherently unsuitable for judicial determination by its subject matter alone or that there are constitutional limits on the jurisdiction of the courts to assess the legality of the challenged act, as noted in the previous section.[3] Non-justiciability is directly related to the level of deference afforded, which ordinarily means 'going along with [the decision maker's] answer to a question'[4]. It is the 'recognition that a court of review does not usurp the function of the decision-maker',[5] and the level of deference varies along a spectrum.[6] Courts in certain situations may refuse to consider a question put to them on the basis that they do not have jurisdiction to consider the question at all, or they may decide to defer to the decision maker based on the expertise or accountability of the decision maker, its democratic legitimacy concerns, or the accessibility of the information needed to assess its lawfulness. In this context, the term deference refers to the extent to which courts will restrain their intervention in a decision or refrain from declaring it unlawful, either at the beginning or at the end of a judicial process. Ultimately, deference operates as the judicial mechanism through which questions of justiciability are resolved in practice, determining whether review occurs at all or proceeds with varying degrees of intensity.

It should be noted that the conceptual scope of judicial deference remains contested. Some authors adopt a restrictive definition, reserving 'deference' for instances of inappropriate judicial abdication and characterising legitimate constitutional restraint instead as 'respect'.[7] However, this thesis adopts a broader approach. Here, deference is treated as a neutral analytical concept encompassing varying degrees of judicial restraint, including respect for the

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[3] *Shergill v Khaira* [2014] UKSC 33, [41].

[4] Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) ch 7.

[5] *R (Lord Carlile) v Home Secretary* [2014] UKSC 60; [22].

[6] ibid.

[7] Michael Foran, 'Shamima Begum, the Separation of Powers, and the Common Good' (UK Constitutional Law Association Blog, 17 March 2021) <https://ukconstitutionallaw.org/2021/03/17/michael-foran-shamima-begum-the-separation-of-powers-and-the-common-good/ > accessed 24 June 2025.

executive's institutional competence and recognition of democratic legitimacy. This approach recognises that judicial deference is not limited to outright abdication, but can also encompass principled restraint grounded in an understanding of institutions' constitutional roles.

Over time, as demonstrated in the previous section on non-justiciability of prerogative powers, the constitutional landscape has shifted from rigid *a priori* non-justiciability toward a more nuanced framework where contextual factors determine both the degree of judicial deference and the boundaries of justiciability itself. This evolution reflects the broader constitutional reconfiguration described in this thesis, where absolute categories have given way to calibrated institutional responses. Within this evolved framework, national security and foreign policy contexts continue to provide compelling grounds for finding matters non-justiciable, but courts now treat national security and foreign relations contexts as one significant factor among others when deciding whether and how closely to review executive decisions.[8] This contextual approach exemplifies how the modern constitutional settlement preserves essential executive authority in sensitive domains while in principle, maintaining the possibility of judicial oversight. The case law demonstrates that despite the theoretical flexibility, the degree of judicial deference within national security and foreign policy contexts remains substantial.

This section first explores the foundational shift executed in *GCHQ*,[9] which moved away from absolute non-justiciability towards a framework of theoretical reviewability combined with substantial practical restraint in the national security context. The analysis then examines the spectrum of judicial deference, across both individual administrative decisions and broader policy matters, drawing on cases such as *Rehman*,[10] *Abbasi*,[11] and *Al-Haq*[12] to demonstrate how

[8] See the statements regarding the jurisdiction of SIAC and of the Court of Appeal in *Begum v Home Secretary* [2021] UKSC 7; 'The reasons for deference depend radically on the type of decision, the nature of the initial decision maker, and the context in which the decision is made.' Endicott (n 4) 247; Kavanagh (n 2).

[9] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

[10] *Rehman* (n 1).

[11] *R (Abbasi) v Foreign Secretary* [2002] EWCA Civ 1598.

[12] *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin).

national security contexts result in consistently high levels of judicial restraint regardless of whether the challenge concerns individual decisions or high policy matters. Third, the section examines *Belmarsh*[13] as a notable departure from this pattern of deference, arguing through analysis of its historical context and statutory framework that the House of Lords' intervention represented particularly justified constitutional response, legitimised both by the Human Rights Act's requirements and the exceptional nature of the challenged powers. Fourth, it analyses subsequent cases, particularly *Corner House Research*, *Carlile*, and *Begum*, which reveal the narrow scope of the *Belmarsh* precedent and demonstrate the persistence of substantial executive primacy in national security contexts. Finally, this section concludes by situating these developments within the broader constitutional evolution examined throughout this thesis, arguing that continued judicial restraint in these sensitive domains reflects principled institutional balance.

2.2 The Post-GCHQ Framework: Theoretical Justiciability with Practical Restraint

In 1984, in the *Council of Civil Service Unions and others v Minister for the Civil Service*[14] (‘*GCHQ*’), the *a priori* non-reviewability of the prerogative powers, the view that the source of power is what determines the reviewability of the matter was discarded by the House of Lords. Despite the judges holding that the prerogative powers could be subject to judicial review according to their subject matter, they still showed a substantial degree of deference to the executive regarding its decision under national security concerns. Judges were of the opinion that questions of national security were for the executive and unsuitable for the courts to determine. National security was considered to be ‘par excellence a non-justiciable question,’[15] the responsibility rested with the government which alone had ‘access to sources of information that qualify it to

[13] *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

[14] *Council of Civil Service Unions v Minister for the Civil Service*(n 9), For a more detailed analysis of the case see the previous section of this chapter.

[15] ibid [412] (Lord Diplock), [401], [402] (Lord Fraser); see also *Liversidge v Anderson* [1942] AC 206; Adam Tomkins, 'National Security and the Role of the Court: A Changed Landscape?' (2010) 126 Law Quarterly Review 543.

judge what the necessary action is'.[16] Lord Fraser furthermore stated that the Order in Council would have been held unlawful because in breach of a legitimate expectation if no question of national security arose.[17]

Indeed, this approach echoed the earlier precedent in *The Zamora*, where Lord Parker asserted that 'those responsible for national security must be the sole judges of what the national security requires,' stating that judicial examination of such matters would be 'obviously undesirable' because of the risks of public disclosure inherent in court proceedings.[18] In *GCHQ,* therefore, the national security context practically insulated the executive from judicial review. Later cases have confirmed the possibility of judicial review even in the context of national security and foreign relations, although, as will now be seen, the courts have remained substantially deferential.

It follows that the scope of judicial review in national security contexts has been more limited than in other areas. Unlike other aspects of judicial review examined throughout this thesis — including standing and intervention rules, justiciability under the Human Rights Act 1998, and greater remedial authority under the Judicial Review and Courts Act 2022 — which have seen a tendency towards expansion, this particular domain has remained substantially constrained. Yet the arguments for non-justiciability in this context are less absolute than they were previously.[19]

2.3 The Spectrum of Deference: Analysing Decision-Making Across Individual and Policy Levels

In the first of the cases examined here, *Secretary of State for the Home Department v Rehman*[20] ('*Rehman*'), a subtle but important shift is seen in the approach of the judges. Although the House of Lords accepted that decisions on national security were a matter for the executive, notably, Lord Steyn made it

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[16] ibid [413] (Lord Diplock).

[17] ibid [401] (Lord Fraser).

[18] *The Zamora* [1916] 2 AC 77, 107 (Lord Parker).

[19] See also Endicott (n 4) ch 7: 'It may seem that administrative law has always been moving towards greater judicial control of executive power.'

[20] *Rehman* (n 1).

clear ‘that issues of national security do not fall beyond the competence of the courts.’[21] Lord Hoffmann maintained a more conservative position, recognising and emphasising that under the separation of powers, the courts have inherent limits in reviewing certain decisions such as national security and foreign policy. However, crucially, Lord Hoffmann, too, alongside Lords Slynn and Steyn, acknowledged that assessments of national security and what is in the interests of national security are not a shield from judicial review, can be justiciable and can be overturned if, first, the national security concerns are not evidenced, in other words have no factual basis; secondly, if there is *Wednesbury* unreasonableness[22]; and thirdly, if the issue is one on which the executive is not empowered to be the decision maker, such as assessments of violations of Convention rights.[23] The traditional approach of viewing the executive's par excellence authority in national security as immune from judicial review has given way to an approach characterised by high judicial deference, where the executive remains the primary decision-maker on matters of national security and foreign policy.

Rehman, in particular, was a challenge to an individual deportation decision made on grounds of national security. Mr Rehman, a Pakistani national, was granted leave to remain in the UK until February 1997 and worked as a minister of religion. He applied for indefinite leave to remain, which was refused in 1998 because his presence was deemed as a threat to national security, and he should be deported. This was because of his association with terrorist groups, although the Home Secretary expressly recognised that this group was unlikely to carry out any acts of violence in the UK, they were directly targeting the Indian subcontinent.[24] The Home Secretary still considered that he was a threat to national security.

Mr Rehman used his statutory right of appeal and applied to the Special Immigration Appeals Commission (‘SIAC’). The SIAC, which has full appellate jurisdiction under the relevant legislation, held that the national security should

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[21] ibid [31] (Lord Steyn).

[22] See ch 3.

[23] *Rehman* (n 1) [54] (Lord Hoffmann); see also [16], [26] (Lord Slynn), [31] (Lord Steyn).

[24] ibid [1].

be interpreted narrowly to include only activities directed against the UK, its system of government or its people.[25] The SIAC, therefore, concluded that Mr Rehman's activities in the Indian subcontinent did not fall within the UK's national security. The Secretary of State appealed, and the Court of Appeal held that SIAC had taken too narrow view of what could constitute a threat to national security, and that the Home Secretary was entitled to take into account the threat that an individual could pose to national security.[26] Mr Rehman then appealed to the House of Lords, and the House of Lords unanimously dismissed Mr Rehman's appeal.

The judges in the House of Lords held that the courts could address issues of national security. Although Lord Hoffmann's opinion was the closest to that expressed in *GCHQ,* in the sense that he maintained the primacy of executive judgment in national security matters and emphasised strongly the institutional limitations of judicial review, all the judges agreed that it was for them to interpret the meaning of the term 'national security'.[27] This represented a conceptual shift. Although the executive retained primary authority over national security decisions, the courts asserted their jurisdiction over the interpretation of national security as a legal concept.[28] Significantly, Lord Hoffmann stated that while the SIAC had full jurisdiction on the matter, its jurisdiction was still subject to the inherent limitations of the judiciary, arising from the separation of powers on the one hand and the appeals process on the other. Despite his most deferential views on the justiciability of national security matters, he, too, acknowledged that the judiciary can review these decisions on certain grounds, such as *Wednesbury* reasonableness and Convention rights. The allocation of powers[29], the process of decision-making[30]

[25] ibid [14]: 'The interests of national security do not include matters which have no direct bearing on the UK, its people or its system of government.'

[26] *Secretary of State for Home Department v Rehman* [2000] 3 WLR 1240.

[27] *Rehman* (n 1) [50] (Lord Hoffmann).

[28] ibid.

[29] ibid [54] (Lord Hoffmann).

[30] ibid [57].

and political responsibility[31] were some of the factors that underlined the decision of the House of Lords.

Rehman marked a significant shift in judicial approach. Although the House of Lords appeared to be conducting the standard exercise of legal interpretation, the decision was notable for how defining the scope of 'national security' inevitably affected executive decision-making in this context. By determining what falls within the term's ambit, the court was indirectly shaping the executive's decisional space, illustrating the evolution of judicial attitudes since *GCHQ*. The executive's position of supreme authority and consequent immunity in the context of national security has been transformed into a position subject to great judicial deference.

Although the executive's decision was upheld by the courts in both cases, the Court in *GCHQ* deemed the national security decision immune from review and therefore it could not be held unlawful. However, in *Rehman*, the court altered its approach and stated that the decision was lawful since the executive is the primary decision maker and requires that a high degree of deference be afforded to its decisions in the absence of *Wednesbury* unreasonableness or no factual basis for the decision. The case is important to show that the Court's ordinary interpretative exercise had a direct impact on the scope of review. The broader the definition of national security, the more the matter falls within the executive's primary constitutional role in foreign affairs and security, requiring correspondingly wider judicial restraint. The broad definition given to national security in *Rehman* therefore represents an evolution from immunity to substantial deference, setting a precedent for review that remains highly deferential to executive judgment.[32]

R (Abbasi) v Foreign Secretary[33] (‘*Abbasi*’) further refined the approach of theoretical justiciability combined with practical high deference. While

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[31] ibid [62].

[32] ADP Brady, 'Proportionality and Deference in Judicial Review of Administrative Decisions: Immigration' in *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (CUP 2012) 141: ‘[Rehman] is an extremely broad reading of the public interest principle of national security. It could be criticised on the grounds that it is unduly deferential.’

[33] *Abbasi* (n 11).

acknowledging that foreign policy matters fall within executive discretion, the Court of Appeal departed from GCHQ's[34] complete immunity by distinguishing between substantive policy decisions and procedural review.[35] The case was lodged by Mr Abbasi, a UK national, who was transported to Guantanamo Bay by US forces in Afghanistan. He was held in detention for eight months without access to a court or legal counsel. The appeal was lodged before the Court of Appeal to compel the Foreign Secretary to make representations to the US government on his behalf and protect him. The Court of Appeal held that the Foreign Secretary had no obligation to offer help and therefore, Mr Abbasi had no legitimate expectation of diplomatic protection. The citizen's legitimate expectation was that his request would be considered, and it was held that this consideration had indeed taken place by the Foreign Secretary.[36] The court recognised that the Foreign Secretary's discretion to refuse assistance was subject to judicial review, although it denied that there was any such duty to make representations to the US in relation to violations of his fundamental rights. The Court held that the discretion was a very wide one and due respect must be, and has been, given to the fact that the Government considered the facts of the case and decided to exercise its discretion within its lawful limits.[37]

Importantly, *Abbasi* improved the approach established in *Rehman* by distinguishing between the merits of foreign policy decisions (which by their very nature remain non-justiciable) and the decision-making process itself. In contrast to *Rehman*, where the primary concern was the question of whether an individual posed a threat to national security, *Abbasi* established that courts had the authority to examine whether the Foreign Secretary had properly considered his discretion to make diplomatic representations, despite having no authority to determine the merit of its decisions.[38] This represents a more fine-grained framework than the relatively broad deference held in *Rehman*, although the

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[34] *GCHQ* (n 9) [398] (Lord Fraser), [412] (Lord Diplock).

[35] *R (Abbasi) v Foreign Secretary* (n 11) [98], [99], [104], [106].

[36] ibid [107].

[37] ibid [99]: 'Whether to make any representations in a particular case, and if so in what form, is left entirely to the discretion of the Secretary of State.'

[38] ibid [99], [100].

practical outcomes remained similar, the decisions were upheld through substantial judicial restraint.

The difference between individual decisions and executive rule-making powers is important for understanding how courts approach national security cases. In the previous section, it was noted that prerogative powers akin to administrative decisions possess distinct characteristics from rule-making powers,[39] and therefore it is less problematic to argue that they can be susceptible to judicial review. Some of these features include the number of people affected, the lack of wider public interest in the matter, the lack of democratic legitimacy concerns or policy preferences, and the lesser constitutional significance of the decision. These suggest that such decisions should be more readily open to judicial review than broad policy measures.

Nevertheless, national security and foreign policy provide a surprising contrast, making the *Belmarsh*,[40] discussed below, even more surprising. National security contexts appear to undermine this distinction between individual and policy decisions in practice. Even seemingly individual cases like *Rehman* and *Abbasi* inevitably trigger broader strategic assessments, causing courts to treat them as if they were policy decisions with wider implications. This suggests that the nature of national security transforms what appears to be an individual administrative decision into a matter implicating broader strategic considerations. Consequently, in *Rehman* and *Abbasi*, the House of Lords gave substantial deference to the executive decisions. By contrast, *Belmarsh* involved a policy decision with much greater constitutional significance in the sense affecting fundamental rights and democratic principles more widely, yet the courts were more willing to intervene, albeit primarily due to ECHR considerations. This is arguably unexpected given that even individual national security cases attract the high deference typically reserved for policy decisions.

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[39] *R v Foreign Secretary, ex p Everett* [1989] 1 QB 811, 820 (Taylor LJ): 'At the top of the scale of executive functions under the Prerogative are matters of high policy, of which examples were given by their Lordships; making treaties, making war, dissolving parliament, mobilising the armed forces. Clearly those matters and no doubt a number of others are not justiciable but the grant or refusal of a passport is in a quite different category. It is a matter of administrative decision affecting the right of individuals and their freedom of travel. It raises issues which are just as justiciable as, for example, the issues arising in immigration cases.'

[40] *Belmarsh* (n 13).

2.4 Traditional Judicial Restraint in High Policy Decisions

To understand why *Belmarsh* represents a significant departure, it is necessary to examine the courts' traditional approach to high policy decisions. The foundational precedent was established in *R (Campaign for Nuclear Disarmament) v Prime Minister*[41] (‘*CND*’), where the Campaign for Nuclear Disarmament sought an declaration as to whether UN Security Council Resolution 1441 authorised military action against Iraq in the case of non-compliance. CND argued that the government would be acting unlawfully if it took military action without a further UN resolution. However, the Divisional Court refused to interpret UN Security Council Resolution 1441, and in doing so, it established a crucial principle: that courts should not declare the meaning of international instruments operating purely on the plane of international law.

Simon Brown LJ rejected the application, ruling that there was ‘no foothold in domestic law’.[42] He held that English courts should not pronounce on international law unless necessary to determine domestic rights and obligations based on a practical concern: such declarations would mean the government could not ignore the ruling even in dealings with other States, effectively allowing domestic courts to dictate foreign policy. Consequently, the critical issue was that domestic courts ‘are not charged with policing the United Kingdom's conduct on the international plane.’[43] The court further questioned the appropriateness of English courts giving authoritative rulings on international instruments that applied equally to all states, recognising the potential for diplomatic complications.[44] Richards J approached the matter through constitutional principles, identifying it as falling within aspects of decision-making that ‘lie properly and solely with the executive’[45] while acknowledging that justiciability depends on the specific subject matter and circumstances of each case.[46] Importantly, he stated that non-justiciability of the matter is a

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[41] *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin).

[42] ibid [36].

[43] ibid.

[44] ibid [62].

[45] ibid [22].

[46] ibid [59]; *Abbasi* (n 11) [85].

matter of constitutional principle rather than discretionary restraint, recognising the institutional limits of judicial expertise in foreign policy matters.[47]

This principled approach to non-justiciability was further developed in *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs*[48] ('*Al-Haq*') which extended the *CND* framework to situations involving alleged violations of international law by foreign states, demonstrating how the judiciary continued to develop its understanding of institutional boundaries. In *Al-Haq* the Divisional Court considered whether courts can examine the government's policy towards alleged breaches of international law by foreign states without transgressing constitutional boundaries. The case thus tested whether the judicial deference established in *CND* would persist in the face of serious allegations of international law violations.

The case particularly concerned obligations under international law in respect of Israel's actions during Operation Cast Lead in Gaza. The claimant (Al-Haq) argued that Israel's occupation of Palestinian territory was unlawful and that there had been breaches of the Geneva Convention 1949.[49] Consequently, the claimant sought to compel the UK government to take specific diplomatic measures against Israel. This request required the court to assess not only the legal merits of the claim but also the constitutional propriety of judicial intervention in matters of high policy.

The Divisional Court dismissed the application, establishing clear principles about when courts will refrain from intervening in such matters. Lord Justice Pill, by citing *Abbasi*, emphasised that justiciability 'depends, not on general principle, but on subject matter and suitability in the particular case'.[50] However, he concluded that the subject matter was 'at bottom, the conduct of Israel and whether that state is in breach of its international obligations.'[51] The court reasoned that determining whether Israel had breached its international

[47] ibid [60].

[48] *Al-Haq* (n 12).

[49] ibid [5], [6].

[50] ibid [36]; *Abbasi* (n 11) [85].

[51] ibid [41].

obligations, and establishing the scope and character of any such violations, was beyond the courts' competence, not merely as a matter of expertise, but because such determinations would require the judiciary to make foreign policy judgements that constitutionally belong to the executive.[52] The court, therefore, recognised that institutional competence is not merely about technical expertise but about constitutional role allocation.

Crucially, the court distinguished this case from situations involving clear breaches of international law, noting that: ‘this is not a case in which the breach of international law is plain and acknowledged or where it is, as in *Abbasi*, clear to the court’.[53] This distinction was significant because it preserved the possibility of judicial intervention in exceptional circumstances, while generally maintaining judicial restraint. Courts will only intervene where factual clarity eliminates the need for policy judgement, thereby preserving the constitutional boundary whilst enabling judicial function where institutional competence is clear. The court emphasised that judicial intervention in high policy matters has occurred only in exceptional circumstances where there existed what has been characterised as a connection to domestic law, which was lacking in this particular case. Therefore, the Divisional Court applied substantial judicial restraint, ruling such matters ‘constitutionally, exclusively within the sphere of the executive’[54] and that courts must avoid *forbidden areas* of foreign policy — though not as a formally immune category — where no domestic foothold exists.

Most significantly in relation to individual versus policy distinction, the court observed that the case was ‘readily distinguishable from those in which a claimant is asserting a readily identifiable right, such as a right in certain circumstances to claim asylum or the right to a fair trial.’[55] This observation established an important boundary: while acknowledging that some executive action can be susceptible to judicial review, the court ultimately held that determining appropriate compliance measures in this context falls within governmental rather than judicial authority. This demonstrates that although

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[52] ibid.

[53] ibid [42].

[54] ibid [46].

[55] ibid [45].

government policy affects broad international obligations and potentially numerous individuals, courts cannot dictate how discretionary power is exercised. Courts should apply the highest level of deference when the matter concerns foreign relations and lacks clear domestic legal rights.

The principle of judicial restraint in high policy matters was further reaffirmed in *R (Gentle) v Prime Minister*[56] ('*Gentle*'). In this case, the mothers of two British soldiers killed in Iraq sought judicial review of the government's refusal to establish an independent inquiry into the circumstances leading up to the invasion. They argued that Article 2 of the ECHR (right to life) required the government to ensure compliance with international law before deploying armed forces. According to their claim, therefore, had the United Kingdom properly considered its international obligations prior to the 2003 invasion, the conflict — and thus the deaths of their sons — might have been avoided.[57] The House of Lords, however, unanimously dismissed this argument on several grounds.

First, the House of Lords found no substantive link between compliance with international law and the Article 2 duty to protect military personnel. In other words, the duty to safeguard the lives of service members did not, in the Lords' view, extend to a requirement that the government ensure the legality of military action under international law before deployment.[58] More fundamentally, the Lords emphasised the limits of judicial competence in matters of war and foreign policy. It was underlined that questions regarding the legality of war are issues to be resolved between states, not matters for domestic courts or the European Court of Human Rights.[59] Similarly, determining the lawfulness of military action is not a dispute between individuals and the state, but rather one between states themselves.[60] Consequently, it would be beyond the remit of UK courts — or indeed the Strasbourg court — to rule on the legality of the Iraq invasion under international law.

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[56] *R (Gentle) v Prime Minister* [2008] UKHL 20.

[57] ibid [3] (Lord Bingham).

[58] ibid [22] (Lord Hope).

[59] ibid.

[60] ibid [57], [58] (Lady Hale).

The judgment thus reaffirmed that, even where human rights frameworks might appear to offer a basis for review, fundamental institutional and jurisdictional boundaries cannot be breached. Military deployment decisions remain constitutionally non-justiciable, and Article 2 cannot be instrumentalised to compel governmental compliance with international law in matters of war and peace. This traditional judicial approach of maximum restraint in high policy matters, therefore, makes the judicial intervention in *Belmarsh* especially remarkable.

2.4.1 *Belmarsh* and the Judicial Challenge to High Policy

The nine appellants in *Belmarsh*,[61] all non-British nationals raised a challenge directed at the policy of the Executive. Their challenge, unlike *Rehman's* individual deportation case, was directed at the broader legislative framework authorising the indefinite detention of foreign nationals. Following the 9/11 attacks in the USA, the UK Parliament passed the Anti-terrorism, Crime and Security Act 2001, which authorised indefinite detention of certified foreign nationals without charge or trial in certain situations under section 23. Through section 14 of the Human Rights Act 1998, the Home Secretary implemented the Human Rights Act 1998 (Designated Derogation) Order 2001[62] and derogated from Article 5(1) of the ECHR, the right to liberty and security, under Article 15(1)[63] of the Convention. The House of Lords initially assessed whether, within the meaning of Article 15 of the ECHR, there was a threat to the life of the nation sufficient to lawfully derogate from Article 5 of the Convention, and secondly, whether the provisions of the 2001 Act enabling indefinite executive detention of non-UK nationals without trial were 'strictly required by the exigencies of the situation', that is, whether they were proportionate and therefore compatible with the ECHR.

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[61] *Belmarsh* (n 13).

[62] Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001/3644.

[63] Article 15(1) of the European Convention on Human Rights reads as follows: 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention t*o the extent strictly required by the exigencies of the situation*, provided that such measures are not inconsistent with its other obligations under international law.' Article 15 requires that the measures taken in derogation should not go beyond what is 'strictly required by the exigencies of the situation.' (Italics added)

The House of Lords, consisting of nine judges, declared by a majority that the derogation order was unlawful, and that section 23 of the 2001 Act[64] was disproportionate and consequently discriminatory, as it discriminated unjustifiably between foreigners and equally dangerous nationals. The measures were therefore incompatible with Articles 5 (right to liberty and security) and 14 (prohibition of discrimination) of the Convention. All judges except Lord Hoffmann accepted that there was a public emergency threatening the life of the nation.[65] Lord Hoffmann argued that the threat to the life of the nation was not present, stating that the nation's life did not hold the same meaning as the lives of the people. He argued that the life of the nation referred to the institutions of government and the legal system that express Britain's political and moral values, rather than terrorist violence.[66] By contrast, Lord Walker dissented from the majority judgment, contending that the derogating measures were strictly necessary, justifiably discriminatory and proportionate.

The dispute between Lord Hoffmann and the remaining judges arose over the meaning of 'the life of the nation', which allows ECHR member states to derogate from obligations under certain articles, rather than over the government's findings or whether there was an actual threat to national security. The judges did not challenge the government's concerns about national security and public emergency, but questioned whether the measures based on those concerns were lawful under the provisions of the Convention — whether they were no more than what was 'strictly required by the exigencies of the situation'.[67] While acknowledging that national security decisions mostly fall under the remit of the government, the judges emphasised that it is the responsibility of the courts to

[64] Section 23 of the Anti-terrorism, Crime and Security Act 2001: 'Detention (1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by (a) a point of law which wholly or partly relates to an international agreement, or (b) a practical consideration.'

[65] See also the doubts of Lord Scott in *Belmarsh* (n 13) [154] (Lord Scott).

[66] ibid [91], [96] (Lord Hoffmann).

[67] ibid [226] (Baroness Hale): 'SIAC were satisfied that the open and closed material before them justified the conclusion that there was also a public emergency threatening the life of this nation. I, for one, would not feel qualified or even inclined to disagree.'

protect and safeguard the rights of individuals. This duty has been explicitly provided in the HRA 1998 and must be fulfilled.[68]

The majority concluded that both foreign nationals and British nationals who were not subject to measures under the Act posed the same threat. They also noted that suspected terrorists could be deported to safe countries, meaning that indefinite detention was not the only available measure. Consequently, detaining non-nationals without trial for an indefinite period was incompatible with the 'strict exigencies of the situation.'[69] Lord Walker, however, regarded the periodic review of the suspect's credentials, the review by SIAC, and the temporary nature of the legislation as adequate safeguards, and the discrimination as justified because the situation of nationals who cannot be deported is different from that of non-nationals.

The relevance of the HRA 1998 was evident in this case.[70] The Human Rights Act 1998 empowers courts and imposes a duty on them to read and give effect to primary legislation in a way that is compatible with Convention rights wherever possible, and to make a declaration of incompatibility where it is not possible to interpret primary legislation in that way.[71] Public authorities, including the executive and courts, are expressly prohibited from acting in a way that is incompatible with the Convention.[72] Nonetheless, it is important to consider whether the case would have yielded similar results in the absence of the HRA 1998. However, Lord Bingham — acknowledging the government's responsibility to determine whether a public emergency endangering the nation's life existed — stated the following in paragraph 29:

> 'The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The

[68] ibid [29] (Lord Bingham), [99] (Lord Hope), [145] (Lord Scott), [175-178] (Lord Rodger), [192] (Lord Walker), [226] (Baroness Hale).

[69] ibid [32] – [37] (Lord Bingham), [126] – [132] (Lord Hope), [155] – [157] (Lord Scott), [168], [187] – [189] (Lord Rodger); Human Rights Act 1998 Section 3 provides: '(1)So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

[70] For a detailed analysis of HRA over the courts, parliament, and executive relationship, see ch 2.

[71] Sections 3 and 4 of the Human Rights Act 1998.

[72] Section 6 of the Human Rights Act 1998.

> smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. […] The present question seems to me to be very much at the political end of the spectrum […] I conclude that the appellants have shown no ground strong enough to warrant displacing the Secretary of State's decision on this important threshold question.'

The indefinite detention was deemed unlawful due to proportionality and discrimination under the ECHR, not because there was no public emergency threatening the life of the nation. The extract highlights the responsibility of the executive for national security and, as this implies a weight to be given to the executive as much as a decision is political, it alone may have led to a finding against the appellants. Alternatively, it may be inferred from what Lord Hope's reasoning at paragraph 108 that:

> 'Put another way, the margin of the discretionary judgment that the courts will accord to the executive and to Parliament where this right is in issue is narrower than will be appropriate in other contexts. *We are not dealing here with matters of social or economic policy, where opinions may reasonably differ in a democratic society and where choices on behalf of the country as a whole are properly left to government and to the legislature. We are dealing with actions taken on behalf of society as a whole which affect the rights and freedoms of the individual. This is where the courts may legitimately intervene, to ensure that the actions taken are proportionate.* It is an essential safeguard, if individual rights and freedoms are to be protected in a democratic society which respects the principle that minorities, however unpopular, have the same rights as the majority.' (Italics added.)

He distinguished between 'matters of social or economic policy, where opinions may reasonably differ in a democratic society and where choices on behalf of the country as a whole are properly left to government and the legislature' and 'actions taken on behalf of society as a whole which affect the rights and freedoms of the individual'. The latter plays a crucial role in democracy, as it protects the minority from the tyrannical power of the majority. Here, the emphasis placed on rights and freedoms is not limited to the Convention. It may be expected that, even in the absence of the Convention, the executive's discretion within a national security context could have been restricted. The judges have acknowledged the overlap between political decision-making and the rights and freedoms of individuals. This is in contrast to *GCHQ*, where national security matters were considered the sole responsibility of the

executive branch and the government. Although the executive has primary responsibility and competence, the judges here recognised that this responsibility may overlap with the courts' duty to uphold the law and protect the rights and freedoms of individuals. Such reasoning does not derive exclusively from the duty under the HRA. We saw that Lord Rodger, also, acknowledged, in paragraphs 177 and 178, the potential need for courts to scrutinise national security decisions due to the risk of overreaching measures. He also noted that it is the traditional role of the British courts 'to watch over the liberty of everyone within their jurisdiction'[73].

One of the factors which might be claimed to be determinative in *Belmarsh* must be found in the political and historical background of the case. The *Belmarsh* case was held just after 9/11 in the United States, and when the policies of the US, particularly what was happening in Guantanamo Bay, were highly criticised extra-judicially[74] and, in case law such as in *Abbasi* where the judges stated that '[it is] objectionable […] that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.'[75] The UK has, also, its own historical cases, which are highly criticised for allowing the wide discretion to breach personal liberty and where the wide discretion given to the executive to make internments without trial in times of war or crisis was allowed generously.[76] Two of them were the World War I case of *R v Halliday, Ex p Zadig*[77] and the World War II case of *Liversidge v Anderson.*[78]

In *Zadig* the Court held that the executive had a wide discretion under the Defence of the Realm Consolidation Act 1914. Regulation 14B, made under that Act, empowered the Secretary of State to detain persons of hostile origins or

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[73] *Belmarsh* (n 13) [178] (Lord Rodger).

[74] Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 International and Comparative Law Quarterly 1.

[75] *Abbasi* (n 11) [66].

[76] Lord Diplock in *IRC v Rossminster Ltd* [1980] AC 952; Lord Reid in *Ridge v Baldwin* [1964] AC 40; AW Bradley and KD Ewing, *Constitutional and Administrative Law* (15th edn, Pearson 2011) 674.

[77] *R v Halliday, Ex p Zadig* [1917] AC 260.

[78] *Liversidge v Anderson* (n 15).

associations without trial and access to legal counselling where he considered it expedient to do so in order to achieve the statutory aims. The House of Lords (Lord Shaw dissenting) held that there was an extreme national danger, and the parliament did not repeal the Act while it could do so. By excessively depending on the parliamentary oversight over the executive, the House of Lords held that the regulation was *intra vires* of the Act, and in a time of supreme national danger, Zadig's personal liberty can be sacrificed according to the Act.[79]

In *Liversidge v Anderson,* the House of Lords interpreted Regulation 18B of the Defence (General) Regulations 1939, allowing the Home Secretary to detain a person 'if he has reasonable cause to believe' that the person is of hostile origin or association. The discussion was about the correct meaning of the phrase 'having reasonable cause', whether it means 'if there is in fact reasonable cause', or 'what a person thinks is reasonable cause'.[80] The majority of the judges (with Lord Atkin dissenting[81]) held that it read as 'if the Secretary of State has reasonable cause to believe […]'.[82] The majority showed a very high degree of deference to the executive, which was not followed in *Belmarsh*, thus, *Belmarsh* is important in setting the precedent for the discussions about the shift of emergencies from the political to the legal sphere.[83]

While *Belmarsh* appeared to signal a fundamental shift in the balance of power between executive and judiciary, later cases, notably for example *R (Lord Carlile) v Home Secretary*[84] reveal that high levels of judicial deference persist in national security and foreign policy matters, even in cases where the

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[79] *Zadig* (n 77) 269 (Lord Finlay), 271 (Lord Dunedin), 309 (Lord Wrenbury); Colm Murray, 'Shifting Emergencies from the Political to the Legal Sphere: Placing the United Kingdom's Derogations from the ECHR in Historical Context' in Matthew Saul, Andreas Follesdal and Geir Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments: Europe and Beyond* (CUP 2017) 198.

[80] *Liversidge* (n 78) 248 (Lord Macmillan).

[81] *Liversidge* (n 78) 245 (Lord Atkin, dissenting): 'I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive…In this country amid the clash of arms the laws are not silent. They may be changed but they speak the same language in war as in peace.'

[82] ibid 252 (Lord Macmillan): 'The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm'; 221–222 (Viscount Maugham).

[83] Murray (n 79).

[84] *Carlile* (n 5).

executive interferes with human rights. Chapter 2 provides a detailed analysis of how the Human Rights Act 1998 has affected the relationship between the executive and judiciary in matters involving Convention rights. Also, four years after *Belmarsh*, in the *R (Corner House Research) v Director of the Serious Fraud Office*[85] (‘*Corner House Research*’) case, which does not concern Convention rights, the deference given to the executive was at the high end of the spectrum, in contrast to what might be expected after the *Belmarsh* case. It is a remarkable case in that although the matter did not directly involve national security or foreign relations, the judiciary exhibited substantial deference to the executive when national security concerns were raised as justification for executive action. This demonstrates how the reference to national security considerations can trigger high levels of judicial restraint even in contexts where national security is not the primary subject matter of the dispute.

2.4.2 The Narrow Scope of *Belmarsh*: Subsequent Judicial Restraint in National Security and Foreign Policy Context

R (Corner House Research) v Director of the Serious Fraud Office concerned the Director of the Serious Fraud Office's decision to terminate a bribery investigation into BAE Systems Plc based on threats and pressure from a foreign government. The constitutional significance of the case lies in the manner in which both the executive and the judiciary characterised foreign interference as a legitimate ‘national security’ concern, thereby justifying judicial deference to executive decision-making.

The case concerned how national security concerns affect the Director's investigative discretion, and the balance between upholding the rule of law and protecting the public interest in relation to national security. This case provides a clear example of the high level of judicial restraint shown in national security contexts, demonstrating why the scope of judicial review has remained largely unchanged in this area, unlike the expansion seen in other governmental domains. Although it did not directly challenge the justiciability of national security matters, it is significant how much judicial restraint was shown towards the executive, particularly given that the rule of law was at stake in the sense

[85] *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60.

that prosecutorial independence was compromised by foreign political pressure, undermining the principle that no one is above the law. The Divisional Court found that the Director's decision was unlawful.[86] The House of Lords, conversely, employed a reframing strategy that fundamentally altered the constitutional question. Rather than addressing whether foreign threats can legitimately influence prosecutorial decisions, the House of Lords recast the issue as whether the Director could lawfully take into account national security risks and threats to British lives in deciding to discontinue the investigation.[87]

The investigation particularly concerned an arms contract between the UK and the Kingdom of Saudi Arabia, of which BAE Systems Plc was the main contractor. During the investigation, the Saudi government threatened to withdraw from existing bilateral counter-terrorism cooperation agreements with the UK and to cease cooperation with the UK in relation to its strategic objectives in the Middle East if the investigation continued. The British Ambassador to Saudi Arabia stated that these developments put the lives of British citizens on British streets at risk. The Prime Minister also raised similar concerns about national security and foreign policy objectives in the Middle East.[88] Despite sufficient evidence to continue the investigation, after many meetings, the Director decided to close the investigation 'concerning the need to safeguard national and international security. It has been necessary to balance the need to maintain the rule of law against the wider public interest.'[89]

The contrasting approaches of the Divisional Court and House of Lords reveal the tension between expanding judicial oversight and maintaining institutional balance in national security matters. The Divisional Court found the Director's decision unlawful, emphasising that courts have primary responsibility for preserving the integrity of the criminal justice system[90] and held that the courts, rather than the executive, had the primary responsibility for dealing with

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[86] *R (Corner House Research) v Director of the Serious Fraud Office* [2008] EWHC 714 (Admin).

[87] *Corner House Research* (n 85) [38], [41]

[88] ibid [11], [17].

[89] ibid [21].

[90] ibid [58].

questions relating to the administration of justice in the UK.[91] The Court decided that the Director had improperly surrendered his powers to foreign pressure, arguing that these powers should have been exercised independently. The House of Lords, however, held that the Director had lawfully taken into account and weighed the concerns of national security against the public interest in the investigation in deciding to close the investigation.[92]

The House of Lords' framing of the decision rendered it *less suitable* for judicial adjudication by focusing solely on the considerability of national security concerns, rather than the balancing exercise of the rule of law with national security concerns in light of the explicit threat posed to the UK by a foreign country. By adopting this framing, the House of Lords effectively diverted attention away from the problematic influence of foreign threats on prosecutorial independence. This approach resulted in an important expansion of executive discretion, thereby in a considerable limitation of the scope for judicial scrutiny in cases invoking national security.

This judicial restraint reflects a broader constitutional approach to executive decision-making in sensitive areas. In *Belmarsh*, Lord Bingham outlined the degree of deference as a spectrum: the more political a decision is, the less judicial intervention is appropriate. Here, deference is given based on the polycentric nature of official decision-making and the limited practical and constitutional competence of the courts to adjudicate on an issue that is canvassed by the parties:

> ‘The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised […] “the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the

[91] ibid [60].

[92] ibid [38] (Lord Bingham), [51] (Lord Rodger), [55] (Baroness Hale).

> constitutional function nor the practical competence of the courts to assess their merits".'[93]

However, the rule of law — recognised as a fundamental constitutional principle in several landmark cases[94] and affirmed in the Constitutional Reform Act 2005 — demands that no person or institution, including the executive, should be above legal scrutiny.[95] In *Corner House Research*, this principle should have required robust judicial examination of whether foreign pressure had compromised prosecutorial independence. Yet the House of Lords' substantial deference to national security considerations effectively precluded meaningful review of this constitutional tension. Thus, *Corner House Research* exemplifies how, despite theoretical recognition of judicial oversight and increased emphasis on rule of law principles, constitutional power has not shifted significantly from the executive to the judiciary in national security contexts. While the executive's absolute authority has yielded to a theoretical possibility of review, persistently high levels of deference ensure that judicial self-restraint continues to characterise outcomes.

Indeed, in the case of *R (Lord Carlile) v Home Secretary*,[96] the Secretary of State was afforded a great degree of deference in its decision to maintain the exclusion from the UK of Mrs Rajavi, who had been invited by UK parliamentarians for a discussion, on the grounds of national security and foreign policy. The case concerned the proportionality of a decision under the Convention, in the absence of an error of fact or principle and irrationality. The claimants argued that the decision to refuse to admit Mrs Rajavi into the UK violated Article 10 of the Convention, which protects freedom of expression. The Supreme Court, by a majority, ruled that the interference with freedom of expression was proportionate and justified.

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[93] ibid [31] (Lord Bingham).

[94] See *R (UNISON) v Lord Chancellor* [2017] UKSC 51; *Jackson v Attorney General* [2005] UKHL 56; *R (Cart) v Upper Tribunal* [2011] UKSC 28.

[95] Endicott (n 4) 263; '[J]judicial review fulfils its primary function in defence of the rule of law.'; TRS Allan, 'Justiciability and Jurisdiction: Political Questions and the Scope of Judicial Review' in *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003) 172.

[96] *Carlile* (n 5).

In 2010, several parliamentarians invited Mrs Rajavi to London for a discussion on democracy and human rights, but the Secretary of State decided to uphold the 1997 decision to exclude her from the UK. She held leadership positions in a political organisation that was designated as a terrorist group in Iran and previously in the UK. The organisation was involved in terrorist violence until 2001. Although the UK removed it from its list of terrorist organisations, even this removal decision led to protests outside the UK embassy in Iran. The Secretary of State, consequently, decided that Mrs Rajavi's presence would not be 'conducive to the public good for foreign policy and in the light of the need to take a firm stance against terrorism'.[97] According to the Secretary of State, removing her exclusion would deteriorate the difficult relationship between the UK and Iran, and the UK has an important interest in working with Iran on key policy issues such as nuclear proliferation and wider Middle East issues. In addition to this, the decision was grounded on the safety concerns of the local staff who are particularly vulnerable in Iran and the security of British personnel in the region.

The case is important to show the difference from *Belmarsh,* which put a powerful emphasis on the duty of the Courts to protect individual rights and freedoms, and why the executive was afforded deference in its decision. All the judges acknowledged that the courts are not permitted to substitute their assessment for that of the executive. However, it was uncontested that in human rights cases 'the court must form its own view on the proportionality of the decision, or what is sometimes referred to as the balancing exercise involved in the decision'.[98] The institutional incompetence of the Courts does not exist when the decision breaches a Convention right and the court was invited to solve a human rights claim, a legal question to be answered by the courts, whether the balance struck by the Executive between individual rights and liberties, and the national security decisions.[99] The majority and Lord Kerr, who was dissenting, disagreed on the issue of how much weight to be given to the

[97] *Carlile* (n 5) [2].

[98] ibid [67] (Lord Neuberger), [105] (Baroness Hale); see also *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420; *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100; *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, [68-76].

[99] Paul Scott, *The National Security Constitution* (Hart 2018).

executive's assessment that the interference with the freedom of expression outweighed the risks to the British staff, therefore, whether it was justified.

In the case of *Carlile*, a greater weight on the expertise and knowledge of the executive was granted by the majority of the judges than Lord Kerr did when deciding whether the interference and the risks are proportionately balanced. According to Lord Kerr, although a considerable weight must be given to the executive's judgment on 'the likely reactions of a volatile foreign government and people',[100] there is no such competence in the matter of assessing the importance of Article 10 right.[101] The court, under the duty to uphold Convention rights under HRA, must have its own assessment of whether the interference is proportionate and necessary. This is what the parliamentary sovereignty requires.[102] He held, consequently, that the interference was not inescapably needed, therefore not justified.

On the other hand, the majority of judges, such as Lord Clarke, argued that judges could not differ from the executive in the absence of veracity or reliability of the executive's assessments.[103] Lord Neuberger and Lord Sumption held that, without sufficient evidence, judges could not question the existence of the risks which the Foreign Secretary believed to exist, and that 'it would require an exceptionally heavy weight on the other side of the balance before a court could satisfactorily carry out its own balancing exercise in this case and come to a different conclusion from that of the Home Secretary'.[104] Baroness Hale was also of the view that the interference here was not 'sufficiently important to put that relationship [with Iran] at risk'.[105]

The majority focused on the institutional competence of the executive in national security assessments, which involve non-purely analytical assessments of what is likely to happen, and on the accountability of the executive, which is

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[100] *Carlile* (n 5) [173] (Lord Kerr), [75] (Lord Neuberger), [105] (Baroness Hale), [46] (Lord Sumption),

[101] ibid [155] – [156] (Lord Kerr).

[102] ibid [180] (Lord Kerr).

[103] ibid [113] (Lord Kerr); see also [65], [72] (Lord Neuberger), [49] (Lord Sumption).

[104] ibid [72] (Lord Neuberger), [49] (Lord Sumption).

[105] ibid [105] (Baroness Hale).

embedded in democratic accountability through electoral removability.[106] Lord Kerr, too, accepted the institutional competence of the executive on risk assessments but held that the balancing of Convention rights and risks was within the competence of the courts and was indeed a duty imposed on them.[107] The majority's approach ultimately determined the outcome of the case, ensuring continued executive primacy in such assessments. The *Carlile* case is significant in demonstrating that even in human rights claims, national security and foreign policy contexts carry a special importance and effect that depends on institutional competence and democratic accountability. *Carlile* thus illustrates, unlike *Belmarsh*, there has been no significant shift of power from the executive to the judiciary to decide on these matters. The limited scope of judicial review remained rather substantially the same in these contexts, though the grounds that the courts relied on are different from those that were relied on half a century ago.

Recently, in 2021, *Begum v Home Secretary*[108] (‘*Begum*’), further exemplified the judiciary’s self-restraint as to national security considerations. Shamima Begum was a British national who went to Syria and aligned with DEASH (also known as ISIS or ISIL) at 15 years old, and was being detained in the Syrian Democratic Forces camp when she wanted to return after 4 years. Before she could return to the UK, the Home Secretary decided to deprive Ms Begum of her British citizenship on the grounds that her return would constitute a threat to national security.[109] Ms Begum asked to enter the UK to pursue her appeal against this decision, but her application for leave to enter was refused. She challenged both the deprivation of her citizenship and the refusal of leave to enter (‘LTE’) on the grounds that the deprivation decision or the LTE decision was contrary to the Secretary of State's extraterritorial human rights policy and that the LTE decision made it impossible for Ms Begum to have a fair and effective appeal against the deprivation decision from outside the UK.

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[106] ibid [31] (Lord Sumption).

[107] ibid [156] (Lord Kerr).

[108] *Begum v Home Secretary* [2021] UKSC 7.

[109] Section 40(2) of the British Nationality Act 1981: ‘The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.’

In her application to SIAC, it was held that first, the Secretary of State did not breach his extraterritorial human rights policy not to deprive individuals of British citizenship when they were outside the UK and when the deprivation would cause a real risk to individual contrary to Articles 2 (right to life) and 3 (prohibition of torture and inhuman or degrading treatment) of the convention.[110] Second, the Commission held, due to Ms Begum's detention in a Syrian Democratic Forces camp, her inability to provide effective instructions or participate significantly in her appeal did not render the appeal process unfair or ineffective.[111] SIAC dismissed both of Ms Begum's challenges. On the other hand, the Court of Appeal decided that Ms Begum should be granted leave to enter the UK to pursue her appeal in order to have a fair hearing.[112] The Court of Appeal held that SIAC had erred in its approach; SIAC, in a full merits appeal, must have stood in the Secretary of State's shoes and decided whether, on all the evidence before it, the conditions for a deprivation decision were met.[113]

In a unanimous Supreme Court ruling, three key substantive legal issues were addressed: the scope of SIAC's review powers, the application of the government's extraterritorial human rights policy, and natural justice requirements given Begum's detention overseas. The Supreme Court unanimously allowed the Home Secretary's appeal against the Court of Appeal's decision as to LTE.[114] The Supreme Court stated that the Court of Appeal made an error in its assessment of the issue of LTE by making its own assessment of national security, which it was not entitled to do.[115] The view of the Court of Appeal that in cases of conflict between national security and an individual's right to a fair trial, the right to a fair hearing must always prevail was also erroneous.[116]

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[110] B*egum v Secretary of State for the Home Department* (Appeal No SC/163/2019) [2020] HRLR 7 [139].

[111] ibid [143], [144].

[112] *Begum v Secretary of State for the Home Department* [2020] EWCA Civ 918, [121]: 'given that the only way in which she can have a fair and effective appeal is to be permitted to come into the United Kingdom to pursue her appeal, fairness and justice must, on the facts of this case, outweigh the national security concerns, so that the LTE appeals should be allowed.'

[113] ibid [125].

[114] The decision to deprive was not final at the time of the Supreme Court decision. *Begum v Home Secretary* (n 110) [10].

[115] ibid [108].

[116] ibid [90] – [94], [102], [110].

Furthermore, the Supreme Court clarified that SIAC's powers are constitutionally limited.[117] The Court rejected the idea that SIAC operates the same way in all cases, instead establishing that section 2B of the Special Immigration Appeals Commission Act 1997 creates a 'supervision' role—more than basic review but less than full appeal.[118] This means SIAC can examine both facts and law, including whether the Secretary of State's findings were evidentially supported and whether human rights issues arise.[119]

As to extraterritorial policy, the Supreme Court held that the discretion was statutorily conferred on the Secretary of State. As it was held in *Rehman* by Lord Hoffman, and in *Abbassi* decisions, the Supreme Court reiterated that the SIAC must decide whether the Secretary of State acted unreasonably, took into account irrelevant considerations, disregarded something that must have been regarded and whether there was any procedural impropriety.[120] The discretion must be used by the Secretary of State, and the Secretary of State, not the SIAC, must be satisfied that deprivation would be conducive to the public good, the Supreme Court held.[121] The Court ultimately found that natural justice requirements were satisfied despite Begum's inability to participate effectively in proceedings while detained overseas.

The Supreme Court stressed, once again, the limits on both SIAC's and the Court of Appeal's jurisdictions.[122] SIAC has appellate jurisdiction; however, even in that jurisdiction, the Supreme Court acknowledged that there are limits on the judiciary depending on the statutory allocation of responsibility, the institutional

[117] ibid [69]: '[T]he principles to be applied by SIAC in reviewing the Secretary of State's exercise of his discretion are largely the same as those applicable in administrative law.'

[118] Hayley J Hooper, 'Justice for one side alone? R (on the application of Begum) v Special Immigration Appeals Commission' (2022) PL 1, 4.

[119] *Begum* (n 108) [65], [71]; Hooper (n 118).

[120] ibid [70], [118]

[121] ibid [67], [68]

[122] *Begum* (n 108) [69], [70] (Lord Reed), citing *Rehman* (n 1) [49] (Lord Hoffmann).

incapability to address evaluative judgements, and democratic legitimacy.[123] Lord Reed stated in paragraph 70 that:

> 'The exercise of the power conferred by section 40(2) must depend heavily upon a consideration of relevant aspects of the public interest, which may include considerations of national security and public safety, as in the present case. Some aspects of the Secretary of State's assessment may not be justiciable, as Lord Hoffmann explained in *Rehman*. Others will depend, in many if not most cases, on an evaluative judgment of matters, such as the level and nature of the risk posed by the appellant, the effectiveness of the means available to address it, and the acceptability or otherwise of the consequent danger, *which are incapable of objectively verifiable assessment,* as Lord Hoffmann pointed out in *Rehman* and Lord Bingham of Cornhill reiterated in *A*, para 29. SIAC has to bear in mind, in relation to matters of this kind, that the Secretary of State's assessment should be accorded appropriate respect*, for reasons both of institutional capacity (notwithstanding the experience of members of SIAC) and democratic accountability.*' (Italics added.)

Similarly, the Court of Appeal was acknowledged as limited in its review by the questions of law. It cannot itself make national security or mistreatment findings. It has no fact-finding jurisdiction.[124] Furthermore, the extraterritorial human rights policy was merely an administrative guideline, not a legal obligation like section 6 of the Human Rights Act which creates enforceable rights. Critically, the Court of Appeal failed to recognise that the policy only applied if there was a 'real risk' of mistreatment, and determining whether such risk existed was a factual question for the executive to assess.[125]

The main criticism towards the Supreme Court decision is the undue deference regarding executive assessments of national security risks at the expense of procedural fairness and the gravity of citizenship deprivation warranting greater procedural protection (in this case granting leave to enter for effective

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[123] *Begum* (n 108) [70, 94]; see also TRS Allan, 'Justiciability and Jurisdiction: Political Questions and the Scope of Judicial Review' in *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003) 189: 'A court is not only poorly qualified to determine matters of general public interest, having inadequate access to relevant information and expertise, but can normally claim no legimate authority for such decisions. It is a requirement of the rule of law that judges should be neither answerable to the electorate nor responsive to public opinion, as regards their decision of any particular case. Limitations that would be grave weaknesses in a policy-making process may, however, be a great source of strength when the court's role is duly confined to the sphere of legal principle.'

[124] *Begum* (n 108) [82], [109].

[125] *Begum* (n 112) [123]-[129]

participation in appeal).[126] However, focusing on constitutional and institutional limitations on the judiciary, the Supreme Court in *Begum* once again demonstrated a high degree of deference to the executive decision-making which is particularly depends on the context of national security.

As Foran explains, the Court's stance was a constitutionally grounded respect for the executive's role, bounded by legality and judicial review, rather than a simple abdication of judicial authority.[127] Thus, the judicial self-restraint evident in *Begum* is not an abdication, but reflects principled and arguably high constitutional restraint grounded in institutional competence and democratic legitimacy, as well as a clear respect for the separation of powers. Therefore, *Begum* is yet another important example demonstrating that there has not been a constitutional power shift from the executive to the courts in matters of national security and foreign policy; in these domains, the executive continues to retain primary responsibility.

Begum furthermore illustrates a clear shift away from the more interventionist approach regarding policies, as seen in *R (Tabbakh) v Staffordshire and West Midlands Probation Trust*[128] ('*Tabbakh*'), where the Court of Appeal was willing to examine policy guidance for inherent unfairness or unacceptable risk of illegality. In *Tabbakh*, a prisoner challenged the procedural fairness of policy on the additional licence conditions on release, arguing that the guidance failed to provide adequate opportunity for offenders to make informed representations about proposed conditions.[129] The Court of Appeal's analysis focused on whether the policy framework was inherently unfair by virtue of procedural omissions, rather than examining specific legal errors.[130] The Supreme Court, in its subsequent decisions, particularly in *R (on the application of A) v Secretary of State for the Home Department*[131] ('*A*') and in a similar sense, in the context of

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[126] Hooper (n 118).

[127] Foran (n 7).

[128] *R (Tabbakh) v Staffordshire and West Midlands Probation Trust* [2014] EWCA Civ 827.

[129] ibid [29]

[130] ibid [48].

[131] *R (on the application of A) v Secretary of State for the Home Department* [2021] UKSC 37; *R (on the application of BF (Eritrea)) v Secretary of State for the Home Department* [2021] UKSC 38; John McEldowney, *Public Law* (5th edn, Sweet & Maxwell 2022) Part IV ch 17, [17-116].

national security, *Begum*, realigned and significantly narrowed this expanded scope of judicial review.

Indeed, in *A*, a convicted child sex offender challenged the Child Sex Offender Disclosure Scheme guidance for failing to adequately specify when police must seek representations before disclosure of information about him/her. The Supreme Court decisively rejected the expansive 'unacceptable risk of unfairness' test that had developed in the lower courts, dismissing it as too loose and unprincipled.[132] Instead, the Court required claimants to demonstrate that policy guidance positively authorises, approves, or encourages unlawful conduct. Where *Tabbakh* allowed courts to intervene on grounds of systemic unfairness, the post-*A* approach required claimants to demonstrate specific legal errors rather than broader procedural inadequacies.[133] *Begum* exemplifies such narrowing of judicial review scope based on more deferential approach in a national security context. The Supreme Court in *Begum* rejected the Court of Appeal's attempt to treat the Secretary of State's extraterritorial human rights policy as a binding legal rule, emphasising instead that such policies were merely intended to guide the exercise of statutory discretion. The Court gave considerable weight to the Home Secretary's assessment of national security risks.

This judicial self-restraint and limited scope of review do not correspond to the expansion of the scope of judicial review in other areas, such as the narrowing of non-justiciability prerogative powers, justiciability of Convention rights, and decreasing effectiveness of ouster clauses.[134] As discussed in the prior section, the judiciary's position regarding a priori non-justiciability has led to an expansion of the scope of judicial review. The focus of non-justiciability has shifted towards the subject matter of power, rather than its source. The Supreme Court's approach in *Miller/Cherry* was in particular problematic, conducive to an unexpected expansion of the scope (which could even apply to future national security and foreign relations decisions). Despite that, rejecting

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[132] *R (on the application of A) v Secretary of State for the Home Department* (n 131) [64, 65]

[133] See *R (on the application of BF (Eritrea)) v Secretary of State for the Home Department* [2021] UKSC 38.

[134] It should be noted, however, that the Judicial Review and Courts Act 2022 has the potential to strengthen the effect of ouster clauses in future cases. See ch 3

a priori non-justiciability has still resulted in rather the same in these certain contexts because of the high levels of deference afforded to the executive in national security and foreign policy. Although the power of the executive in national security and foreign policy is no longer supreme and immune from judicial review, we witness substantial judicial deference.

As discussed in the previous section of this chapter, the individualised decisions of the executive are less problematic when it comes to non-justiciability, making such decisions more readily amenable to judicial review when they do not challenge policy and have less constitutional significance. *Abbasi*, *Rehman*, *Corner House Research* and *Begum* cases demonstrate that even an individualised decision, a challenge not to policy but to its implementation, similar to the administrative decisions in *Everett* or *Bentley* discussed in first section, can still receive substantial protection from judicial review with the same high degree of deference granted to wider policy, when the context relates to foreign policy or national security. The national security or foreign policy dimension, therefore, effectively diminishes the practical significance of the individual/policy distinction made in the previous section, in terms of judicial deference, with both categories of decision attracting similarly elevated levels of judicial restraint. In national security and foreign policy contexts, the scope of judicial review remains narrow, with courts continuing to exercise substantial restraint.[135]

2.5 Conclusion

Although *a priori* non-justiciability doctrine has been abandoned since the *GCHQ* in 1984, the executive still enjoys a high degree of deference in the context of national security and foreign affairs. This recognition of theoretical justiciability enables incremental legal development and allows courts to shape doctrine for future cases, yet the scope of review remains substantially narrow in these specific contexts (even when Convention rights prompt more rigorous scrutiny, a significant deference to the executive persists in national security and foreign

[135] Simon Brown, 'Public Interest Immunity' [1994] Public Law 579, 589: 'The very words 'national security' have acquired over the years an almost mystical significance. The mere incantation of the phrase of itself instantly discourages the court from satisfactorily fulfilling its normal role of deciding where the balance of public interest lies.'

affairs — see Chapter 2 for further analysis). The preservation of substantial judicial restraint in national security and foreign policy contexts, while other key areas of constitutional law examined in this thesis have witnessed incremental yet significant expansions in the scope of judicial review, reveals a constitutionally principled approach to institutional balance rather than unchecked judicial supremacy. This selective evolution demonstrates that courts have developed a nuanced understanding of their constitutional role, one that respects institutional boundaries and democratic primacy. Rather than pursuing unlimited judicial authority, this continued deference in national security matters ensures that democratic accountability through executive responsibility is preserved by keeping such decisions within the political sphere, where executives remain answerable to Parliament and ultimately the electorate for their choices.

The expansion of the scope of judicial review is evident in the evolution from source-based to subject-matter-based justiciability for prerogative powers, as examined in the previous section, which opened previously immune executive actions to judicial scrutiny while leaving high policy matters largely unreviewable. Similarly, as explored in Chapter 2, the Human Rights Act 1998 enhanced judicial review capacity by enabling more intrusive examination of a wider range of executive actions yet crucially preserved parliamentary sovereignty. The broadening of procedural access to judicial review through reformed standing and intervention rules, examined in the subsequent section, further illustrates this calibrated approach — expanding participation while maintaining appropriate boundaries and preventing the capture of constitutional decision-making by what Bellamy identifies as powerful minorities who might exploit expensive judicial processes to override democratic choice.[136] This evolution reflects a recognition that true constitutional strength lies not in judicial dominance but in a carefully considered distribution of institutional competence across different governmental domains, though what constitutes

[136] Richard Bellamy, 'The Limits of Lord Sumption: Limited Legal Constitutionalism and the Political Form of the ECHR' in Nicholas Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart 2016) 193.

appropriate distribution is itself a matter of ongoing constitutional and political debate.

3 The Changing Scope of Judicial Review in the UK: The Role of Standing and Intervention Rules

3.1 Introduction

The mechanism of judicial review, which enables scrutiny of public authorities' actions in England, has evolved significantly from its initial position in the mid-20th century. Several key developments have both strengthened and expanded the function and scope of judicial review, including the relatively radical incorporation of the proportionality test following the enactment of the Human Rights Act[1] the broadening of the scope of error of law,[2] the judicial limitation of ouster clauses through the principle of legality,[3] and the recognition that prerogative powers can be subject to judicial review.[4] This expansion, however, is not linear. The current state reflects a multifaceted development influenced by the unique, centuries-old dynamic and evolving structure of the English constitution. This evolution occasionally creates tension between constitutional principles, particularly between parliamentary sovereignty and the rule of law. The English constitution's dynamism and context-dependency mean that the development of judicial review reflects an ongoing judicial negotiation between competing constitutional imperatives, resulting in decisions that may enhance supervisory powers over administrative action while simultaneously reinforcing respect for democratic decision-making and parliamentary authority.

Therefore, while my thesis aims to determine the scope of judicial review in England and reaches broader conclusions, it cannot contain an entirely consistent and uniform answer as to the precise boundaries between legitimate judicial supervision and impermissible judicial overreach, given the inherently contextual and evolving nature of these constitutional boundaries. This section demonstrates the transformation of the function of judicial review in maintaining the rule of law, along with the vindication of individual grievances, which affects and is affected by the changes regarding standing and intervention

[1] For a detailed analysis, see Ch 2.

[2] For a detailed analysis, see Ch 3.

[3] For a detailed analysis, see Ch 3.

[4] For a detailed analysis, see previous section

rules. Although parliamentary sovereignty remains the prevailing principle in its relationship with the rule of law, the strengthening position of the latter has, particularly since the early 2000s following the implementation of the Human Rights Act and subsequent landmark cases, begun to create concerns, particularly among political constitutionalism proponents in academic circles and the executive branch. It is witnessed that the rule of law — or, more accurately, judicial review's function of *maintaining the rule of law* — is increasing its scope and power as a general principle.

This evolution has taken the form of numerous iterations of advance and retreat including the expansion of judicial review from around the 1960s, the broadening of jurisdictional control in the period following *Anisminic*, a degree of retrenchment during the late twentieth century, renewed expansion after the enactment of the Human Rights Act 1998, and more recent judicial and legislative recalibrations in the past decade. The scope of judicial review, characterised by decisions seen by some as judicial overreach and by others as necessary judicial oversight to safeguard constitutional principles and individual rights, has expanded. More recent developments, however, show several efforts to control this expansion by both the judiciary through more restrictive approaches and the executive through legislative proposals such as the Judicial Review and Courts Act 2022.

Rules of standing and intervention — which form the central focus of this section — have also evolved to facilitate the expansion and strengthening of the scope of judicial review and its function in upholding the rule of law. Despite frequent criticisms of judicial overreach, I observe a careful *de facto* coordination between the legislature (given the relatively minimal changes enacted compared to the original Judicial Review and Court Bill 2021 and the absence of radical legislative intervention) and the judiciary in maintaining constitutional balance in the context of third-party intervention and standing rules. This evolution represents a principled development rather than judicial supremacy: whilst strengthening judicial oversight and enhancing courts' capacity to uphold the rule of law, it simultaneously maintains essential constitutional principles, namely parliamentary sovereignty and separation of powers.

Crowdfunding, however, remains an uncertain element in this evolution: While enhancing access to judicial review, it poses risks of judicial politicisation and an uncertain blurring of constitutional boundaries, due to a lack of regulation on transparency and accountability; with no clear resolution yet in sight. Thus, although this dynamic occasionally generates unpredictability, the constitution's fluid equilibrium is sustained through implicit inter-institutional cooperation, with the notable exception of the uncertainties introduced by crowdfunding.

3.2 The Constitutional Framework of Standing and Intervention

Standing and intervention rules, which delineate the criteria for initiating or participating in legal proceedings, are of fundamental importance in shaping the scope and effectiveness of judicial review — understood in terms of both the accessibility of judicial remedies and the practical enforcement of administrative accountability. The scope of judicial review is essentially determined by the cases brought before the courts. Thus, this analysis examines the doctrinal development of judicial review law and its practical operation, as the two are inextricably linked. Consequently, the rules governing access to the courts directly and significantly impact the practical reach of judicial review. While their primary function is to facilitate legal accountability and rights protection, these rules simultaneously serve a broader constitutional function through their influence on the evolution of law enforcement and administrative oversight. This dual role, both practical and constitutional, renders standing rules essential to understanding how administrative law operates in practice.

Central to this analysis is the argument that the understanding of judicial review as a mechanism for safeguarding the rule of law has been decisive in broadening the legal framework of who may initiate and participate in judicial review proceedings. As a result, this broadened conceptualisation of standing rules and third-party intervention requirement has led to a corresponding expansion of the scope of judicial review in terms of both its subject matter and its procedural aspects. By relaxing previously rigorous standing requirements, the judicial system has effectively created a more robust framework for legal oversight and accountability.

A fundamental tension exists within constitutional theory regarding this liberalisation. This tension can be situated within the broader interplay between political constitutionalism, which prioritises democratic legitimacy through elected representatives,[5] and legal constitutionalism, which places responsibility for safeguarding constitutional norms in judicial oversight.[6] Critics argue that expanding judicial oversight effectively transfers policymaking authority to unelected judges, potentially undermining democratic processes and legislative sovereignty. This is regarded as a form of judicial overreach, as it circumvents the democratic origins of legislative processes — representation and representativeness.[7] Instead of emerging from parliamentary deliberation, policy outcomes are incrementally shaped by judicial interpretation and practitioner-led doctrinal evolution.[8]

The proponents of legal constitutionalism maintain that judicial intervention serves as a necessary check on majoritarian abuses, ensuring policy choices align with constitutional principles and minority protections. Political constitutionalists emphasise that elected legislatures, as the primary expression of democratic will, must retain supremacy over political decisions. However, when courts adopt a quasi-legislative role, for instance, in the adjudication of policies concerning environmental governance or social benefits, there is a risk that they may exceed the boundaries of institutional competence that are central to the political constitutionalist perspective. This tension is most directly and visibly expressed outside the rights-protection context, in the evolution of standing and intervention rules —an area where, as this thesis argues, the holistic judicial review lens reveals institutional dynamics that a rights-centred account cannot fully capture. The constitutional position and scope of judicial

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[5] JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1.

[6] '[L]egal constitutionalism can be seen to be composed of the following main tenets. 1. Law is an activity that is not only distinctive from but also superior to politics. 2. The principal arena in which the activity of law takes place is the courtroom. 3. Individuals should, as far as possible, remain free of interference by the government. 4. Where government interference is unavoidable, it should be limited and justified by reason. 5. Both the extent of and the justification for government interference are questions of law for the judges to determine. 6. The law should control government through the enforcement of specific rules and general principles of legality (such as human rights).' Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 11.

[7] Tomkins (n 6) 26-27.

[8] Carol Harlow, 'Public Law and Popular Justice' (2002) 65(1) Modern Law Review 1.

review have been directly affected by the liberalisation of standing requirements and remedial powers. Indeed, this liberalisation enables a broader range of claims to be brought before courts. Consequently, the evolving scope of judicial review is a significant concern for those who advocate for a more limited judicial role and greater emphasis on political mechanisms of accountability and redress.

Rather than evaluating these competing perspectives in terms of right or wrong, a greater emphasis on consistency or inconsistency with constitutional principles is necessary. The evolution of the constitutional position of judicial review, particularly in the context of standing and third-party interventions, can be seen as an oscillating movement between these positions, reflecting a response to changing governance challenges while maintaining democratic values. This flexibility acknowledges the value of both perspectives: legal constitutionalism provides essential safeguards against the tyranny of the majority, while political constitutionalism preserves the democratic mandate of elected representatives. Consequently, it is held here that the UK's constitutional landscape has experienced a general expansion in the scope of judicial review, though this progression has not been linear but rather characterised by progress and retreats. This dynamic and broadly consistent pattern of judicial empowerment is indicative of the ongoing recalibration of institutional relationships within the uncodified constitution and is a response to the evolving understanding of rights and governance. Rather than being inevitable, this pattern reflects deliberate institutional choices made in response to specific historical circumstances and could be reversed through parliamentary action or judicial self-restraint.

This section initially presents an examination of the gradual expansion of standing criteria in judicial review, with a particular focus on the subtle yet significant transformation in judicial interpretation of the term ‘sufficient interest’. Contemporary judicial approaches have evolved beyond traditional narrow constructions, incorporating a multidimensional assessment that encompasses not merely the immediate legal connection of the applicant, but a complex set of factors within the broader context. These parameters include the legal and factual context, the significance of the contested issue in and of itself, the potential for alternative legal challengers, and the relative influential authority of the applicants. This analysis is then followed by an examination of

recent attempts to recalibrate the scope of judicial review following the constitutionally significant *Miller* and *Miller/Cherry* cases, which generated considerable political controversy and highlighted tensions between judicial and executive authority.[9]

The analysis will continue to concentrate on two significant doctrinal developments: public interest standing and third-party interventions, respectively. These mechanisms have fundamentally transformed the traditional paradigm of judicial review by expanding participation beyond directly affected parties, thereby reshaping the constitutional landscape of administrative adjudication. While these have the potential to facilitate a more inclusive judicial process, they simultaneously raise complex challenges concerning democratic legitimacy, the risk of judicial overreach into areas of political judgment, and the potential for judicial politicisation and legalisation of politics.[10]

As will be demonstrated below, the development of judicial review has followed a pattern of advances and retreats, ultimately resulting in a stronger constitutional role than in the previous century. This is reflected in expanded grounds for review, increased scrutiny of executive actions, enhanced rights protection, broader access to courts and increased judicial confidence in addressing executive authority, all while maintaining a delicate balance within the framework of parliamentary sovereignty. These developments demonstrate the capacity of the constitutional framework to provide robust accountability mechanisms while preserving democratic legitimacy.

3.2.1 Defining 'standing':

Standing, or *locus standi*[11] in Latin, allows the claimant to be heard in court to challenge the legality of the executive's actions, with remedies available where unlawfulness is proven and relief is appropriate. Prior to procedural reforms and particularly the enactment of the Senior Courts Act 1981 introducing a

[9] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41.

[10] Harlow (n. 8)

[11] "a place to stand',Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) ch 11.

'sufficient interest' test for all applications, standing requirements varied considerably across different prerogative remedies, with certiorari requiring sufficient interest while mandamus usually demanded the more stringent special interest test.[12] In general, the traditional approach was much more restrictive than the current sufficient interest test, requiring interference with a private right or suffering of special damage specific to the claimant as a result of interference with a public right.[13] It reflected the courts' historical view of public law remedies as extensions of private law rights, combined with pragmatic concerns about judicial resource management.[14] Consequently, under this approach, a member of the public who shared the same interest as everyone else was not permitted to bring a case to prevent the infringement of a public right.[15]

The evolution towards a more flexible interpretation has led to the establishment of the current sufficient interest test, which permits a wider range of claimants to initiate judicial review proceedings. By maintaining the discretionary 'sufficient interest' threshold while abandoning the restrictive private rights requirement, this development exemplifies how judicial oversight has been strengthened through controlled expansion—enhancing accountability mechanisms without creating unlimited access that might undermine democratic processes. In this way, the modern approach to standing not only broadens access to judicial review but also signifies a recalibration of institutional relationships in the uncodified UK constitution, reinforcing the courts' capacity to safeguard legality and accountability.

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[12] *R v Inland Revenue Commissioners, ex parte National Federation for the Self-Employed and Small Businesses Ltd* [1982] AC 617; *R (Good Law Project and Runnymede Trust) v The Prime Minister* [2022] EWHC 298 (Admin); *Ex parte Greenbaum* [1951] 55 Knight's L.G.R. 129; Reg. v. Guardians of Lewisham Union [1897] 1 Q.B.498, Reg. v. Russell [1969] 1 Q.B. 342

[13] Endicott (n. 11); Boyce v Paddington Borough Council [1903] 1 Ch 109, 114: 'A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with...; and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.'

[14] HWR Wade and CF Forsyth, *Administrative Law* (11th edn, OUP 2014) 449.

[15] *Gouriet v Union of Post Office Workers* [1978] AC 435

The traditionally strict requirement for individualised grievance served various purposes, including the prevention of the courts being overwhelmed with litigation, the maintenance of the distinction between political and legal accountability mechanisms, and the preservation of the understanding that matters affecting the general public should primarily be addressed through parliamentary channels rather than judicial intervention — a principle of judicial restraint that underpins John Griffith's concept of the 'political constitution'.[16] This position aligned with the constitutional principle that elected representatives, typically represented by the Attorney General who was directly accountable to Parliament, rather than individual citizens, were the appropriate actors to challenge government decisions affecting the broader public interest, reflecting a more limited conception of judicial review's role in administrative oversight.[17]

This liberalisation has its roots in the post-war expansion of the administrative state. The period following the Second World War saw a significant expansion of governmental intervention in the economy and public services and the establishment of numerous administrative bodies such as the National Health Service, nationalisation of industries like railways, electricity, gas, and the enactment of foundational welfare legislation such as the Town and Country Planning Act 1947 and the National Insurance Act 1946. Consequently, there was a considerable increase in the use of prerogative orders as mechanisms for judicial control, as well as a need to relax the rigid standing rules and procedural formalities to control potential overreach.[18] This shift in legal policy has had a major impact on the oversight of administrative law. This trend continued into the 1980s, which saw remodelling the state and transferring central government functions outwards to the private sector and agencies; outsourcing and privatisation, such as the Telecommunications Act 1984, the Gas Act 1986, the Electricity and Water Acts 1989 and the Railways Act 1993.

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[16] Griffith (n 5); Harlow (n 8); *Gouriet v Union of Post Office Workers* (n 15)

[17] Carol Harlow and Richard Rawlings, *Law and Administration* (4th edn, CUP 2021) 840-843.

[18] Order 53 of the Rules of the Supreme Court 1977; Maurice Sunkin, 'What is Happening to Applications for Judicial Review?' (1987) 50 MLR 432; Harlow and Rawlings (n 17) 39, 811-830.

The process of legal liberalisation was developed partly under the influence of the US Supreme Court[19] and can also be seen as the judiciary's response[20] to the necessity for efficacious mechanisms to curtail the wide powers of the administrative state. This need arose within an increasingly bureaucratised system characterised by the growth of administrative agencies and delegated legislation.[21] The judicial response was formalised through Order 53, which was introduced into the Rules of the Supreme Court in 1977[22] and which first introduced the 'sufficient interest' language.

Since the Senior Courts Act 1981[23], the test for *locus standi* in judicial review has been the 'sufficient interest test' as the uniform standard for all remedies, which actually has its origins in an earlier judicial decision, *Ex parte Stott*[24]. According to this test, individuals seeking judicial review must demonstrate that their interest exceeds the mere casual concern level. The courts consider, in contrast to establishing a specific violation of legal rights, whether the applicant has a meaningful connection to the matter in question. Critically, however, this assessment is inherently contextual and is decided by the courts on a case-by-case basis. While there has been an evolution towards a more liberal interpretation of this requirement over the past four decades, the application remains contextual.[25] As Bell's analysis demonstrates, courts maintain differentiated approaches depending on the nature of the decision under challenge, with 'targeted decisions' affecting specific individuals subject to

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[19] Harlow and Rawlings (n 17)

[20] Harlow (n 8)

[21] *Ridge v Baldwin* [1964] AC 40, Lord Reid; *R v Inland Revenue Commissioners, ex parte National Federation for the Self-Employed and Small Businesses Ltd* (n 12) (Lord Scarman)

[22] The equivalent rules are now to be found in Part 54 of the Civil Procedure Rules.

[23] Originally Supreme Court Act 1981. The evolution towards the test can be traced back to the Law Commission's recommendations in 1976 and the introduction of Order 53 of the Rules of the Supreme Court (RSC) in 1977, which first introduced the sufficient interest language. The 1981 Act then codified this test, stating that the High Court shall not grant leave for judicial review unless the court considers that the applicant has a sufficient interest in the matter to which the application relates.

[24] *Ex parte Stott* [1916] 1 KB 7, 9; Endicott (n 11).

[25] Anthony Speaight, 'How and Why to Constrain Interveners and Depoliticise Our Courts' [2022] Public Law 276.

more stringent standing requirements than broader policy decisions.[26] This contextual variation reflects the courts' attempt to balance expanded access with concerns about inappropriate judicial intervention in political matters. This evolution in standing rules has influenced administrative law beyond England and Wales. Most notably, in Scotland where the traditional ‘title and interest’ test was replaced by the sufficient interest standard following the case of *AXA General Insurance Ltd v Lord Advocate*[27] and the Scottish Parliament's subsequent amendment of 27B(2)(a) of the Court of Session Act 1988.

It should also be noted that the question of purpose behind standing has generated significant theoretical debate in administrative law. Academic discourse has predominantly conceptualised this issue through two theoretical models: a 'rights' conception that determines whether applicants possess protected private rights or interests justifying judicial review, and a 'public interest' conception that focuses on the applicant's ability to represent broader public interests.[28] However, this binary framework, although theoretically straightforward, oversimplifies the complex reality of judicial practice, as Bell's analysis rightly demonstrates.[29] As will be seen below, the courts' approach to standing appears to be highly context-sensitive, and varies according to specific factual and legal circumstances rather than adhering universally to either conception.

The Human Rights Act 1998 introduced a significant new dimension to this framework. Section 7 of the Act introduced a distinct 'victim test' for human rights claims, establishing a parallel but differentiated approach to standing. This provision limits standing to individuals who are, or would be, victims of human rights violations, as interpreted by the European Court of Human Rights.[30]

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[26] Joanna Bell, 'The Resurgence of Standing in Judicial Review' (2024) 44(2) Oxford Journal of Legal Studies 313; *R v Birmingham City Council, ex parte Connolly* (1994) 26 HLR 551.

[27] *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46.

[28] Jason Varuhas, ‘The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications’ in J Bell and others (eds), *Public Law Adjudication in Common Law Systems* (Hart Publishing 2016).

[29] Bell (n 26).

[30] *Ada Rossi v Italy*, ECtHR (Second Section), App. No. 55185/08, 16 December 2008; *R (on the application of DXK) v Secretary of State for the Home Department* [2024] EWHC 579 (Admin).

While the 'sufficient interest' test permits a broader interpretative approach, the human rights 'victim test' necessitates a more exact demonstration of individual detriment or potential violation.[31] This dual framework illustrates the complexity of modern administrative law. While the victim test represents an important development, this chapter's primary focus is on the development of general standing principles in administrative law, and thus a comprehensive examination of the human rights context will not be undertaken here.

3.2.1.1 Legislation:

The sufficient interest test is set out in the Senior Courts Act 1981, section 31(3). It reads as follows:

> 'No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.'

Similarly, 27B(2)(a) of the Court of Session Act 1988 states:

> 'Subject to subsection (3), the Court may grant permission under subsection (1) for an application to proceed only if it is satisfied that—
>
> (a) the applicant can demonstrate a sufficient interest in the subject matter of the application, and
>
> (b) the application has a real prospect of success.'

The term sufficient interest is inherently vague and is left to the courts' discretion to be assessed. It is evident from the term itself that a sufficient interest test involves possibly more types of interested parties than a direct interest test that would require a narrower focus on personal, immediate

[31] In the context of seeking a declaration of incompatibility under section 4 of the Human Rights Act 1998, the standing requirements are less stringent compared to those for making direct claims of rights violations. The requirement for claimants to meet the stringent 'victim' status criteria is not applicable in this instance; however, they must demonstrate that they have been adversely affected by the legislation in question. See *R (on the application of Rusbridger) v Attorney General* [2003] UKHL 38; but also see *Lancashire County Council v Taylor* [2005] EWCA Civ 284.

impact. However, neither of the statutes above defines or determines what is sufficient and the approach of the courts has not always been consistent.

Importantly, however, the lack of a consistent approach to determining what constitutes sufficient interest gives rise to several potential risks. A restrictive approach to the test carries the risk of blocking access to the courts and effectively validating unlawful conduct, contrary to the requirements of the rule of law and parliamentary sovereignty, which emphasise acting within powers and accountability.[32] On the other hand, an overly broad interpretation of the rules on standing may lead to unnecessary delays and disruptions in the work of public authorities, result in expensive litigation costs for taxpayers, overload the courts with litigation and may undermine legal certainty and predictability.[33] This, in turn, may again result in a breach of various aspects of the rule of law, including legal certainty, foreseeability; and good governance, particularly in terms of the effectiveness and efficiency of administrative acts. The need for coherent judicial practice in standing (and intervention) rules extends beyond mere procedural considerations to fundamentally impact the constitutional framework, as inconsistent or unpredictable approaches risk undermining the constitutional framework by eroding the rule of law and the effective accountability of public authorities.

The evolution of the concept of 'sufficient interest' in judicial review reflects the dual constitutional functions of administrative law: protecting individual rights and upholding the rule of law through oversight of executive power. As will be demonstrated below, this approach, which is inherently discretionary, enables courts to consider cases with broader constitutional implications, even where the individual impact may be limited. The tension between the constitutional role of judicial review and parliamentary sovereignty is particularly evident in public interest standing cases, where courts have adopted a progressively expansive approach to standing. This development, while strengthening the function of judicial review as a constitutional safeguard, has given rise to

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[32] Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (9th edn, OUO 2021); Gordon Anthony, 'Public Interest and the Three Dimensions of Judicial Review' (2013) 64(2) Northern Ireland Legal Quarterly 125, 138.

[33] Lisa Webley and Harriet Samuels*, Complete Public Law: Text, Cases, and Materials* (5th edn, OUP 2021); Ministry of Justice, 'Judicial Review: Proposals for Further Reform' (Cm 8703, 2013) Foreword.

significant questions concerning the balance between the executive, judiciary and Parliament, and the democratic legitimacy of the courts' decisions.[34] Through this evolving interpretation of standing requirements, courts continue to negotiate the complex relationship between individual grievance resolution and broader constitutional oversight, reflecting the dynamic nature of the constitution. This pattern illustrates the dynamic balance between judicial and parliamentary authority that defines the modern constitutional framework, where enhanced judicial oversight coexists with respect for democratic legitimacy and parliamentary supremacy.

3.2.1.2 Determining what is 'sufficient'?

In cases where there is a clear private interest at stake, the claimant's standing to bring a claim is typically uncontroversial. This is because the claimant demonstrates a direct and personal connection to the issue, which is a central tenet of standing.[35] In other cases, in determining who satisfies the sufficient interest test and should be granted standing, courts look primarily at the legal and factual context, the importance of the issue raised, the availability of other challengers, and the prominence of the particular applicants.[36] It is also within the court's purview to examine the actual motives and reasons of the claimants in initiating legal proceedings in order to mitigate potential risks, including the politicisation of judicial review, the dilution of core legal issues, and an inappropriate burden on the judicial system.[37]

In the evolution of English administrative law, there has been a notable shift from a highly restrictive approach towards standing to a comparatively inclusive

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[34] Harlow (n 8).

[35] ibid.

[36] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386, (Rose LJ); *R ((D) and another and Mayor of London) v Parole Board* [2018] EWHC 694 (Admin), [2019] QB 285; Anne Dennett, *Public Law Directions* (2nd edn, OUP 2021); Paul Craig, *Administrative Law* (9th edn, Sweet & Maxwell 2021) 783.

[37] *R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWCA Civ 1546 (Dyson LJ) [23]; Dennett (n 36): 'If the claimant is acting out of ill will, a lack of genuine concern, or other improper purpose, s/he should not be permitted to bring a claim, even though there is a public interest'.

one, particularly evident in public interest standing cases.[38] This evolution, however, has not always been linear and has recently shown signs of recalibration — reflecting the broader pattern of principled development, sensitive to constitutional boundaries, that this thesis traces. Nevertheless, as Bell persuasively demonstrates in her analysis of 'targeted decisions' in judicial review, standing requirements are relatively straightforward to apply in cases involving individual administrative decisions[39].[40] In such instances, in principle, where the decision directly subjects specific individuals or entities, the courts more readily recognise standing for those subjects of the administrative decisions.[41] This approach aligns with the traditional common law principles of *locus standi*, rooted in the principle that those most affected by a decision should have the right to challenge it.

However, the landscape becomes more complex and problematic when these decisions carry wider public implications and become issues of public interest (one such example being procurement cases, as discussed below). In such cases, the matter transitions into the domain of public interest standing, introducing significant theoretical and practical challenges in determining appropriate standing requirements. A pivotal moment in this evolution of contemporary liberal law of standing came with the seminal case of *R v Inland Revenue Commissioners, ex parte National Federation for the Self-Employed and Small Businesses Ltd*[42], also known as the *Fleet Street Casuals case*. This case facilitated a more liberal approach by recognising the public interest in

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[38] See *Boyce v Paddington Borough Council* (n 13)where a direct and personal interest was required.

[39] As opposed to general regulatory measures.

[40] Bell (n 26); *R (on the application of Zafar) v Secretary of State for Levelling Up, Housing and Communities* [2022] EWHC 2154 (Admin); *R (on the application of AB) v A County Council* [2022] EWHC 2707 (Admin), [2023] ACD 11.

[41] Bell (n 26) 321; in cases concerning Parole Board decisions to release of a prisoner can be challenged by the victims and Secretary of State for Justice. In the context of challenges to grants of planning permission, participants in consultation processes can be granted standing.

[42] *R v Inland Revenue Commissioners, ex parte National Federation for the Self-Employed and Small Businesses Ltd* (n 12).

administrative legality and allowing representative organisations to challenge administrative decisions.[43]

The case concerned printing industry workers and the Inland Revenue, where there had been difficulties collecting taxes due to false records. The Inland Revenue granted an ‘amnesty’ in exchange for future tax compliance. The Federation of Small Businesses challenged this decision, raising a novel question of standing in public interest litigation. Although the Federation eventually failed to secure standing, the House of Lords' judgment set forth several foundational principles that transformed the doctrine of standing. The court's reasoning ultimately emphasised that the denial of standing did not arise from the Federation's indirect interest, but rather from the insufficient gravity of the issues at stake.[44] This case marked a critical departure from traditional approaches to standing, indicating that direct personal impact was not a prerequisite for judicial review claims, particularly in matters of substantial public interest. It is concluded that the law of standing is merged with the importance and gravity of the issue before the court.[45]

The majority, Lords Wilberforce, Fraser and Roskill, adopted a conservative interpretation firmly rooted in private law principles. This traditionalist approach emphasised two key elements: first, the fundamental requirement for claimants to demonstrate express or implied personal rights under statutes or direct interests to establish standing, and second, the necessity of restricting discretionary elements in standing determinations.[46] Nevertheless, in acknowledging the possibility of exceptional and widespread illegality, they conceded that the interest test might be met in rare circumstances. This position reflected a cautious approach to expanding administrative law's reach.

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[43] Mark Elliott and Robert Thomas, *Public Law* (4th edn, OUP 2020) 588; Harlow and Rawlings (n 17).

[44] *R v Inland Revenue Commissioners, ex parte National Federation for the Self-Employed and Small Businesses Ltd* (n 12), 618 (Lord Wilberforce); 643 (Lord Diplock); 645 (Lord Fraser).

[45] Webley and Samuels (n 33) ch 15.

[46] *R v Inland Revenue Commissioners, ex parte National Federation for the Self-Employed and Small Businesses Ltd* (n 12) 633, (Lord Wilberforce); 646 (Lord Fraser).

In contrast, the minority opinion, argued by Lords Diplock and Scarman, proposed a fundamental reconceptualization of standing as an inherently public law concept. Their reasoning explicitly rejects the private law approach, contending that it would fundamentally undermine the public law character of judicial review, which is 'a remedy that lies exclusively in public law'[47].[48] Instead, they argued for a more expansive framework that emphasised judicial discretion in determining sufficient interest, therefore extended standing rights to a broader range of parties, including pressure groups and individuals who could demonstrate prima facie unlawfulness in administrative actions.[49] Although initially representing a minority view, this more liberal interpretation became influential in shaping the modern administrative law's approach to standing. This shift was driven by a growing recognition that the traditional private law approach created gaps in public accountability, failing to adequately address the oversight of governmental power. The minority's emphasis on public law principles provided a framework better suited to contemporary constitutional needs for effective executive accountability within the broader evolution of institutional relationships.

Lord Diplock's adoption of a flexible approach is particularly noteworthy for its recognition that public law challenges can extend beyond the scope of individual harm, encompassing broader societal implications. He stated that it would represent 'a grave lacuna in our system of public law if a pressure group [...] or even a single public spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped'.[50] He underlined that procedural restrictions should facilitate rather than impede the judiciary's fundamental role in upholding the rule of law. This progressive interpretation, although initially representing a minority view, ultimately led to the crystallisation of several fundamental doctrinal principles in administrative law.

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[47] ibid 639, (Lord Diplock).

[48] ibid 649 (Lord Scarman); *AXA General Insurance Ltd v Lord Advocate* (n 27) [58] - [62] (Lord Hope), [171] (Lord Reed).

[49] *R v Inland Revenue Commissioners, ex parte National Federation for the Self-Employed and Small Businesses Ltd* (n 12) 639 (Lord Diplock); 653 (Lord Scarman).

[50] ibid 619 (Lord Diplock).

These included the legitimisation of public interest as a basis for judicial review, the recognition of representative organisations' capacity to challenge administrative decisions, and an acknowledgement of the judiciary's responsibility in judicial review to consider wider societal implications. Most significantly, the House of Lords' determination that standing must be assessed within its complete legal and factual context represented a nuanced evolution in administrative law. This comprehensive approach allowed courts to consider not only the actual connection of the claimant but also the merits of the case, the context, and the gravity of the alleged legal violations when determining whether a claimant has sufficient interest.[51]

This evolution in judicial thinking particularly manifested itself in the development of public interest standing. This distinct category of standing permits individuals or organisations lacking direct personal interest to initiate legal proceedings if doing so serves the public interest. This recognises that certain issues transcend individual interests and carry significant implications for society as a whole and is particularly evident in instances where the matters in question have far-reaching implications for the wider society or concern the enforcement of significant legal principles. By granting such standing, the courts ensure that matters of public importance, which might otherwise go unchallenged merely due to the absence of traditionally qualified litigants, are subject to judicial scrutiny.

An analysis of the jurisprudential developments demonstrates (below) how the courts' increasing emphasis on public interest considerations has transformed the landscape of judicial review in an important way. This transformation reflects a profound reconceptualization of judicial review's function, viewing it primarily as an instrument for maintaining the rule of law and addressing public wrongs. The evolution has enabled courts to engage substantively with matters of considerable public significance. This focus is prompted by and has led to an enhanced role for the courts in upholding the rule of law, particularly in the context of determining issues of standing.[52] By guaranteeing that law is applied equitably, consistently, and transparently, and that government actions are

[51] Webley and Samuels (n 33).

[52] See Anthony (n 32).

subjected to legal scrutiny, the court has reinforced the fundamental aspects of the rule of law. Since the 1980s the courts' emphasis on the importance of upholding the rule of law in this sense and, in particular, the importance of the public interest in 'public authorities acting lawfully and in accordance with standards of good governance,'[53] have allowed wider number of applicants to be heard before the Court.[54] This has, simultaneously, however, opened the way for applications motivated by broader policy concerns rather than particular points of law.[55] This reflects the delicacy of constitutional balance: while public interest standing strengthens the aspects of the rule of law and executive accountability, it simultaneously requires careful judicial management to ensure that enhanced oversight does not transgress into inappropriate judicial determination of political questions, thereby preserving the essential democratic character of the constitutional system.

Lord Diplock's influential reasoning in the *Fleet Street Casuals* case, emphasising that technical procedural constraints should not impede the court's fundamental role in upholding the rule of law, found significant subsequent application. A notable illustration of this evolving interpretation emerged in 1989 when Lord Woolf granted standing to several public interest organisations. In the landmark case of *R v Secretary of State for Social Services, ex p Child Poverty Action Group,*[56] Lord Woolf explicitly drew upon principles of the *Fleet Street Casuals* and extended standing considerations beyond the traditional narrow confines of personal interests. Considering several factors, he granted standing to the Child Poverty Action Group, the National Association of Citizens Advice Bureaux, and Hackney London Borough Council. The factors considered included the significance of the issue at stake, the expertise and experience of the applicant organisations, and the fact that many claimants lived within the area of the relevant council. Furthermore, Lord Woolf considered the interconnected nature

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[53] Christopher McCorkindale and Paul F Scott, 'Public Interest Judicial Review in Cross-Border Perspective' (2015) 26(3) King's Law Journal 412.

[54] Notwithstanding, the evolution occurred at an earlier date in England than in Scotland (i.e. the 2010s). See McCorkindale and Scott (n 53).

[55] Anthony (n 32)

[56] *R v Secretary of State for Social Services, ex p Child Poverty Action Group* [1990] 2 QB 540.

of administrative decisions, emphasising the impact on both councils and residents and the broader implications for the community.[57]

However, this liberal tendency found opposition only one year later, in *R v Secretary of State for the Environment, ex p Rose Theatre Trust Company*[58] where the Secretary of State's decision not to designate the Rose Theatre as an ancient monument under the Ancient Monuments and Archaeological Areas Act 1979 was challenged. In this case, Schiemann J adopted a distinctly restrictive approach to standing, denying it to Rose Theatre Trust, a company established with the specific purpose of preserving the historic Rose Theatre as a national monument. The court ruled that individual members' interests, or their cumulative effect, were not sufficient to establish standing.[59] Crucially, Schiemann J acknowledged that his decision might leave the unlawfulness 'unrebuked and unrevealed'[60] yet held that the courts were not intended to be a forum for every interest group to challenge administrative actions.

Nevertheless, the restrictive *Rose Theatre* approach proved to be a a temporary deviation rather than a turning point, with subsequent cases representing a clear judicial movement towards the recognition of 'public interest standing' in UK administrative law, *including R v Inspectorate of Pollution, ex p Greenpeace (No. 2)*[61] and *R v Secretary of State for Foreign and Commonwealth Affairs, ex p The World Development Movement Ltd*,[62] demonstrated further development of a more liberal approach to standing.

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[57] ibid 546-547: 'the Child Poverty Action Group and the National Association of Citizens Advice Bureaux play a prominent role in giving advice, guidance and assistance to such claimants. In addition, many claimants live within the boroughs of Islington and Hackney and those boroughs contend that the way the supplementary benefit scheme has been administered has adversely affected the boroughs in their carrying out of their responsibilities as well as adversely affecting their residents who are individual claimants for benefit.'

[58] *R v Secretary of State for the Environment, ex parte Rose Theatre Trust Co* [1990] 1 QB 504.

[59] ibid 520.

[60] ibid 522.

[61] *R v Inspectorate of Pollution, ex p Greenpeace (No 2)* [1994] 4 All ER 329.

[62] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p The World Development Movement Ltd* (n 36).

In *R v Inspectorate of Pollution, ex p Greenpeace (No 2)*, Greenpeace was granted standing to challenge the decision to allow the discharging of radioactive waste to test a new reprocessing plant at Sellafield in Cumbria, three years after the *Rose Theatre* case. Standing was granted on several grounds including that Greenpeace was a 'responsible and respected body with a genuine concern for the environment', that it was an internationally and nationally recognised body with expertise in the matter and that Greenpeace demonstrated a significant local presence, with 2,500 of its 400,000 supporters residing in Cumbria.[63] Additionally, the court acknowledged the practical difficulties and benefits; and recognised that it was difficult for other individuals to challenge the decision. Moreover, the benefits of 'sparing scarce court resources, ensuring an expedited substantive hearing and an early result'[64] led the court to grant standing.

The different outcomes in the *Rose Theatre* and *Greenpeace* cases can be attributed to several factors that illustrate the evolving nature of judicial attitudes to standing. First, Greenpeace's well-established status and proven expertise was strongly in contrast to the *ad hoc* nature of the Rose Theatre Trust, which was created specifically for litigation purposes. This may indicate that courts are more receptive to established organisations than to newly formed groups without a long history. Second, the *Greenpeace* case involved broader public health implications that addressed societal concerns, whereas the *Rose Theatre* case focused primarily on the preservation of cultural heritage. Although cultural heritage is undoubtedly of importance, it was possibly considered to have a more limited scope compared to the public health concerns raised in the *Greenpeace* case. In addition, the Court in *Greenpeace* explicitly considered judicial efficiency and the practical difficulties associated with individual challenges. In the *Rose Theatre* decision, these practical concerns were largely absent.

Nevertheless, the cases of *Rose Theatre* and *Greenpeace* represent a significant shift in the judicial understanding of the purpose of standing in administrative

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[63] *R v Inspectorate of Pollution, ex p Greenpeace (No 2)* (n 61) [79, 81, 82].

[64] ibid*;* Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46 *Law & Society Review* 523, <http://www.jstor.org/stable/23252253> accessed 2 June 2025, 537.

law. The acknowledgement by Schiemann J that unlawfulness may go '*unrebuked and indeed unrevealed*', and his rejection of standing to *Rose Theatre Trust*, prioritises the prevention of excessive litigation over comprehensive legal accountability, viewing judicial review primarily as a protector of individual rights. Conversely, the *Greenpeace* court's acknowledgement of the difficulty of other individuals challenging the decision was used as a justification for the grant of standing, reflecting an evolved conception of judicial review as a mechanism for ensuring public accountability and good governance. This represents a significant shift from the previous perspective of standing rules as merely filtering excessive litigation to their current understanding as facilitators of effective administrative scrutiny.

Still, the emphasis on local supporters in the *Greenpeace* case should be seen as a way for the Court to maintain a link with traditional standing doctrine, which in the past has focused on individual interests, while also moving towards a broader public interest approach. This reasoning implies that the Court was consciously attempting to reconcile old and new perspectives on standing, rather than making a radical departure from long-standing principles. Rather than being seen as contradictory, therefore, these cases should be seen as representing a shift in judicial understanding of standing between 1990 and 1993. Subsequently, the 1994 case of *R v Secretary of State for Foreign and Commonwealth Affairs, ex p The World Development Movement Ltd*[65] exemplifies a particularly controversial development in the doctrine of standing. The court granted the World Development Movement ('WDM') standing to challenge the Secretary of State's allocation of £234 million in aid for the Pergau Dam in Malaysia, despite the organisation's members having no direct personal or financial interest.

Notably, the *WDM* decision represented a yet more significant departure from the restrictive approach previously maintained in *Rose Theatre*, and the court placed significant emphasis on factors such as the importance of vindicating the rule of law, the public interest in scrutiny, the WDM's expertise and credibility, and its established relationships with international bodies such as UNESCO and the OECD. Particularly significant was the court's pragmatic consideration that if

[65] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p The World Development Movement Ltd* (n 36).

WDM were denied standing, there would likely be no other party capable of bringing the challenge, thus potentially leaving any unlawful conduct unaddressed; a stark contrast to Schiemann J's earlier position in *Rose Theatre* where similar concerns were acknowledged but not deemed sufficient to grant standing.

This decision established an even more liberal approach to standing based on the constitutional significance of issues rather than personal connection. The decision, however, remains controversial because it potentially extends standing too far beyond traditional boundaries.[66] The primary concerns focus on the risk of excessive public interest litigation and the potential undermining of traditional standing principles that serve to filter unnecessary litigation and maintain separation of powers. The case's emphasis on constitutional significance and practical necessity in standing determinations suggests a fundamental shift from viewing standing as primarily protecting individual rights to seeing it as a mechanism for ensuring public accountability. While debate continues regarding the appropriate balance between access to justice and judicial restraint, the *WDM* case remains a pivotal moment in the evolution of standing doctrine in UK administrative law.

Following the progressive approach established in *WDM*, the case of *R (Evans) v Secretary of State for Defence*,[67] further expanded the boundaries of standing in public interest litigation. In *Evans,* the court allowed a peace activist to challenge UK military policy in Afghanistan despite lacking a direct personal interest, underscoring the growing importance of addressing significant public issues over individual stakes. This decision aligns with the broader trend of liberalising standing rules in judicial review cases, emphasising the importance of the issues raised rather than the claimant's immediate stake. A controversial aspect of this case concerns the court's willingness to hear a case brought by an individual primarily motivated by wider political objectives. However, by prioritising the public interest nature of the claim, the court enabled greater

[66] Ministry of Justice (n 3333) [79].

[67] *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin).

scrutiny of government actions in matters of significant public importance, even when those directly affected might be unable to bring a case themselves.[68]

This liberal trajectory was further reinforced in 2021 in *R (Good Law Project Ltd) v Secretary of State for Health and Social Care*[69] building on the principles of the *WDM*. The High Court granted the Good Law Project standing to challenge the government's COVID-19 procurement practices, prioritising the public interest in transparency and accountability over the claimant's lack of direct interest. In particular, the court recognised that a public interest organisation could have standing to challenge systemic procurement issues, not just individual procurement decisions, effectively broadening the space for public interest litigation. The court recognised the Good Law Project's expertise in government scrutiny and its genuine interest in transparency as sufficient grounds for standing. Moreover, by recognising that systemic failures in procurement transparency may not have 'better placed' economic challengers, the court demonstrated progressive development in adapting standing doctrine to modern governance challenges. Additionally, the denial of standing to the Member of Parliament claimants was made based on the existence of a well-placed challenger (Good Law Project) rather than a general limitation on standing, suggesting that the Court's primary concern was with efficient litigation rather than restricting access to judicial review.[70]

The evolution of standing doctrine, however, has not been uniform across the United Kingdom. While English law embraced significant progress with the *WDM*[71], Scotland's progression towards liberalisation followed a distinctly

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[68] ibid [2]: 'The fact that she may have a wider objective in bringing her claim is, however, an irrelevance. The claim itself is brought in the public interest, with the benefit of public funding.'

[69] *R (Good Law Project Ltd) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin).

[70] In *R ((D) and another and Mayor of London) v Parole Board* (n 36), the High Court, refining the public interest standing, declined to grant the Mayor of London standing to challenge the Parole Board's decision to release a convicted taxi driver who had committed serious sexual offences, on the ground that since two direct victims were capable of bringing the challenge, there was no necessity for a public official's intervention to ensure proper legal enforcement.

[71] In the context of planning permission challenges see Sedley J at 183 in *R v Somerset County Council and ARC Southern Limited, ex p Dixon* [1998] Env LR 111: 'Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs—that is to say misuses of public power; and the courts have always been alive to the fact

different path, occurring almost two decades later. This divergence reflects Scotland's historical legal tradition, where the distinction between private and public law has historically been less pronounced, and the evolution of judicial review was primarily through private law mechanisms. The significance of Scottish developments within this predominantly English law-focused section lies in its ability to provide a comprehensive understanding of the fundamental connection between the liberalisation of standing and the evolution of the concept of judicial review, which is particularly evident within a more stringent legal framework. The Scottish experience, particularly given its historically stronger private law orientation, provides a compelling illustration of how reforms in the rules of standing necessarily imply broader changes in the constitutional role of judicial review. The connection is both fundamental and inevitable: standing rules determine not merely who may access the courts, but also fundamentally reshape what constitutes a justiciable issue and how courts understand their constitutional function. Liberalisation of standing requirements necessitates a transition by courts from a narrow role, focused on the protection of individual private rights, to a broader constitutional function of ensuring public accountability and governmental legality.

The underlying rationale for this transformation can be found in the inherent logic of expanded access: the broadening of standing inevitably results in courts adjudicating on matters of general public interest rather than individual grievances. This shift entails the involvement of the courts in matters pertaining to policies and governmental process, and constitutional principle, which extend well beyond the scope of conventional private law disputes. Consequently, the liberalisation of standing rules does not merely result in procedural changes; rather, it fundamentally reshapes judicial review as a mechanism of constitutional oversight rather than individual remedy.

The Scottish experience offers a clear illustration of this pattern: as standing became more accessible, Scottish courts were compelled to develop more advanced public law doctrine and assume a more active role in scrutinising

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that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power.'

executive action, thereby aligning their constitutional function with that of their English counterparts. Although delayed, this parallel development in Scotland reinforces the argument that the liberalisation of standing is inextricably linked to the development of judicial review's fundamental function of ensuring public accountability.

A seminal moment for Scottish law was the *AXA General Insurance Ltd v Lord Advocate*[72] case, in which the Supreme Court fundamentally reconceptualised the nature of judicial review applications in Scotland. The Supreme Court held that 'an application to the supervisory jurisdiction [...] is not brought to vindicate a right vested in the applicant, but to request the court to supervise the actings of a public authority so as to ensure that it exercises its functions in accordance with the law'.[73] This represents a pivotal shift in Scotland's legal thinking, moving away from the conventional private law paradigm and towards a more public interest-oriented conception of judicial review. This shift was grounded in the constitutional imperative of ensuring public authorities act within their lawful boundaries, echoing earlier developments in English law. As Baroness Hale later articulated in her analysis of standing requirements, this transformation was essential to fulfil judicial review's constitutional purpose. She emphasised that the approach to standing fundamentally shapes the ability of judicial review to serve its constitutional function in ensuring public accountability.[74] Indeed, the *AXA* decision thus represents not merely a procedural reform, but a fundamental realignment of Scottish administrative law with broader constitutional principles of accountability and governance, bringing it closer to the position established in English law.

[72] *AXA General Insurance Ltd v Lord Advocate* (n 27).

[73] ibid [159].

[74] Baroness Hale of Richmond, 'Who Guards the Guardians?' (2014) 19(1) Judicial Review 1: 'The approach we adopt towards the standing required for people and organisations to bring claims for judicial review or other public law remedies is crucial to the constitutional purpose which they serve'.

3.2.2 Strategic Non-Intervention: Executive Approaches to Standing in Political Litigation

The evolution of judicial approaches to standing in cases of constitutional significance reflects a growing commitment to scrutinising potentially unlawful conduct by public authorities. The trend in this sense is evident in a series of landmark cases that have progressively expanded the concept of standing, particularly in matters of fundamental constitutional importance. An early manifestation of this trend appeared in *R v Secretary of State for the Foreign and Commonwealth Affairs, ex p Rees-Mogg*,[75] where standing to challenge Maastricht Treaty ratification was granted based merely on the applicant's (Lord Rees-Mogg) 'sincere concern for constitutional issues.'[76] In the contemporary context, the *Miller* litigations represent a significant advancement in this jurisprudential evolution. Notably, in both *R (Miller) v Secretary of State for Exiting the European Union*[77] (*'Miller'*) and *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland*[78] (*'Miller/Cherry'*), the courts effectively recognised Gina Miller's standing despite the fact that she had no greater interest than any other citizen.

In *Miller,* the Supreme Court addressed the question of whether parliamentary authorisation was required to trigger Article 50 of the Treaty on European Union. Although Gina Miller, as a private citizen, had no greater personal interest than others, the Court implicitly upheld her standing by ruling on the merits. Similarly, in *Miller and Cherry*, the Supreme Court unanimously invalidated the Prime Minister's prorogation of Parliament, finding it to be an unlawful frustration of parliamentary sovereignty and parliamentary accountability. The lack of direct personal impact on the claimant was immaterial; the constitutional gravity of the issue made it justiciable. Notably, the government's decision not to contest standing in these cases suggests a strategic approach to

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[75] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] QB 552.

[76] ibid 562.

[77] *R (Miller) v Secretary of State for Exiting the European Union* (n 9) *5*. For a detailed analysis of the case, see previous section.

[78] *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* (n 9) For a detailed analysis of the case, see previous section.

constitutional litigation, enabling judicial resolution of fundamental questions. This practice, coupled with the courts' progressively liberal interpretation of standing requirements in constitutional cases, suggests that traditional standing requirements have become less stringent in cases about matters of fundamental constitutional importance, whether through executive acquiescence or judicial development of the law.

This conceptual evolution was theoretically underpinned in other cases, one of which is the Scottish case of *Walton v Scottish Ministers.*[79] Following the *AXA* decision, in *Walton* the Supreme Court overturned the concerns of the Inner House of the Court of Session regarding standing[80] and explicitly acknowledged that standing might be granted even where decisions affect all citizens equally, provided the case raises sufficiently important public law issues, in this case, environmental issues.[81] Before the Inner House, however, Scotland's traditionally conservative approach to the requirements for standing was maintained, contrasting sharply with the more liberal position already established in English law.[82] The Inner House emphasised two key factors reflecting Scotland's legal tradition: the applicant's physical distance from the challenged development and the absence of a significant personal stake in the outcome.

The Inner House particularly emphasised its concern that an individual with no close connection to the development could potentially obstruct a long-established infrastructure project that had already been subject to extensive public consultation. This restrictive interpretation, while reflecting traditional Scottish legal thinking on standing, was ultimately overruled by the Supreme Court, thus aligning Scottish practice with the more inclusive English approach to

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[79] *Walton v Scottish Ministers* [2012] UKSC 44.

[80] *Walton v Scottish Ministers* [2012] CSIH 19.

[81] *Walton v Scottish Ministers* (n 79), Lord Hope [152], Lord Reed [94].

[82] *Walton v Scottish Ministers* (n 80); This jurisdictional difference between the courts reflected deeper historical and doctrinal distinctions between Scottish and English legal traditions. The Inner House's emphasis on factors such as physical distance and a significant personal stake derived from Scotland's historical prioritisation of direct property or personal interests ('title and interest') over broader public interest considerations. This approach, rooted in private law concepts, contrasted sharply with English law's evolution away from such restrictions following the *Fleet Street Casuals* case and subsequent developments.

standing in public interest standing.[83] Importantly, before the Supreme Court, Lord Reed made some general comments on the law on standing at paragraph 94 where he explicitly recognised that citizenship alone may confer a sufficient interest to challenge violations of public law, thereby reinforcing the fundamental relationship between standing and the rule of law:

> 'Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no one was able to bring proceedings to challenge it.'

His reasoning framed judicial review as a constitutional safeguard, positing that the rule of law necessitates judicial intervention even when unlawful acts uniformly affect the public. This reasoning implicitly challenges political constitutionalist assumptions by asserting that courts, rather than elected bodies, bear ultimate responsibility for policing constitutional boundaries.

The divergence between the Inner House and the Supreme Court fundamentally exemplifies the tension between political and legal constitutionalism in the UK's constitutional framework. The Supreme Court's, particularly Lord Reed's, judicial interpretation represents a significant shift towards legal constitutionalism, where courts assume a more prominent role in upholding constitutional principles and the rule of law, moving beyond the traditional emphasis on parliamentary supremacy characteristic of political constitutionalism. However, this shift does not represent a complete abandonment of political constitutionalism. As will be seen below, it demonstrates the emergence of a nuanced hybrid model where both approaches co-exist and interact dynamically.

The strategic reluctance to challenge standing and the liberal approach of the Supreme Court facilitate the judicial resolution of fundamental constitutional questions, and, more crucially, transform the role of the standing doctrine

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[83] *Walton v Scottish Ministers* (n 79).

itself.[84] What was formerly conceptualised as a mere procedural gate has evolved into a sophisticated mechanism that necessarily facilitates a form of institutional dialogue between the executive and judiciary. This transformation reflects the broader evolution in constitutional jurisprudence, where procedural requirements are increasingly interpreted through the lens of their constitutional function rather than their traditional 'gatekeeping' role.[85]

The courts' and executive's approaches in cases of important public law issues together indicate that a nuanced balancing act has resulted in a less stringent application of conventional standing requirements in certain cases, particularly those involving constitutional issues. This balancing act itself reflects the ongoing dialogue between legal and political constitutionalism, where courts must navigate between their role as guardians of the rule of law and their traditional deference to democratic processes. The rationale underlying this shift appears to be that the constitutional issues, by their very nature, affect the broader societal framework, rendering traditional concepts of individual interest less applicable or even inappropriate. This evolution suggests a gradation of standing requirements, with constitutional challenges being given relatively less stringent standing requirements, reflecting their fundamental importance to the rule of law.

The evolution has played a pivotal role in shaping the scope of judicial review, a development that has generated significant academic and political debate in recent years.[86] By allowing a wider range of parties to bring such challenges, the courts have effectively expanded their supervisory jurisdiction over the actions of public authorities. This expansion has enabled more comprehensive scrutiny of administrative decision-making, particularly in cases raising significant constitutional questions. Furthermore, the liberalisation of standing requirements can be seen as a facilitator of the establishment of substantive

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[84] See *R (Miller) v Secretary of State for Exiting the European Union* (n 9); *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* (n 9); *R v Secretary of State for the Foreign and Commonwealth Affairs, ex p Rees-Mogg* (n 75); *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22; *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 1409; *R (Unison) v Lord Chancellor* [2017] UKSC 51.

[85] See previous section.

[86] See Independent Review of Administrative Law, *Independent Review of Administrative Law Report* (CP 407, 2021).

principles of judicial review, as it enables the courts to address significant constitutional issues that may previously have been regarded as beyond the scope of judicial review due to traditional standing requirements. Consequently, this expansion of the scope of judicial review has prompted considerable administrative concern about the overreach of judicial review, particularly regarding its impact on effective governance and administrative efficiency, ultimately contributing to the enactment of the Judicial Review and Courts Act 2022.[87]

3.2.3 Recalibrating Judicial Oversight: Legislative Reactions to Judicial Review Expansion

The concerns regarding the expansion of judicial review, particularly through the liberalisation of standing requirements, included several factors. Firstly, there was a concern that this would impede the efficient governance and implementation of policies.[88] Secondly, a more expansive definition of standing could result in strategic litigation that could delay or disrupt administrative processes.[89] Furthermore, the increased litigation could result in a corresponding rise in costs and an increase in the administrative burden.[90] The IRAL report also emphasised the government's concerns that courts may become the forum for adjudication of cases initiated by parties whose interests are primarily political or theoretical in nature, as opposed to cases involving direct practical stakes.[91] The government's perspective, as evidenced in its response to IRAL and subsequent legislative reforms, suggests a view that the courts' liberal approach to standing has inadvertently transformed judicial review from a mechanism of legal accountability into a tool for broader political contestation.[92] This perceived shift from its traditional constitutional role has prompted legislative

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[87] Independent Review of Administrative Law (n 86)

[88] ibid [4.84].

[89] Conservative Party, 'Our Plan Conservative Manifesto 2019' (Conservative Party, 2019) <https://cchq2019.webflow.io/our-plan> accessed 3 June 2025, 48.

[90] Independent Review of Administrative Law (n 86) [2.59], [2.60].

[91] Independent Review of Administrative Law (n 86) [22]; Constitution Committee, *Judicial Appointments* (HL 2010–12, 272), [41].

[92] Ministry of Justice (n 33)

intervention, the Judicial Review and Courts Act 2022, aimed at recalibrating the balance between judicial oversight and administrative efficiency.

Despite the fact that standing was included in the agenda of the IRAL, no amendments were made to the standing rules in JRCA 2022. However, the IRAL panel recommended that government bodies should, in instances where the courts' broad approach to standing is problematic, adopt a more proactive stance in challenging the standing of claimants in judicial review proceedings. It also urged courts to explicitly address standing, even in cases where it has not been raised by the parties.

3.2.4 Recalibrating Judicial Oversight: Judicial Narrowing of Standing Requirements

The evolution of judicial review in the United Kingdom, particularly concerning standing requirements for public interest organisations, has recently reflected a retrenchment in the legal landscape. This transformation is evident in the wake of the Independent Review of Administrative Law ('IRAL') and the subsequent enactment of the Judicial Review and Courts Act 2022[93], both of which were initiated in response to perceived judicial overreach. The shift is particularly evident in two significant cases involving the Good Law Project ('GLP'), an organisation known for its broad objectives in pursuing administrative justice.[94]

In *R (Good Law Project and Runnymede Trust) v The Prime Minister ('Runnymede')*[95], GLP was denied standing. This case concerned a challenge regarding public appointments made during the COVID-19 pandemic. The claimants argued that the appointments were made without fair and open competition, constituted indirect discrimination and violated the Public Sector Equality Duty under section 149 of the Equality Act 2010. It was held that the Runnymede Trust, which has a specific aim of promoting racial equality is the (more) appropriate claimant. Thus, it was granted standing related to challenges

[93] For a detailed analysis of the changes that the Act established, see ch 3.

[94] Good Law Project, 'Articles of Association', objects 2.1-2.8: the organisation's stated purposes include promoting sound administration of the law, challenging injustice and inequality, upholding democracy, advancing access to justice, and protecting the environment.

[95] *R (Good Law Project and Runnymede Trust) v The Prime Minister* (n 12).

of the Public Sector Equality Duty. More significantly, however, the Court held that despite the wide-ranging objectives of GLP pertaining to administrative justice, it cannot be automatically granted standing. The Court stated that adopting such an approach would effectively grant the GLP 'carte blanche to bring any claim for judicial review no matter what the issues and no matter what the circumstances'[96] and denied granting standing to GLP on the grounds that it lacked sufficient interest.

Similarly, in *R (Good Law Project) v Secretary of State for Health and Social Care ('Abingdon')*[97] the court again rejected GLP's standing based on several factors including briefly that the GLP had no greater interest than any other member of public, was not 'tangibly affected' by the contested public contracts, demonstrated limited relevant expertise, and the alleged breach was not considered sufficiently grave.[98] The decision of the Department of Health and Social Care regarding the awarding of three contracts for the development of antibody lateral flow tests to Abingdon Health during the period of the Coronavirus pandemic was contested. The Department of Health and Social Care challenged GLP's standing. While this case involved procurement law, which might warrant distinct treatment, it nonetheless reflects a broader trend towards more rigorous scrutiny of standing requirements.

GLP was found to have failed to demonstrate any tangible impact from the contested contract, and no more affected than any ordinary member of the public. The absence of direct effect was deemed to be of particular significance in the context of the procurement, wherein economic operators were considered the natural claimants. This approach marks a departure from the more liberal standing regime evident in prominent cases like *WDM* and *Walton*. In those earlier decisions, the courts were more willing to grant standing based on factors such as the importance of vindicating the rule of law, the significance of public interest challenges in maintaining good administration, the absence of other

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[96] ibid [58]; *R (Good Law Project) v Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC).

[97] *R (Good Law Project) v Secretary of State for Health and Social Care* (n 96).

[98] Ibid [521], [533], [536], [541], [542]; See R (Good Law Project Ltd) v Secretary of State for Health and Social Care (n 69).

responsible challengers. Here, the court upheld the principle that public interest litigation in procurement matters demands more than mere interest and expertise. The court imposed a high standard for the establishment of public interest standing, requiring either direct impact or exceptional circumstances. The contracts in question were not considered to be of sufficient gravity, and the alleged breaches did not reach the threshold of fundamental impropriety that might otherwise justify public interest standing.[99]

A notable departure from the formerly more liberal interpretation of standing rules is evident, which also stands in stark contrast to *R v Secretary of State for Social Services, ex p Child Poverty Action Group*,[100] which adopted a more flexible stance, allowing public interest organisations to bring claims if individual affected parties were unlikely to do so, based on the understanding that the public interest function of the judicial review is to uphold the rule of law. While previous cases often accepted that matters of significant public interest could justify broader standing rules, here mentioned GLP judgments took a more restrictive view, requiring either direct impact or exceptional gravity. This is particularly evident in the court's dismissal of GLP's expertise and track record in procurement litigation as an insufficient basis for standing. The judgments explicitly rejected that the mere reluctance or inability of economic operators to bring claims cannot automatically confer standing on public interest organisations.

The court was also unpersuaded by GLP's arguments regarding their expertise and public interest motivation. While acknowledging GLP's experience in procurement litigation and their capacity to pursue such cases through crowdfunding, the court determined that such factors, absent direct impact or exceptional circumstances, were again insufficient to establish standing. In *R v Inspectorate of Pollution, ex p Greenpeace (No. 2)*,[101] Greenpeace's environmental expertise was considered sufficient to establish standing.

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[99] See *World Development Movement* (n 36).

[100] *R v Secretary of State for Social Services, ex p Child Poverty Action Group* (n 56).

[101] See *Greenpeace (No 2)* (n 61).

However, the court here considered GLP's procurement expertise inadequate without additional factors to support their claim for standing.

In order to provide a more comprehensive overview of the subject, also a comparison with the *Rose Theatre* decision is necessary. The *Abingdon* case exemplifies a contemporary, context-specific approach to judicial review, in which courts consider factors such as expertise, the gravity of breaches, and the presence of alternative challengers, even in cases involving public interest — although a modified value is attributed to the factors. By contrast, the *Rose Theatre* case was notable for its rigid, almost doctrinal stance, categorically refusing to recognise collective or representational standing, irrespective of the claimant's purpose or the public significance of the issue at hand. This rigid stance reflected the earlier judicial approach that viewed standing primarily through the lens of individual rights and direct interests. However, both cases demonstrate a judicial caution concerning the potential for opening the floodgates to litigation.

Rose Theatre was concerned about the overreach of interest groups, while *Abingdon* emphasised the need for claimants to demonstrate more than an abstract concern. It is important to note that the courts later moderated *Rose Theatre's* restrictiveness, whereas *Abingdon's* reasoning reflects a contemporary balancing act that aligns with the legislative attempts, allowing public interest standing in some cases[102] but imposing higher thresholds where there is no direct harm or expertise. Consequently, *Abingdon* demonstrates a narrowing of standing rules, and by extension the scope of judicial review, by realigning the factors of standing.

The *Abingdon* and *Runnymede* mark a notable constraint on the previously more expansive approach to standing in public law cases, potentially limiting the role of public interest organisations in administrative law challenges, possibly in technical areas like public procurement. This retreat from the previously liberal standing regime appears to be part of a wider recalibration of judicial review, coinciding with other developments such as the Judicial Review and Courts Act 2022. This recent trend reflects growing judicial concern about the need to

[102] *R (Good Law Project Ltd) v Secretary of State for Health and Social Care* (n 69).

maintain meaningful boundaries around public interest standing. The courts are now increasingly emphasising a more detailed, multi-factorial approach to standing, where the public interest element, while important, is not uniquely decisive.

This evolution of the standing rules demonstrates the judiciary's ongoing efforts to balance the fundamental right to access justice with the practical constraints of judicial review. This balance is, at its core, a reflection of the broader constitutional dialogue between political and legal constitutionalism as it manifests in concrete doctrinal form through standing rules, competing perspectives on the role of courts in scrutinising executive power. The dynamic relationship between these concepts is evident in how courts must simultaneously uphold the rule of law through accessible judicial review while respecting democratic processes and administrative efficiency. The judiciary thus faces the challenge of ensuring that individuals and organisations can challenge potentially unlawful government actions, while also preventing an overwhelming flood of litigation that could impede effective governance. Through the calibration of standing criteria and the scope of review, the judiciary is effectively engaged in a practical negotiation of the boundaries between legal and political constitutionalism.

Yet, in principle, the shifts between these constitutional approaches are not arbitrary but respond to specific institutional and societal pressures. As demonstrated in the Introduction, legal evolutions reflect broader historical *cycles* — most notably captured in Harlow and Rawlings' categorisation of the 'green light', 'red light' and 'blue rinse' periods — where legal and political environments mutually shape the development of public law. The movement towards legal constitutionalist approaches typically occurs when existing political accountability mechanisms prove inadequate to address governmental overreach or when executive power expands beyond traditional parliamentary oversight. This pattern is evident in the enactment of the Human Rights Act 1998, which followed mounting ECHR violations that arguably demonstrated Parliament's inability to adequately protect rights.[103] Similarly, the *Belmarsh*[104]

[103] See ch 2.

[104] *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

decision exemplifies judicial learning from historical failures: unlike the deferential wartime cases of *R v Halliday, Ex p Zadig*[105] and *Liversidge v Anderson*,[106] post-9/11 courts actively scrutinised executive emergency powers, reflecting institutional memory of past judicial acquiescence to excessive executive authority.

Conversely, political constitutionalist reassertion often follows periods perceived as excessive judicial intervention or when democratic legitimacy concerns become prominent. The Brexit period illustrates this dynamic clearly: the *Miller*[107] and *Miller/Cherry*[108] decisions' constitutional significance triggered substantial political backlash, culminating in the Judicial Review and Courts Act 2022, which represented a legislative attempt to constrain judicial review despite ultimately implementing more moderate reforms than initially proposed.[109] Notably, courts have demonstrated strategic adaptation when facing anticipated political pressure. The development of common law proportionality as a ground of review gained momentum particularly as HRA repeal discussions intensified, suggesting judicial preparation of alternative rights protection mechanisms should statutory protections be removed.[110] Therefore, these constitutional approaches operate on a spectrum, with courts calibrating their institutional role according to contextual factors.

This demonstrates how constitutional evolution responds to functional imperatives while maintaining a fragile and fluid balance between competing constitutional values, with courts learning from historical experiences and adapting to contemporary challenges.

3.2.5 Conclusion

The overall evolution of standing doctrine in UK's judicial review is revealed to contain theoretical tensions, which attempt to balance access to justice with

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[105] *R v Halliday, Ex p Zadig* [1917] AC 260.

[106] *Liversidge v Anderson* [1942] AC 206.

[107] *R (Miller) v Secretary of State for Exiting the European Union* (n 9).

[108] *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* (n 9).

[109] See ch 3.

[110] See ch 2.

the need for efficient governance. The case law reveals a progression from the stringent understanding of standing requirements in the *Rose Theatre* case to more recent decisions of the Good Law Project, which, though comparatively liberalised, employ a more nuanced restrictive approach to standing requirements against the 'overly liberalised' developments in this area.

The 1990 *Rose Theatre* decision demonstrated an approach to standing that failed to recognise the changing nature of public administration, and Schiemann J's insistence on direct, tangible interest reflected an outdated private law paradigm ill-suited to modern governance challenges. The 2010s, relatively recent *AXA* and *Walton* decisions represented a significant theoretical shift, but one that perhaps went too far in the opposite direction creating concerns about excessive judicial intervention in administrative decision-making. While Lord Reed's judgment in *Walton* acknowledged the significance of environmental protection and broader public interests, it potentially opened the procedural doors excessively and encountered political dissatisfaction. Recent Good Law Project decisions in 2022, on the other hand, represent an important re-evaluation of this liberal approach. These decisions, which were delivered after the *Miller* and *Miller/Cherry* cases[111] and subsequent political attempts to statutorily constrain judicial review, appear to indicate a more cautious judicial stance. This cautiousness is suggested to be a response to concerns regarding the over-extension of judicial review and can now be characterised by an emphasis on factors such as demonstrable expertise and tangible interest.

As public administration continues to evolve, particularly in response to challenges such as new technologies and climate change, the doctrine of standing is likely to remain a dynamic and contested area of law. In order to meet the challenges of contemporary governance, the courts will need to continue refining their approach, while at the same time maintaining the delicate balance between judicial oversight and executive efficiency.

The prevailing state of UK administrative law, therefore, can be characterised as a contextually responsive constitutional model in the context of judicial review,

[111] For a detailed analysis of these cases see previous section.

which seeks to achieve a balance between the imperatives of legal constitutionalism and the principles of political constitutionalism. This balancing approach aims to uphold the rule of law through the mechanism of robust judicial oversight, whilst at the same time maintaining a degree of deference to both democratic processes and parliamentary sovereignty. The ongoing evolution of standing doctrine thus provides a clear illustration of the dynamic nature of the UK's uncodified constitution, as it continuously adapts to address the complexities of modern governance and the challenges posed in the field of public law. This evolution necessarily mirrors the transformative development of judicial review itself, whose scope has gradually but significantly expanded overall with each passing decade. While retaining its essential character, judicial review has demonstrated remarkable back-and-forth flexibility, allowing courts to respond to evolving conceptions of rights and the proper exercise of public power within the constitutional framework. This evolutionary process, however, generally represents a constitutional adaptation that gradually establishes dynamic boundaries for judicial intervention. The value lies in the constitutional system's ability to correct itself when institutional relationships become imbalanced.

3.3 Third Party Interventions

The concepts of standing and intervention are distinct, however, they are interrelated given their focus on the interests and rights of parties seeking to participate in legal proceedings. The liberal approach to standing has meant that individuals and groups can challenge decisions by public authorities on behalf of a section of the public. However, instead of becoming a party, it is also possible for third parties who have no direct or personal connection with or no interest in the matter to join the case as interveners thereby contributing to broader public interests and potentially influencing legal precedents. This mechanism enables their participation in significant legal discourse while circumventing the need to establish standing or bear the full weight of litigation expenses.[112] Consequently, intervention is an increasingly popular and effective means for various

[112] The Criminal Justice and Courts Act 2015 established certain cost provisions for interveners, yet these are more limited in scope and apply exclusively in specific circumstances, such as instances where an intervener has acted unreasonably or has not provided significant assistance. The rules governing the costs involved in intervening will also vary depending on the court involved.

stakeholders, particularly NGOs and interest groups, to shape legal developments in certain areas of public importance. This expansion of participants in judicial proceedings has a fundamental effect on the scope of judicial review by introducing diverse perspectives that may broaden the court's considerations beyond the immediate parties' arguments.

Before the mid-1990s, interventions often took the form of *amicus curiae* who intervened at the specific request of the court for assistance with questions of law or fact. Courts often adopted a restrictive approach to third-party interventions, as illustrated by the *Gillick v W Norfolk & Wisbech Area Health Authority,*[113] where the Children's Legal Centre and the Responsible Society were denied permission to intervene despite their relevant expertise.[114] The judicial process was limited in scope for external interventions, reflecting the judicial unwillingness to expand proceedings beyond the directly involved parties and concerns about potential procedural delays. Whereas earlier cases, such as *R v Secretary of State for the Home Department, Ex parte Sivakumaran*[115] involved intervention, in this case by the UNHCR as a specialised treaty monitoring body with limited precedential effect; *R v Khan*[116] marked the transformative moment for modern third-party intervention in the UK courts by allowing Liberty, a domestic NGO, to submit written statements on broader Article 8 ECHR issues. *Khan* laid the foundations for modern public interest intervention and paved the way for more frequent and formalised third-party interventions by civil society organisations.[117]

In parallel with this development, JUSTICE and the Public Law Project published an influential report[118] chaired by Laws J, recommending formal amendments to facilitate third-party interventions. This report underscored a growing recognition of their potential value, highlighting the public character of judicial

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[113] *Gillick v W Norfolk & Wisbech Area Health Authority* [1985] 1 All ER 533.

[114] See also *Shields v E Coomes (Holdings) Ltd* [1978] 1 WLR 1408.

[115] *R v Secretary of State for the Home Department, Ex parte Sivakumaran* [1988] AC 958.

[116] *R v Khan* [1997] AC 558.

[117] See also *R v Coventry Airport* [1995] 3 All ER 37, National Farmers Union, Compassion in World Farming representing the directly affected farmers were the interveners.

[118] JUSTICE and Public Law Project, 'A Matter of Public Interest: Reforming the Law and Practice on Interventions in Public Interest Cases' (1996).

review. In this context, governmental power under judicial scrutiny was deemed to be 'inherently likely to be [a] richer field for the introduction of arguments by third parties than is the standard private law case of contract, tort or other causes of action.'[119] On this understanding, interventions regarding the validity of executive decisions serve to protect the interests of affected parties who may not be present in court. This stems from the understanding that the court's essential role in public law is to monitor the use of public power and to ensure that government authority is exercised both lawfully and in the interests of the public. This public interest function ensures that government authority is exercised lawfully even when no directly affected applicant is willing or able to bring a challenge.

In 1998, the Civil Procedure Rules 54.17 created the statutory framework for interventions stating that 'any person may apply for permission to file evidence or make representations at the hearing.' This was complemented by Practice Direction 54A. Enactment of the Human Rights Act 1998 also accelerated third-party intervention trend by creating a framework in which broader constitutional and human rights arguments became more relevant.

3.3.1 Legislation:

The power of the court to grant permission to intervene is found in the Civil Procedure Rules ('CPR'), Part 54, which came into force in 2000 and reads as follows:

> 'Court's powers to hear "any person":
>
> 17. (1). Any person may apply for permission—
>
> a) to file evidence; or
>
> b) make representations at the hearing of the judicial review.
>
> 17. (2). An application under paragraph (1) should be made promptly.'[120]

[119] ibid 17.

[120] It is complemented by Practice Direction 54A and Supreme Court Rule 24 and 25.

Additionally, Part 3 Rule 16 and Part 4 Rule 24 of the Supreme Court Rules 2024 reads as follows:

> ‘Interventions in applications
>
> 16.(1) Any person and in particular—
>
> (a)any official body or non-governmental organization seeking to make submissions in the public interest; or
>
> (b)any person with an interest in proceedings by way of judicial review,
>
> may file submissions asking the Court to grant or dismiss an application for permission to appeal which has been issued by the Court (including for lack of jurisdiction) and request that the Court takes them into account.
>
> (2) Once the submissions are filed, they must be served by the person on—
>
> (a)the appellant;
>
> (b)every respondent; and
>
> (c)any person who was an intervener in the court below.
>
> (3) Any submissions which are filed and served shall be referred to the panel of Justices which considers the application for permission to appeal.’
>
> ‘Intervention
>
> 24. (1) After permission to appeal has been granted by the Court or a notice of appeal has been issued, any person and in particular—
>
> (a)any official body or non-governmental organization seeking to make submissions in the public interest;
>
> (b)any person with an interest in proceedings by way of judicial review;
>
> (c)any person who was an intervener in the court below or who made submissions under rule 16,
>
> may apply to the Court for permission to intervene in the appeal.[…]

> (4) No permission is required—
>
> (a)for an intervention by the Crown under section 5 of the Human Rights Act 1998(1) (as to which see rule 43), or
>
> (b)for an intervention by a person who has a right to intervene conferred by the legislation referred to in rule 44 (devolution jurisdiction and compatibility issues and questions). […]'

The criteria for allowing intervention are defined in a limited way. They are interpreted as requiring only that the submissions address issues of general significance and offer a reasonable potential to provide meaningful assistance to the proceedings.[121] The broadly discretionary legal framework affords judges considerable latitude in both permitting interventions and determining their scope.

As Lieven notes, this discretion extends to judges' selective consideration of evidence and approach, marking a departure from traditional *inter partes* adversarial proceedings.[122] This selective consideration power is open to be problematic for two main reasons. Firstly, it allows judges to select from interveners' submissions without clear or consistent criteria. This potentially undermines the predictability of the process and the equal treatment of interveners' contributions. Moreover, the evolution of judicial review from an adversarial examination of administrative action into a more expansive forum potentially risks undermining its fundamental purpose of scrutinising the lawfulness of executive decision-making. These have become particularly important considerations when reviewing the relevant statistics. The introduction of the CPR Part 54 and the HRA in 2000 represented a significant shift, leading to pressure groups becoming interveners in nearly 30% of judicial review cases.[123] While there are challenges in measuring the direct impact of

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[121] Endicott (n. 11) 460; *R (MH) v Health Secretary (Application for Permission to Intervene)* [2004] EWCA Civ 1321 [8]; *R v Re: Northern Ireland Human Rights Commission* [2002] UKHL 25 [32]

[122] Nathalie Lieven, 'Interventions in Judicial Review Proceedings' in Andrew Higgins (ed), *The Civil Procedure Rules at 20* (OUP 2020).

[123] Speaight (n 25); Anthony (n 32); JUSTICE, 'To Assist the Court: Third Party Interventions in the UK' (2nd edn, JUSTICE 2009), 9: 'In 2015, of 79 judgments in the Supreme Court, 38 cases involved one or more interventions by a public body, a civil society organisation or another person or organisation (almost 50% of cases)' .

such interventions,[124] their cumulative effect has undoubtedly enriched — and arguably even steered — legal discourse, especially in cases with broad constitutional or human rights implications.[125]

3.4 Role of the Interveners

The evolution of third-party interventions in judicial proceedings has significantly transformed the landscape of legal advocacy and constitutional discourse. The interveners' role has evolved beyond the traditional neutral *amicus curiae* position, which intervenes at the specific request of the court for assistance with questions of law or fact.[126] Instead, third-party interveners often actively advocate for particular positions in the public interest and bring wider political and legal considerations before the court. This transformation is particularly evident in high-profile cases with significant political implications, such as *Miller/Cherry*[127] and *Northern Ireland Abortion*[128] case, where interveners advance specific policy agendas.

In these instances, interventions have played a pivotal role in reframing legal issues, shifting the focus from narrow procedural issues to broader constitutional principles. In *Miller/Cherry*, for instance, the prorogation of Parliament for five weeks was initially regarded as a political question concerning executive discretion, a matter that courts would traditionally refrain from addressing. However, the interventions, particularly by the former Prime Minister John Major, were significant because they helped to redefine the prorogation of Parliament as one of constitutional principle about parliamentary sovereignty and executive accountability rather than political discretion — though, as argued in the justiciability section of this chapter, the Court's methodology in that case

[124] It is challenging to ascertain the impact of the interventions on the decisions unless such an assertion is made by the judges.

[125] *EM (Eritrea) and Ors v. SSHD* [2014] UKSC 12; Lieven (n 122); Hale (n 74).

[126] In the US, '*amicus curiae*' refers to third-party interveners, while in the UK, this term refers to a neutral figure appointed by the Attorney General at the court's request. JUSTICE (n 123).

[127] *R (Miller) v The Prime Minister* (n 9).

[128] *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (NI)* [2018] UKSC 27.

raises distinct concerns that are independent of the intervention question.[129] Ultimately, the Court ruled unanimously that the prorogation was unlawful because it had the effect of frustrating Parliament's constitutional functions without reasonable justification.

Similarly, in the *Northern Ireland Abortion* case, legal disputes over abortion services in Northern Ireland were initially framed as a devolution issue between Westminster and Northern Ireland. However, interveners shifted this framing by presenting the issue as one of fundamental rights under the ECHR. This shift moved the focus from devolution to broader human rights concerns.[130] As a result, the interventions played a critical role in redefining the legal and constitutional discourse surrounding abortion access in Northern Ireland. This transformation illustrates a significant evolution in judicial review itself — from a limited mechanism concerned primarily with procedural compliance to a more robust constitutional instrument capable of protecting fundamental rights and remedying constitutional defects. They thus represent not only a legal success for interveners, but also a progressive expansion of the constitutional function and scope of judicial review.

Third-party interventions often affect the application of policies as well. The case of *EM (Eritrea) v Secretary of State for the Home Department*,[131] provides a compelling illustration of this influence. Interventions concerning the return of asylum seekers to Italy under the Dublin II Regulation played a crucial role in developing the legal framework and the decision-making process. They supplied factual evidence on the systemic deficiencies in the Italian asylum system that might not otherwise be available to the Court. Furthermore, the interventions were fundamental in establishing the legal test for determining the real risk of treatment contrary to Article 3 of the ECHR. Significantly, influenced by these interventions, the Supreme Court overturned the decision of the Court of Appeal that requires demonstrating a systemic failure, and instead, adopted a more

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[129] R (Miller) v Prime Minister (n 9), Witness Statement of Sir John Major (2 September 2019).

[130] *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (NI)* (n 128) [135]; The Court did not issue a declaration of incompatibility as the NIHRC did not have legal standing, but the majority of the Court agreed the current law is 'untenable' and 'in need of radical reconsideration'.

[131] *EM (Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12.

nuanced approach and focused on whether there were ‘substantial grounds for believing that the person concerned would face a real risk of being subjected to treatment contrary to Article 3’, and it had a significant impact on the assessment of asylum cases and potentially offered greater protection to vulnerable individuals.

Similarly, in *R (Kiarie and Byndloss) v Secretary of State for the Home Department*,[132] third-party interveners, Bail for Immigration Detainees and The Byndloss Children, provided critical evidence that might not otherwise have been available to the Court demonstrating how 'deport first, appeal later' certificates issued under section 94B of the Nationality, Immigration and Asylum Act 2002 created practically insurmountable barriers for appellants. Their submissions detailed the financial and logistical challenges faced by deportees attempting to participate in UK appeals from abroad, which significantly influenced the Supreme Court's conclusion that the policy violated Article 8 ECHR rights by effectively preventing meaningful participation in appeals.

However, this evolution in the role of third-party interventions has sparked debate regarding the potential politicisation of the judicial process. This phenomenon, which Harlow characterises as a ‘partial colonisation of the legal by the political process,’[133] manifests when interest groups pursue political-legal objectives through courts rather than legislative channels. Harlow identifies here a shift that resulted in the expansion of intervention rights for advocacy groups, without sufficient public scrutiny or debate.[134] This evolution/transformation receives further criticism for its effect on the institutional limits of courts.[135] As Hannett observes, while interventions can address informational gaps in complex cases, they are unable to replicate Parliament's consultative mechanisms or ensure a balanced representation of affected interests.[136] The IRAL Report also underlined the risk of interventions conflating adjudication with political

[132] *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42.

[133] Harlow (n 8) 2.

[134] Harlow (n 8); Speaight (n 25).

[135] Speaight (n 25).

[136] Sarah Hannett, 'Third Party Intervention: In the Public Interest' [2003] Public Law 128.

lobbying, potentially undermining perceptions of judicial neutrality.[137] These concerns are not without foundation, yet they do not necessarily undermine the constitutional value of interventions but point to the need for careful management of intervention. The evolving role of third-party interventions therefore intersects significantly with fundamental questions about the constitutional position of judicial review. The traditional role of judicial review as a mechanism for examining the legality of administrative decisions rather than their substantive merits is potentially being stretched by the increasing use of interventions to advance policy arguments.

The debate extends to the practical impact of intervention on court proceedings. Courts occasionally emphasise practical considerations in their assessment of intervention applications. The judicial assessment of such applications often depends on the ability of the prospective intervener to make a distinctive contribution to the proceedings, thereby establishing a functional threshold for intervention. For instance, in the case of *R (British American Tobacco UK Ltd) v Secretary of State for Health,*[138] the High Court rejected the KZPT's (Polish National Association of Tobacco Growers) application to intervene illustrating important principles about the threshold for third-party intervention in administrative law cases.[139] The court's judgment focused on three key elements. First, it emphasised the lack of a distinct contribution that KZPT's intervention would make in the case. The court held that KZPT's interests were closely aligned with those of British American Tobacco (BAT), and that KZPT's evidence merely added detail to BAT's existing arguments, rather than introducing new perspectives. This highlights that an intervention should contribute unique value to the proceedings. Second, the court considered the procedural efficiency of the evidence. It suggested that BAT could incorporate

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[137] Independent Review of Administrative Law (n 86) [4.108]: 'Intervention as a lobbying tactic also raises concerns for the integrity of the adjudicative process and separate identity of courts.'; Hannett (n 136) 128: 'That the court may feel the need for more information and assistance to ameliorate these deficiencies may well be understandable. Yet intervention cannot replace or mimic the processes of consultation that Parliament undertakes. Intervention cannot realistically provide a voice for all of those affected by the decision at hand. A court is simply not suited to canvassing relevant interests, or assessing the credibility or representative nature of those before it.'

[138] *R (British American Tobacco UK Ltd) v Secretary of State for Health* [2014] EWHC 3515 (Admin).

[139] ibid [19], [20].

KZPT's evidence by way of attachment to the reference, thus rendering formal intervention unnecessary. Third, and most importantly, the court distinguished between having an interest in the outcome and providing meaningful assistance to the court. While acknowledging the KZPT's ‘very lively interest’[140] in the outcome of the case, the court emphasised that this alone was not sufficient to justify intervention. These practical considerations reflect a judicial attempt to balance expanded participation with procedural efficiency through clear, functional criteria.

Significantly, IRAL panel's explicit recommendation for the development and publication of formal standards for third-party intervention,[141] which, despite its ability to address most of the criticisms of democratic legitimacy noted above, was notably left unaddressed in the government's subsequent Judicial Review and Courts Act 2022. Parliament's restraint suggests recognition that the existing framework adequately manages the tensions inherent in expanded third-party participation. This legislative inaction, therefore, can be understood as democratic validation of the constitutional equilibrium that has emerged through judicial practice. This parliamentary approach supports the thesis argument that expanded judicial roles through judicial review have not resulted in judicial supremacy. Instead, Parliament's decision to allow courts to continue developing functional criteria through case law demonstrates confidence in the detailed and balanced constitutional arrangement that has evolved. It exemplifies how the current constitutional framework functions not as a contest for institutional supremacy, but as a dynamic and evolving balance between judicial and parliamentary authority that remains responsive to changing legal and societal needs.

3.5 Crowdfunding and the Diversification of Public Interest Litigation

Many examples of public interest litigation are funded by crowdfunding, an online funding arrangement to raise third-party funds. Defined by Lord Justice Jackson as funding provided by a ‘party who has no preexisting interest in the

[140] ibid.

[141] Independent Review of Administrative Law (n 86) [4.108].

litigation,' crowdfunding typically operates on the understanding that 'the funder will be paid out of the proceeds of any amounts recovered as a consequence of the litigation', while receiving nothing 'should the claim fail'.[142] This funding approach has facilitated numerous high-profile judicial review cases, including landmark challenges such as *Miller*,[143] *Justice for Health v Secretary of State for Health*,[144] *R. (on the application of Webster) v Secretary of State for Exiting the European Union,*[145] *R (The Good Law Project) v Electoral Commission &Others*.[146]

One of the key benefits of crowdfunding is its potential to broaden access to judicial review by facilitating the ability of a broader range of litigants to pursue claims. This is particularly advantageous for claimants who might otherwise be unable to bring a judicial review due to the high costs involved, especially in light of the reduction in legal aid funding.[147] Crowdfunding has the potential to diversify the landscape of judicial reviews by providing financial resources to voices previously under-represented. This allows a greater number of cases to reach the courts, thereby increasing the number of cases in which legal accountability mechanisms are used. However, this also results in an increase in the caseload.[148]

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[142] Lord Justice Jackson, *Review of Civil Costs: Final Report* (2010), xv; 'Two organisations have become particularly prominent in this landscape: CrowdJustice, a dedicated platform for legal funding, and the Good Law Project, an organisation that actively initiates and pursues litigation through crowdfunded resources.'

[143] *R (Miller) v Secretary of State for Exiting the European Union* (n 9).

[144] *Justice for Health v Secretary of State for Health* [2016] EWHC 2338.

[145] *R (on the application of Webster) v Secretary of State for Exiting the European Union,* [2018] EWHC 1543 (Admin).

[146] *R (The Good Law Project) v Electoral Commission &Others* [2018] EWHC 2414 (Admin).

[147] Tom Hickman, 'Public Law's Disgrace' (UK Constitutional Law Blog, 9 February 2017) <https://ukconstitutionallaw.org/2017/02/09/tomhickman-public-laws-disgrace> accessed 20 March 2025: 'The problem with judicial review is that most people cannot afford a Rolls Royce'; Independent Review of Administrative Law (n 86) [4.95]; Sam Guy, 'Mobilising the Market: An Empirical Analysis of Crowdfunding for Judicial Review Litigation' (2023) 86(2) MLR 331.

[148] Joe Tomlinson, 'Crowdfunding Public Interest Judicial Reviews' [2019] Public Law 166.

Empirical research, however, reveals a more nuanced reality than simple democratisation.[149] While crowdfunding platforms have increased the overall volume of public interest litigation reaching the courts, questions remain as to whether they have genuinely diversified the pool of litigants. The Good Law Project's[150] prominence in this area, for example, raises important questions about whether crowdfunding truly facilitates diverse voices or merely enables new organisational models that replicate existing patterns of NGO dominance in public interest litigation.[151] Yet, Guy's empirical analysis suggests that the crowdfunding landscape is predominantly characterised by inexperienced groups and local-level actors rather than established NGOs with professional legal expertise.[152] This signifies a substantial transformation in the composition of actors involved in legal mobilisation, that is to say, as the strategic use of the legal system by social movement groups to contest prevailing laws or policies and promote social transformation,[153] with local and inexperienced groups now accessing judicial review mechanisms previously dominated by established NGOs. Rather than reflecting coordinated advocacy strategies, this represents a more ad hoc approach to using litigation for challenging governmental decisions, demonstrating how technological platforms can enable diverse forms of legal participation.

Beyond potential diversification, crowdfunding offers several recognised benefits. Most significantly, it reduces financial barriers to justice, allowing meritorious claims to proceed where they might otherwise fail due to resource constraints. It has the capacity to complement traditional litigation funding

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[149] Comprehensive comparative studies of different organisations' crowdfunding frequencies are limited.

[150] It is described by its founder Jolyon Maugham QC as an ‘explicitly political project,’ See Jolyon Maugham, 'The Lawyer as Political Actor' (Annual Queen Mary University of London Law and Society Lecture, 2017).

[151] 'Good Law Project Fantasies and Little Stupid Jokes' (Labour Pains Blog, 9 May 2022) <https://labourpainsblog.com/2022/05/09/good-law-project-fantasies-and-little-stupid-jokes/> accessed 20 March 2025; Guy (n 147).

[152] Guy (n 147).

[153] SA Boutcher and HJ McCammon, 'Social Movements and Litigation' in David A Snow and others (eds), *The Wiley Blackwell Companion to Social Movements* (2nd edn, John Wiley & Sons 2018) 307.

models. The distributed nature of funding can also facilitate wider participation, thus broadening public engagement with executive accountability.

Nevertheless, crowdfunding raises legitimate concerns. The most common criticism centres on its unregulated nature, which creates ethical ambiguities around transparency, accountability, and the appropriate use of funds.[154] Questions persist about whether donors fully understand the legal merits of cases they support or are primarily motivated by political sympathies. This leads to the more fundamental issue of whether crowdfunded litigation risks further politicising judicial review — a concern that applies equally to cases brought by established NGOs and newer entities like the GLP.

Crowdfunding exists at a point of tension, with the potential to enable both valuable public interest litigation and more problematic politically motivated challenges. The emergence of crowdfunded judicial review creates both opportunities and challenges for the constitutional role of courts. The constitutional position of judicial review represents a delicate balance within the separation of powers framework, ensuring that courts exercise oversight of executive action in a manner that respects the democratic legitimacy of elected branches. This creates an inherent tension, requiring courts to enforce legal boundaries without encroaching on policy-making functions constitutionally assigned to the government. Crowdfunding significantly challenges these constitutional boundaries by potentially transforming traditional standing limitations and the relationship between litigants and claims.

External actors can identify and financially encourage individuals to pursue litigation that primarily serves broader political agendas rather than genuine personal grievances. This arrangement allows politically motivated groups to circumvent standing requirements by using individuals as figureheads, undermining the constitutional principle that judicial review should address real legal wrongs rather than policy disagreements. Furthermore, the anonymity often associated with crowdfunding contributions can obscure the true motivations and interests behind litigation, making it difficult for courts to assess whether cases serve genuine public interest or merely partisan objectives.

[154] Tomlinson (n 148).

The proliferation of such politically driven cases increases the risk of judicial politicisation, as courts become forums for policy debates rather than legal adjudication, potentially undermining public confidence in judicial neutrality and constitutional authority. Finally, the removal of financial barriers through crowdfunding also risks encouraging litigation that lacks merit or genuine necessity. When financial constraints no longer filter weak or politically motivated claims, courts face increased caseloads of challenges that may lack legal foundation but benefit from popular support.

These constitutional tensions surrounding crowdfunded litigation exemplify the broader challenges facing the UK's evolutionary constitutional framework. While crowdfunding has enhanced access to judicial review and enabled valuable public interest challenges, it has simultaneously introduced risks of judicial politicisation and constitutional boundary-blurring that require institutional response. The constitutional system's capacity to address these challenges will likely determine whether crowdfunding becomes a beneficial enhancement to accountability mechanisms or a disruptive force undermining judicial authority.

3.6 Conclusion

The development of third-party intervention in UK judicial review represents a significant change in the constitutional landscape, paralleling and interacting with the development of the doctrine of standing. This evolution reflects perfectly the inherent adaptability of the UK's uncodified constitution. Just as standing doctrine broadened through cases such as *Fleet Street Casuals*, *Greenpeace* and *WDM* in response to the demands of public interest in upholding the rule of law through legal accountability — while being nuanced in cases like *Runnymede* and *Abingdon* by imposing higher thresholds of demonstrable expertise and tangible interest, reasserting the boundaries of public interest standing without reverting to the private law logic of *Rose Theatre* — so too intervention rules have extended participation in judicial review broadening it beyond standing claimants to include a broader range of civil society actors. This illustrates a shift from inter partes individual grievance-focussed adversarial proceedings to a more expansive constitutional forum that is attentive to constitutional boundaries while expanding the scope and strength of judicial review in upholding the rule of law. Rather than mere procedural changes, these

developments illustrate a context-sensitive recalibration of the judicial role, ensuring that the expansion of review remains anchored to constitutional principles. Similarly, the emergence of crowdfunding represents another evolutionary step in this constitutional landscape, albeit one that creates new tensions in judicial review's scope as courts must determine when financial support from numerous donors transforms a challenge from political contestation into legitimate legal scrutiny. The rise of crowdfunding thus further tests the constitutional position of judicial review by necessitating clearer principles for distinguishing between genuine public interest litigation and politically motivated claims that may exceed the constitutional boundaries of judicial oversight.

Third-party interventions have contributed significantly to broadening the constitutional function of judicial review. By introducing different perspectives, specialised expertise and wider public interest considerations, interventions have helped to transform judicial review from a narrow test of administrative legality into a more robust mechanism for constitutional scrutiny. Cases such as *Miller/Cherry* and the abortion litigation in Northern Ireland illustrate how interveners have successfully reframed disputes from questions of procedure or jurisdiction to questions of fundamental constitutional principle.

However, developments both in standing and intervention potentially challenge the traditional boundaries between legal adjudication and political decision-making. It is demonstrated that courts have responded by developing limiting principles — emphasising the need for distinctive contributions from interveners and meaningful expertise from public interest litigants — that seek to maintain the integrity of judicial review while recognising its expanded role. The parallel evolution of intervention and standing doctrines in this sense ultimately reveals judicial review as a constantly recalibrating mechanism that seeks to balance competing constitutional values: access to justice, effective governance, democratic accountability and the rule of law.

These developments demonstrate that judicial review's constitutional role is itself subject to ongoing debate and evolution. Rather than having a single pre-defined role, judicial review operates within competing visions of its appropriate scope that gain prominence at different times. These competing approaches —

from narrow procedural oversight to robust constitutional oversight — are reflected in the changing patterns of standing and intervention law. The shifts between restrictive and permissive approaches demonstrate how constitutional understanding evolves in response to changing political and institutional contexts. Courts have not simply found the ‘correct’ balance but have instead engaged in a continuous and dynamic negotiation of judicial review’s appropriate scope within the constitutional balance — one that responds to changing institutional and political contexts while remaining anchored to constitutional principles.

Chapter 2: The Human Rights Act 1998: Constitutional Rebalancing and the Transformation of Judicial Review

4 The Scope of Judicial Review and the Principle of Parliamentary Sovereignty following the Human Rights Act 1998

4.1 Introduction

In this chapter I will examine the scope of judicial review under the Human Rights Act 1998 ('HRA') and the European Convention on Human Rights ('ECHR' or 'Convention') in order to demonstrate the current scope of review and the implications of any change in the scope of review, as caused by the HRA, on the constitutional principles of parliamentary sovereignty and the rule of law. The enactment of the HRA represents the most significant legislative intervention in the trajectory this thesis traces, one that simultaneously enhanced judicial capacity to protect rights and raised the acute question of whether enhanced judicial protection of rights is compatible with the foundational principle of parliamentary sovereignty. In the light of the HRA, first, I will examine the relationship between the courts and Parliament, including the review of Acts of Parliament, and then the relationship between the executive and the courts.

Firstly, in order to understand the effect of the legislation on review, it is necessary to understand why and how the HRA 1998 was enacted, and what kind of problems it was intended to solve. The United Kingdom ratified the European Convention on Human Rights in 1951, and it came into force in 1953. However, the rights in the Convention were not given domestic legal effect until the HRA 1998 came into force in October 2000. Because violations of rights are not in themselves grounds for judicial review under UK law, challenges had to fall within one of the pre-existing grounds for review. This is because rights are not recognised in the same way as under the Convention. One of the main purposes

of the HRA 1998 was to give effect to the Convention rights in domestic law and to end this disparity between domestic law and international law obligations.[1]

The HRA 1998, along with other changes it made to domestic law,[2] particularly enabled domestic courts to review Convention rights and made it unlawful for public authorities to act incompatibly with the Convention rights. In this way, the aim was to avoid the lengthy and expensive process of taking cases to the Strasbourg Court and to make Convention rights directly accessible in the domestic courts.[3] Consequently, the UK courts have had the opportunity to contribute directly to the development of ECHR jurisprudence through their judgments.[4] More importantly, for the purposes of this section, UK courts were given a duty (and power) to protect Convention rights in accordance with the Convention. Although the role of the courts to protect fundamental rights was a part of common law even before the HRA,[5] the Act provides a stronger form of detailed, dynamic, and relatively fast-developing human rights protection than exists at common law.

Secondly, a number of provisions of the HRA are of special importance for the purposes of this chapter and will now be read closely. These include section 1 of the Human Rights Act, which identifies the 'Convention rights' for the purpose of the Act as inter alia the rights set out in Articles 2-12 and 14 of the Convention, Articles 1-3 of the First Protocol and Article 1 of the Thirteenth Protocol. These rights were made legally enforceable before the courts in a

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[1] Rights Brought Home: The Human Rights Bill (Cm 3782, 1997) [2.7]; Colm O'Cinneide, 'Human Rights and the UK Constitution' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, OUP 2019) 77.

[2] Examples include statements of compatibility under section 19 of the HRA, and the Act's overall incorporation of Convention rights into domestic law.

[3] Rights Brought Home: The Human Rights Bill (n 1).

[4] *Al-Khawaja v United Kingdom* (2012) 54 EHRR 23 in light of the Supreme Court's decision in *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373; *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 in light of the House of Lords' decision in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312; *S v Denmark* (2019) 68 EHRR 17 in light of the Supreme Court's decision in *R (Hicks) v Commissioner of Police for the Metropolis* [2017] UKSC 9, [2017] AC 256; Lord Reed, 'Response to a Call for Evidence produced by the Independent Human Rights Act Review' (December 2021) Supreme Court of the United Kingdom <https://www.supremecourt.uk/uploads/independent_human_rights_act_review_uksc_214bcdef91.pdf> accessed 1 June 2025.

[5] Lord Steyn, 'Deference: a Tangled Story' [2005] PL 346, 348-49; See *R (Unison) v Lord Chancellor* [2017] UKSC 51.

number of ways. According to section 3(1), legislation must be interpreted and given effect in a way that is compatible with the Convention rights, *so far as it is possible*:[6] a more powerful obligation than taking into account the Convention.[7] When they do so, section 2 requires the courts to take account of the Strasbourg jurisprudence.[8] Section 4 allows a UK higher court to issue a declaration of incompatibility if it nevertheless finds a provision of statute to be incompatible with Convention rights. Public authorities are required to act in accordance with the Convention under section 6, except where it is contrary to statute to do so.[9]

Thirdly, I argue that the HRA establishes a shared responsibility among the judiciary, the executive, and the legislature – not only by making it unlawful for any public authority aside from Parliament to act inconsistently with the Convention, but also by requiring ministers to make statements of compatibility under section 19, informing Parliament whether proposed legislation is compatible with Convention rights.[10] The requirement that the implications for

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[6] Section 3(1) of the Human Rights Act 1998: '(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights [...]'

[7] *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 [44] (Lord Steyn).

[8] The European Court of Human Rights' judgements should be followed with clarity and consistency. However, the ECtHR case law is not strictly binding on the courts; there is no obligation to follow Strasbourg jurisprudence if there are valid reasons not to do so. Additionally, UK courts consider domestic law first before ECtHR jurisprudence. See *R (Animal Defenders) v Secretary of State for Culture, Media and Sport* (n 4); *R v Horncastle* (n 4); *Osborn v Parole Board* [2013] UKSC 61; *Kennedy v Charity Commission* [2014] UKSC 20; *Re G (A Child) (Adoption: Unmarried couple)* [2008] UKHL 38.

[9] Section 4 of the Human Rights Act 1998: '(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right. (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility [...] (6) A declaration under this section ('a declaration of incompatibility'—(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given [...]'

[10] Section 19 of the Human Rights Act 1998 requires the Minister responsible for a Bill to make a statement to Parliament indicating whether the Bill is compatible with Convention rights or, if not, that the Government nevertheless intends to proceed with it. This mechanism has been politically significant in recent legislation, such as the Illegal Migration Act 2023 and the Safety of Rwanda (Asylum and Immigration) Act 2024, where the Government proceeded despite being unable to make a positive compatibility statement. See also: Aileen Kavanagh, 'Is the Illegal Migration Act itself illegal? The meaning and methods of section 19 HRA', (UK Constitutional Law Blog, 10 March 2023) <https://ukconstitutionallaw.org/2023/03/10/aileen-kavanagh-is-the-illegal-migration-act-itself-illegal-the-meaning-and-methods-of-section-19-hra/\> accessed 7 May 2025; Elin Weston, 'Section 19 of the Human Rights Act 1998: Importance, Impact and Reform' (PhD thesis, King's College London 2013) <https://kclpure.kcl.ac.uk/portal/en/studentTheses/section-19-of-the-human-rights-act-1998\> accessed 7 May 2025; Adam Tomkins, 'Written evidence from Professor Adam Tomkins

human rights be taken into account has influenced, at least politically, legislation and policy-making in the UK.[11] Ministers must either affirm compatibility with Convention rights or explicitly acknowledge that legislation proceeds despite potential incompatibility, as occurred with the recently controversial Illegal Migration Act 2023 and Safety of Rwanda Act 2024.[12] The objective was to enhance human rights protection through systematic pre-legislative scrutiny, creating a more robust parliamentary debate on rights implications before laws are enacted. And it seems to be effective indeed.[13] In identifying a shared constitutional responsibility among the judiciary, the executive, and the legislature, this shares certain structural similarities with the collaborative and dialogic models advanced by Gardbaum, Young and Kavanagh examined in the introduction — though this thesis approaches that shared responsibility through a different analytical lens, asking not how rights are best protected but how judicial review has shaped the constitutional balance within which that responsibility operates

Although the Act empowers the courts to quash or declare unlawful the acts by public authorities which violate rights within the Act under section 6, it was deliberately designed to preserve parliamentary sovereignty by ensuring that declarations of incompatibility do not affect the validity, continuing operation, or enforcement of primary legislation.[14] The courts have no power to disapply or strike down the Acts of Westminster Parliament, and Parliament can still legislate contrary to Convention rights. In this sense, therefore, Parliament retains the final say within the UK legal system and thus the ultimate domestic

(HRA0012)' (UK Parliament, 7 March 2022) <https://committees.parliament.uk/writtenevidence/106854/html/> accessed 7 May 2025.

[11] Weston(n 10); See also Lord Rodger in *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [106]: 'section 3 is carefully drafted in the passive voice to avoid specifying, and so limiting, the class of persons who are to read and give effect to the legislation in accordance with it.'

[12] The earlier examples where the government was unable to make a positive statement of compatibility include the Local Government Bill 2000, the House of Lords Reform Bill 2012, and the Communications Bill 2002.

[13] Kavanagh (n 10).

[14] Section 4(6): 'A declaration under this section ("a declaration of incompatibility") (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given'; *A and others v Secretary of State for the Home Department* [2004] UKHL 56 [37] – [42]; *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 [39] (Lord Nicholls); Rights Brought Home: The Human Rights Bill (n 1) [2.13].

responsibility for Convention rights protection, though this does not negate the UK's international obligations under the ECHR.

It is clear, therefore, that the HRA has expanded the statutory scope of judicial review by making all public authority decisions and legislation subject to judicial review in relation to Convention rights, and moreover by providing domestic legal protection to some Convention rights which are not (yet) recognised in common law,[15] and by requiring courts to interpret legislation compatibly with Convention rights. This expansion has been achieved both by the duty to act compatibly with Convention rights, which is imposed on the courts as well as other public authorities, and by the duty imposed on the courts which, through judicial interpretation of section 3, has been determined to permit modification of even seemingly unambiguous statutory language to achieve Convention compatibility. The HRA also, in effect, introduced a proportionality test, thereby increasing the depth of judicial review beyond the traditional *Wednesbury* unreasonableness standard.[16] In practice, as discussed below, these expanded judicial powers and more intensive standards of review raised questions about the institutional and constitutional boundaries of the courts, which are closely linked to parliamentary sovereignty, separation of powers principles and the rule of law.[17]

From a constitutional perspective, several questions are raised by this description of the key provisions, such as whether and to what extent such reviews lead to changes in government policy and executive discretion.[18] Another, which will be considered here first, is whether parliamentary sovereignty has been affected by the HRA in practice, particularly under the duty to interpret an Act of Parliament consistently with ECHR rights. This chapter supports the proposition that the evolution of judicial review since the HRA's enactment represents neither a revolutionary transformation nor a mere

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[15] Such as right to respect for private and family life under Article 8.

[16] See the next section of this chapter.

[17] *A and others v Secretary of State for the Home Department* (n 14) [44] (Lord Bingham): 'The greater intensity of review now required in determining questions of proportionality.'

[18] Richard Ekins, 'Protecting the Constitution: How and Why Parliament should Limit Judicial Power' (Policy Exchange, 2019) <https://policyexchange.org.uk/wp-content/uploads/2020/01/Protecting-the-Constitution.pdf.> accessed 1 July 2025. Discussed in the following section.

preservation of the *status quo*, but rather an incremental yet significant reconfiguration of constitutional relationships. The HRA exemplifies how statutory innovation, operating with explicit parliamentary consent, has contributed to creating a system of judicial oversight that is both robust and carefully calibrated to preserve parliamentary supremacy while enhancing judicial scrutiny. I argue that Parliament remained supreme and parliamentary sovereignty has been preserved in practice against claims of judicial supremacy. However, the dynamics between the executive, legislature and judiciary have changed in accordance with the expansion of the scope of judicial review. The HRA preserves parliamentary sovereignty but modifies its practical operation. Under section 3, courts may modify even seemingly unambiguous statutory language to achieve Convention compatibility, provided they do not act contrary to a fundamental feature of the legislation.

The political and constitutional costs of legislating contrary to the Convention — coupled with the judiciary's enhanced role in scrutinising statutory compatibility — have created a more rights-focused and collaborative framework among the institutions, namely the Parliament, executive and judiciary. The perception of the parliamentary sovereignty principle has evolved from its traditional Diceyan conception of absolute and unqualified legislative supremacy to one where courts are under the HRA democratically mandated to modify the effect of legislation and, arguably, Parliament's intention within the statutes through interpretive techniques that would previously have been considered impermissible judicial legislation. This evolution exemplifies the contextual and incremental development that characterises modern constitutional adaptation, demonstrating how the creative tension between parliamentary sovereignty and the rule of law generates new forms of institutional accommodation. This transformation does not represent judicial supremacy but rather illustrates how constitutional principles adapt to contemporary governance challenges while maintaining their essential character. The courts' interpretive mandate derives explicitly from parliamentary will, creating a framework where enhanced judicial oversight operates within, rather than against, the continuing supremacy of Parliament.

To demonstrate this evolving dynamic, this section first examines the expansive interpretation permitted by section 3, focusing on *R v A (No 2)*[19] as the high-water mark of judicial interpretive power. This case illustrates the courts' initially far-reaching approach to statutory reinterpretation to secure Convention compliance. The analysis then shifts to the less intrusive mechanism of declarations of incompatibility under section 4, examining how even this more deferential power reflects continuing institutional and constitutional limitations. Key cases such as *Nicklinson*[20] and *Re an application by the NIHRC for Judicial Review (NI)*[21] highlight the complexities of judicial self-restraint in morally contentious areas, demonstrating that courts remain mindful of their institutional role even when exercising their declaratory powers. Finally, the study returns to section 3's application in practice, as this raises distinct concerns for parliamentary sovereignty despite the courts' generally cautious approach. This section analyses the interpretative boundaries established in cases like *Bellinger v Bellinger*[22] and *Ghaidan v Godin-Mendoza*,[23] which developed the 'grain of the legislation' principle, before critically assessing the controversial approach in *DPP v Ziegler*[24] to illustrate the continuing challenges in defining appropriate judicial intervention limits.

The HRA exemplifies how statutory innovation can contribute to constitutional evolution that is both incremental and significant, creating new institutional dynamics while maintaining essential constitutional principles. The enhanced judicial power under the HRA serves to develop and uphold democratic authority, rather than replace it, operating within the ongoing framework of parliamentary sovereignty to establish a more rigorous yet flexible system of constitutional governance. This constitutional order reflects the evolving nature of judicial review in the twenty-first century. Enhanced judicial scrutiny does not function as a challenge to democratic authority; rather, it serves as a mechanism to ensure that democratic governance operates within a framework

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[19] *R v A (No 2)* (n 7).

[20] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.

[21] *Re an application by the NIHRC for Judicial Review (NI)* [2018] UKSC 27.

[22] *Bellinger v Bellinger* [2003] UKHL 21.

[23] *Ghaidan v Godin-Mendoza* (n 11).

[24] *Director of Public Prosecutions v Ziegler* [2021] UKSC 23.

that respects both parliamentary supremacy and constitutional principles, particularly the rule of law and the protection of human rights.

4.2 The HRA Changes to the Courts' Review of Acts of Parliament

4.2.1 Extent of the Power of Interpretation so far as Possible Compatibly with Convention and Incompatibility Declarations

The HRA 1998 made all decisions of public bodies and legislation potentially reviewable on human rights grounds and, as noted above, section 4 by stating a declaration of incompatibility 'does not affect the validity, continuing operation or enforcement of the [primary legislation]' preserved the principle of parliamentary sovereignty which establishes Parliament's supreme legal authority to enact or repeal any law, with no other body having the power to override or set aside Acts of Parliament.[25] However, the duty given to the courts under section 3 requires courts to interpret all legislation, both pre- and post-HRA, without requiring that its terms be ambiguous (or unambiguous), 'so far as possible' to be compatible with Convention rights[26], is a matter of concern for parliamentary sovereignty, in the sense that it permits courts to adopt interpretations that may significantly depart from the apparent meaning of the statutory text or Parliament's original intent. As will be examined below, in cases like *Ghaidan v Godin-Mendoza*,[27] courts have used section 3 to read words into statutes or interpret them in ways that Parliament might not have contemplated when enacting the legislation. This interpretive power effectively allows judges to modify statutory meaning to achieve Convention-compatibility without formal amendment by Parliament, thus arguably circumventing the traditional understanding that only Parliament can alter its own enactments.

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[25] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959) 39–40; *R (Simms) v Secretary of State for the Home Department* [2000] 2 AC 115, 131F: 'Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal.'

[26] *R v A (No 2)* (n 7); *Ghaidan v Godin-Mendoza* (n 11) [23], [29] (Lord Nicholls), [44] (Lord Steyn).

[27] *Ghaidan v Godin-Mendoza* (n 11); *Director of Public Prosecutions v Ziegler* (n 24).

Critics like Bennion contend this creates a 'parallel legislative authority' that functionally, if not technically, erodes parliamentary sovereignty's core premise.[28] Bennion further argues that section 3(1), undermines the fundamental concept of law by compelling courts to misrepresent the linguistic meaning of other Acts of Parliament — meaning that has traditionally been determined by legislative intent at the time of enactment. Regarding pre-existing legislation, this represents a problematic instance of retrospective lawmaking. For future legislation, it constitutes an improper attempt to constrain subsequent Parliaments.[29]

The HRA's relevant provisions for this part's purposes, therefore, start with section 3, which provides a legal remedy to the person whose rights might have been violated in the specific case, and an immediate solution to potential violations of convention rights contrary to declarations of incompatibility which only make Parliament aware of the violation without any binding force on Parliament and cause delay while potential appeals are being made.[30] The declaration of incompatibility, additionally, does not affect the issue being litigated, and the courts proceed on the basis that the law is valid.[31] Nevertheless, since declarations of incompatibility have no legal effect on the validity of the impugned Acts of Parliament, courts may paradoxically be less deferential in their reviews and more willing to scrutinise legislation.[32] The interpretive approach under section 3 appears to challenge parliamentary sovereignty, however, the deeper constitutional reality reveals, in fact, something more sophisticated: Parliament itself deliberately crafted this interpretive framework as an exercise of its sovereign power. By enacting the HRA 1998, Parliament consciously chose to create a mechanism that incorporates

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[28] Francis Bennion, 'Human Rights: A Threat to Law?' [2003] 26 UNSWLJ 418, 433.

[29] ibid 434.

[30] Lady Hale, ' Oral Evidence to the Joint Committee on Human Rights' (3 February 2021) Q27 <https://committees.parliament.uk/oralevidence/1661/html/> accessed 1 June 2025; Independent Human Rights Act Review, 'Independent Human Rights Act Review Report' December 2021, [48]; Alisdair Gillespie and Siobhan Weare, *The English Legal System* (9th edn, OUP 2023) ch 5; Tom Hickman, 'Bill of Rights Reform and the Case for Going beyond the Declaration of Incompatibility Model' (2015) 2015 NZ L Rev 35.

[31] Section 4(6) of the HRA: 'A declaration [of incompatibility] (a)does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b)is not binding on the parties to the proceedings in which it is made.'

[32] ADP Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge University Press 2012).

Convention rights into domestic law without formally ceding its (ultimate) authority to legislate contrary to Convention rights.

The duty under section 3 is indeed a potential concern for parliamentary sovereignty because its boundaries are not precisely defined within the statute.[33] The phrase ‘so far as it is possible to do so’ leaves open the question of how far courts may go in interpreting legislation to achieve compatibility. This duty of interpretation therefore entails several risks: that an overly cautious approach to interpretation may unduly restrict the scope of the legal protection afforded by the HRA — contrary to the intention of Parliament — or that judges may trespass on the legislative domain of elected representatives if they go too far and in effect rewrite the law.[34] Furthermore, an excessive use of section 3 risks rendering the declarations of incompatibility in section 4, which are provided by the legislature for a certain purpose within the HRA, redundant, by removing the possibility that courts will ever have to make them.[35] Against this background, the courts have recognised several limits to their duty of interpretation – and therefore of judicial review, in certain cases, namely institutional and constitutional limits, and the need not to contradict Parliament's overall intention within statutes. The treatment and application of both sections by the courts inevitably affect the scope of judicial review, that is, the extent and limits within which courts review the lawfulness of decisions taken by public bodies. In other words, it determines to what extent a court is empowered to review and adjudicate upon human rights claims.

Lastly, it is crucial to acknowledge the substantial divergences between interpreting the law in a manner that is consistent with the Convention and issuing declarations of incompatibility. These discrepancies pertain to the functionality, role, and legal effect of the two powers. Given that section 4 is a

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[33] *R v A (No 2)* (n 7) [108]:’Compatibility with Convention rights is the sole guiding principle.’; *Ghaidan v Godin-Mendoza* (n 11) [104] (Lord Rodger).

[34] *Ghaidan v Godin-Mendoza* (n 11) [61] (Lord Millett), [121] (Lord Rodger); Independent Human Rights Act Review (n 30) 205; Lord Wolfson, 'Oral Evidence to the Joint Committee on Human Rights: Human Rights Act Reform', HC 1033 (2 February 2022); Brian Thompson, Michael Gordon and Adam Tucker, *Cases and Materials on Constitutional and Administrative Law* (13th edn, OUP 2021) ch 9, 453.

[35] Roger Masterman and Ian Leigh, *Making Rights Real: The Human Rights Act in its First Decade* (Bloomsbury 2008) 97; IHRAR Report (2021) [44].

necessary complement to section 3,[36] which applies when section 3 cannot be used in the case and is a last resort; and because the analysis in this chapter is primarily concerned with broadening or narrowing the scope of judicial review rather than the procedural aspects of judicial review, sections 3 and 4 of the HRA will be examined together, noting the necessary differences. I aim to explain the operation of sections 3 and 4 from the perspective of the factors that limit the jurisdiction of the courts to hear human rights claims and so the scope of judicial review.

4.2.1.1 The Expansive Interpretation of Section 3: *R v A (No 2)* as the High-Water Mark

It was one of the key questions when the HRA was enacted, whether and to what degree Parliament's intention in enacting legislation would be relevant in interpretation so far as compatible with the Convention.[37] This question, in turn, delineates the boundaries of the application of section 3 and, although indirectly, section 4 of the HRA. The first case examined here is the case of *R v A (No 2)*,[38] handed down in 2001. This case is seen as the high-water mark of section 3's application, and beyond the breaking point of interpretation since the House of Lords considered itself entitled in exercise of that obligation to interpret the statute contrary to the intention of Parliament.[39]

In the case, the defendant, accused of rape, sought leave to question the victim about her previous relationship and sexual activity immediately before the alleged rape. He claimed that section 41 of the Youth Justice and Criminal Evidence Act 1999, which prohibited such questioning in order to prevent the unnecessary humiliation of rape victims during trial, breached his right to a fair

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[36] Independent Human Rights Act Review (n 30) 186.

[37] Lord Hope in *Ghaidan v Godin-Mendoza* (n 11) [108]: '[…] section 3 does not entitle the court to legislate; its task is still one of interpretation. The compatibility is to be achieved only so far as this is possible. Plainly this will not be possible if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible. It seems to me that the same result must follow if they do so by necessary implication, as this too is a means of identifying the plain intention of Parliament.'

[38] *R v A (No 2)* (n 7).

[39] Independent Human Rights Act Review (n 30) 194; Richard Ekins and Graham Gee, 'Submission to the Joint Committee on Human Rights', 20 years of the Human Rights Act (18 September 2018) <https://policyexchange.org.uk/wp-content/uploads/2018/10/JPP-submission-to-the-JCHR-inquiry-18-September-2018.pdf\> accessed 1 June 2025; See also the Court of Appeal case of *R v Offen* [2001] 1 WLR 253.

trial protected in Article 6 of the Convention. The House of Lords first refused to grant a declaration of incompatibility, holding that it is a measure of last resort for the courts. Secondly, a majority, against a powerful dissent by Lord Hope, interpreted the unambiguous words of the Act under section 3 of the HRA. The majority held that questioning about sexual history might be admissible and that its admissibility must be decided by the trial judge according to its relevance.[40] However, this interpretation ran contrary to Parliament's clear intention in enacting Section 41, which was precisely to limit the scope of such questioning to protect victims. This interpretation was excessive in that it significantly changed the nature of the interpretation process and appeared to depart from Parliament's original legislative intent in a way that contravened the core feature of that legislation.

Lord Steyn suggested at paragraph 44 that the boundaries of the application of section 3 are very wide to allow courts to interpret legislation extensively, even if it may seem linguistically strained. This was remarkable. He stated that:

> 'Parliament specifically rejected the legislative model of requiring a reasonable interpretation. Section 3 places a duty on the court to strive to find a possible interpretation compatible with Convention rights. Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: section 3 is more radical in its effect. […] In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained.'[41]

It was, however, controversial whether the HRA licensed such broad interpretations that would effectively allow the courts to reinterpret statutes contrary to Parliament's original intention (therefore allowing them unduly to re-

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[40] *R v A (No 2)* (n 7) [108] (Lord Hope): 'I should like to add however that I would find it very difficult to accept that it was permissible under section 3 of the Human Rights Act 1998 to read in to section 41(3)(c) a provision to the effect that evidence or questioning which was required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible.' And at [109]: 'It seems to me that it would not be possible, without contradicting the plain intention of Parliament, to read in a provision which would enable the court to exercise a wider discretion than that permitted by section 41(2).'; Ekins and Gee (n 39) [18]; Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights (CP 588, December 2021) [118].

[41] [44]; See also Lord Irvine LC, Hansard, HL, 18 November 1997, vol. 583, col. 535 at 50: 'whenever [such a possible interpretation] is possible according to language of the statutes'; Jack Straw MP, Hansard, HoC, 3 June 1998, vol. 313, col. 422 at 55.

write or practically limit the application of statutes contrary to Parliament's intention, thereby breaching the doctrine of parliamentary sovereignty) and, indeed, was not approved in later cases. Such a strained interpretation enables the *de facto* creation of legal rules that are not grounded in statute, effectively empowering judges to rewrite the entire body of extant legislation. Such novel judicial lawmaking, divorced from the common law traditions of statutory interpretation, represents a departure from conventional legal evolution — a role that is better suited to the executive and Parliament than to courts engaging in uncertain interpretative territory. Within a few years, the Supreme Court (formerly the House of Lords) acknowledged certain limitations on the interpretive power of section 3 (with implications for the use of incompatibility declarations under section 4) in cases particularly such as *Bellinger v Bellinger*[42] and *Ghaidan v Godin-Mendoza*.[43]

4.2.1.2 Institutional Competency as a Limiting Factor of the Scope of Review

The principle of institutional competence embodies the notion that decision-making authority should be allocated to the institution or body that possesses the most relevant expertise, experience, or formal mandate to address a particular issue or perform a specific function. This concept is a reason for deference and emphasises the importance of matching decision-making responsibilities with the most capable and appropriate institutional entities.[44] The weight given to competency depends on the facts of the cases and context and varies according to numerous factors such as who is the one that the responsibility is afforded to, who is able to reach the correct judgement, whether the issue can be accurately answered or whether the decision is a result of educated guesswork as it is in national security or public health matters.[45] These are the factors that eventually determine the scope of judicial review. In the following cases, we will see that the effect of HRA is also limited in practice in the issues of social policy or controversial moral questions due to judicial

[42] *Bellinger v Bellinger* (n 22).

[43] *Ghaidan v Godin-Mendoza* (n 11).

[44] Brady (n 32) 106-114; Alison Young, 'Ghaidan v Godin-Mendoza: avoiding the deference trap' [2005] PL 23.

[45] Brady (n 32) 114.

institutional constraints, including limitations in expertise, democratic legitimacy, and constitutional role.

This institutional competence as a ground for deference is not confined to the HRA context, as the first chapter demonstrated, it has been a consistent justification for judicial restraint even where courts' jurisdiction over the national security and foreign policy matters is recognised. Under the HRA, however, its operation takes a distinctive form. First, courts act under an explicit statutory duty to engage with Convention rights, making restraint, where it occurs, a more deliberate constitutional choice; second, the grounds for restraint generally differ, resting not on executive expertise, as most often in national security and foreign policy contexts, but on the recognition that certain value judgments, notwithstanding that duty, are more legitimately made by a democratically accountable Parliament.

Courts do not rule out the possibility of judicial review on the grounds that the challenged issue is related to a social policy or moral question. However, institutional limitations continue to hold significant importance to courts. The Supreme Court is aware of its institutional and constitutional limitations, not only in terms of its interpretative powers but also in cases where the matter in dispute is not remedied by interpreting or modifying domestic law but is referred to Parliament, in other words, where declarations of incompatibility are issued. A nuanced examination of institutional competency reveals that it can expand the scope of judicial review in human rights claims beyond traditionally political domains, particularly when fundamental rights are directly at stake and the courts have specialised legal knowledge about protecting rights that political institutions tend to overlook.

Firstly, two years after *R v A (No 2),* in *Bellinger v Bellinger*,[46] the House of Lords recognised that section 3 could not be used to interpret the law where the interpretation would have policy implications beyond the relevant legislation, on the ground that the issue was outside the institutional jurisdiction of the courts. The Court held that the interpretative power set out in section 3 of the HRA cannot be used as a power that amounts to *de facto* legislative power, and that

[46] *Bellinger v Bellinger* (n 22).

the institutional limitations on the courts were not removed by the requirement to interpret the statutes in a manner consistent with Convention rights.

In this case, the House of Lords was asked whether the marriage between Mr and Mrs Bellinger was valid. Mrs Bellinger, a post-operative transsexual person who was married to Mr Bellinger, sought a declaration that section 11(c) of the Matrimonial Causes Act 1973, which provides that a marriage is void unless it is between a male and a female, was incompatible with Articles 8 (right to respect for private and family life, home and correspondence) and 12 (right to marry) of the ECHR. In determining whether a post-operative transsexual person was within the terms used in the 1973 Act, judges had to consider the broader policy implications and practical challenges arising from exercising an extended interpretation of 'male' and 'female'. The House of Lords unanimously decided that the law was clear and that an interpretation which was compatible with the Convention would be outside the Court's jurisdiction. It was because such an interpretation would raise difficult policy questions and require deep investigation, widespread public participation, and an assessment of social policy issues and administrative feasibility.[47]

The House of Lords, therefore, issued a declaration of incompatibility as section 11(c) was not compatible with Articles 8 and 12 of the Convention. In conclusion, it underscored the necessity for comprehensive legislation to acknowledge gender reassignment, while also delineating the limitations of judicial interpretation under the HRA. Following the *Bellinger v Bellinger* case, the institutional response followed quickly: the Gender Recognition Act 2004, a significant advance towards the eventual legal recognition of transgender rights in the UK, was passed. This Act granted legal recognition of gender identity to transgender individuals, as well as the right to marry or enter into a civil partnership. This approach in *Bellinger v Bellinger* established a precedent for similar cases involving statutory interpretation and Convention rights such as *R (Wilkinson) v Inland Revenue Commissioners*,[48] where the House of Lords

[47] Bellinger v Bellinger (n 22), [37] (Lord Nicholls); Lord Hope at [62], [69]: '[62] Any attempt to enlarge [the word "male"] meaning would be bound to lead to difficulty, as there is no single agreed criterion by which it could be determined whether or not a transsexual was sufficiently "male" for the purpose of entering into a valid marriage ceremony.'

[48] *R (Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30.

declined to interpret the term ‘husband’ in tax legislation to include a same-sex partner, on the grounds that doing so would be incompatible with the clear statutory language — further illustrating the courts' recognition of institutional boundaries in matters of social policy.

The Supreme Court confronted even more controversial social policy questions with broad social and legal implications nearly a decade after *Bellinger v Bellinger* in two landmark cases: *R (Nicklinson) v Ministry of Justice*[49] *(‘Nicklinson’)* concerning assisted suicide in 2014, and later in *Re an application by the NIHRC for Judicial Review (NI)*[50] regarding abortion in 2018. In the context of declarations of incompatibility, in *Nicklinson*, the Supreme Court was asked whether section 2(1)[51] of the Suicide Act 1961, creating the offence of assisting someone else to commit suicide, constituted a disproportionate, and therefore an unjustifiable, interference with Article 8[52] rights of individuals with locked-in syndrome.[53] A central question before the Court was whether it possessed the constitutional and institutional competence to decide if section 2 infringed Article 8 of the ECHR.[54]

Unlike *Bellinger v Bellinger*, where the issue primarily concerned the need for comprehensive legislation and clear definitional boundaries, the challenge in *Nicklinson* stemmed from the absence of any definitive or objectively ‘correct’ answer. The matter was deeply controversial among relevant parties and encompassed sensitive moral and religious considerations. The court was therefore required to consider not only the broad social policy implications that may arise but also to navigate competing moral and ethical frameworks in an area where reasonable people could profoundly disagree about fundamental

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[49] *R (Nicklinson) v Ministry of Justice* (n 20).

[50] *Re an application by the NIHRC for Judicial Review (NI)* (n 21).

[51] Section 2(1) of the Suicide Act 1961: ‘(1) A person ("D") commits an offence if— (a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and (b) D's act was intended to encourage or assist suicide or an attempt at suicide. […] (1C) An offence under this section is triable on indictment and a person convicted of such an offence is liable to imprisonment for a term not exceeding 14 years. […] (4) [N]o proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions.’

[52] Respect for the private and family life.

[53] These individuals are fully conscious and aware, yet their bodies are paralyzed.

[54] *R (Nicklinson) v Ministry of Justice* (n 20) [58].

values. Although a minority of the judges believed that the Court had the institutional and constitutional competency to issue a declaration of incompatibility,[55] the Supreme Court, by majority, concluded that the questions fell outside the institutional and constitutional competency of the courts and therefore declined to issue a declaration of incompatibility.

However, in 2018, in *Re an application by the NIHRC for judicial review*, the Supreme Court took a markedly different approach. A majority of the Supreme Court were prepared to issue a declaration of incompatibility on the ground that the abortion law of Northern Ireland was interfering unjustifiably with the Convention rights. Unlike in *Nicklinson*, the majority did not consider the issue to be outside the Court's institutional competence. This evolution in judicial approach warrants closer examination. The following analysis will focus on the *Nicklinson* judgment to illuminate the nuanced reasoning employed by the Supreme Court justices when confronted with contentious social policy questions. This examination will reveal how the Court established the legitimate boundaries of judicial review in cases involving complex moral considerations and competing societal values, effectively delineating when courts should defer to Parliament and when they may properly intervene to protect Convention rights.

4.2.1.3 Institutional Boundaries and Judicial Discretion: Analysing the *Nicklinson* Approach to Declarations of Incompatibility

This case highlights the potential for the judiciary's powers under HRA, — particularly to issue incompatibility declarations under section 4 of the HRA — to extend into deeply controversial and morally charged areas that have traditionally been reserved for Parliament. The judges unanimously held that section 2(1) could not be read and given effect under section 3 of the HRA in a way that would remove any incompatibility with Convention rights. More significantly, the majority, as explained in the following paragraphs, even considered issuing a declaration of incompatibility would be institutionally inappropriate in the context of the case. This position is particularly noteworthy given that declarations of incompatibility generally possess stronger democratic

[55] Lady Hale and Lord Kerr in *R (Nicklinson) v Ministry of Justice* (n 20).

credentials, as they ultimately refer the question to Parliament for consideration rather than imposing a judicial solution.

Lord Neuberger, with whom Lord Mance and Lord Wilson agreed, emphasised that categorically excluding specific matters from judicial review in advance, such as assisted suicide in this case, would be wrong.[56] However, on the grounds of institutional competence and legitimacy, he held that a declaration of incompatibility would be inappropriate in this particular case.[57] This is because assisted suicide is an exceptionally difficult and sensitive issue that raises complex moral and religious questions; a declaration of incompatibility would represent a significant departure from previous law,[58] and such a declaration would not be sufficient to address the issues raised by the case which were already actively considered by the Parliament at the time.[59] He therefore held that in this particular case it was institutionally inappropriate for the court to make a declaration of incompatibility.

Similarly, Lords Mance, Clarke and Reed were of the view that the HRA 1998 enables the courts to consider the compatibility of legislation on the issue where the legislature has a wide margin of appreciation. When the legislature enjoys a wide margin of appreciation, in other words, when the national authorities have discretion in interpreting and enforcing human rights based on their specific circumstances and domestic contexts,[60] the courts must be sensitive to

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[56] *R (Nicklinson) v Ministry of Justice* (n 20) [112]: 'it would be inappropriate for us to fetter the judiciary's role in this connection in advance. More specifically, where the court has jurisdiction on an issue falling within the margin of appreciation, I think it would be wrong in principle to rule out exercising that jurisdiction if Parliament addresses the issue.'; [163] (Lord Mance).

[57] ibid [115], [119], [125] (Lord Neuberger), [166] – [170] (Lord Mance); See *Re an application by the NIHRC for Judicial Review (NI)* (n 21) [116].

[58] *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800.

[59] *R (Nicklinson) v Ministry of Justice* (n 20) [116], [202]; see also *Re an application by the NIHRC for Judicial Review (NI)* (n 21) [117].

[60] Eleni Frantziou, 'The margin of appreciation doctrine in European human rights law' (University College London Policy Briefing, October 2014) <https://www.ucl.ac.uk/public-policy/sites/public_policy/files/migrated-files/European_human_rights_law.pdf> accessed 1 June 2025; *R v DPP, ex p Kebilene* [2000] 2 AC 326, 380G–381D (Lord Hope): 'This doctrine is an integral part of the supervisory jurisdiction which is exercised over state conduct by the international court. By conceding a margin of appreciation to each national system, the court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions.'; In relation to assisted suicide, the European Court of Human Rights in *Pretty v United Kingdom* (2002) 35 EHRR 1 establishes that the margin of appreciation afforded to Member States empowers them to legislate in a manner that involves a blanket prohibition of assisted suicide.

considerations of institutional competence and legitimacy.[61] They held that, based on institutional competency concerns such as being better equipped to address the issue or having greater expertise on the issue, it was appropriate to give significant weight to the legislature on this issue, which involved difficult ethical and social judgments,[62] and refused to make a declaration of incompatibility.[63]

Lord Kerr, in the minority, did not accept the claim of greater competency of the legislature and emphasised that the fact that the Strasbourg Court had placed the issue within the margin of appreciation of the member states does not mean that a blanket ban does not breach the Convention rights.[64] According to him, it implies that the examination must be carried out by the member states and does not necessarily mean that the issue must be resolved by the parliaments.[65] Furthermore, the fact that the matter is within the margin of appreciation of the member states does not relieve them of the obligation of rigorous examination.[66] Nevertheless, he contended that in specific instances where interference requires practical or empirical evidence, and when competing opinions are equally plausible, the courts should adopt a less rigorous approach. Importantly, this does not amount to deference to the legislature's institutional competence. He further contended that this does not imply that Parliament is inherently better equipped to make judgments, nor that the courts lack the ability to assess compatibility. Rather, the challenge of determining the correct approach is greater in these situations.[67]

From a different perspective, Lord Sumption, with whom Lord Hughes agreed, refused to grant an incompatibility declaration and claimed that the issue is inherently legislative in nature and thus constitutionally reserved for Parliament rather than the courts. He stated the three main reasons for this position. First, he pointed out that where there is more than one rational choice between the

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[61] *R (Nicklinson) v Ministry of Justice* (n 20) [163], [166], [296], [297].

[62] ibid [164], [189], [191]; See also [347] (Lord Kerr).

[63] ibid [148], [190], [293], [297].

[64] ibid [339]; *Pretty v United Kingdom* (n 60).

[65] See *In re G* [2009] 1 AC 173 [37] (Lord Hoffmann).

[66] *R (Nicklinson) v Ministry of Justice* (n 20) [341].

[67] ibid [348].

fundamental but mutually inconsistent moral values, the decision falls within the competence of representatives of the community and is inappropriate for the courts to decide on the issue.[68] Second, he emphasised that Parliament had deliberately considered and decided this issue through multiple recent legislative processes, including extensive parliamentary debates and the 2009 amendment process. During these proceedings, Parliament specifically chose to retain section 2 unchanged, demonstrating a clear democratic decision against reforming the blanket prohibition on assisted suicide.[69] Finally, he argued that Parliament was in a better position than the courts, firstly, to take into account interested parties to the issue who may not be represented before the court; secondly, to have access to expert opinion; thirdly, to legitimately decide on the issue where the conclusions are elusive and the evidence is inconclusive.[70] The margin of appreciation in this case must be left to the Parliament, which is constitutionally and institutionally the competent representative body.[71] He held that the issue was constitutionally and institutionally inappropriate for the court to decide on.[72]

On the contrary, the minority, Lord Kerr and Lady Hale, held that under the HRA the judiciary has the constitutional authority to issue a declaration of incompatibility, and the declaration must be issued. According to Lady Hale, the Suicide Act 1961 failed to admit some exceptions to the ban on assisting suicide, therefore, the interference with the individuals' right to choose the time and manner of their deaths is disproportionate and incompatible with article 8 of the Convention.[73] Lord Kerr, also, on the grounds that there was no rational connection between the law and its aims, that the interference was not strictly necessary and did not strike a fair balance, found section 2(1) to be disproportionate and incompatible with Convention rights. He further pointed out that when a declaration of incompatibility is issued, the matter, in

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[68] ibid [230].

[69] ibid [231].

[70] ibid [232].

[71] ibid [232], [234].

[72] ibid [191], [234].

[73] ibid [312], [314], [317]; Lady Hale also held at [320]: 'In my view, the question is one of principle rather than evidence, and in principle it is the interference which requires justification rather than the limited exception which is suggested.'

accordance with the duty under HRA, is remitted to the Parliament to make a moral choice or to decide to do nothing. The Court, therefore, does not make the choice for itself.[74] Contrary to what Lord Sumption argued, Lord Kerr was of the opinion that Parliament's choice not to repeal the law is irrelevant to the compatibility of section 2(1) and cannot prevent the court from fulfilling its duty under HRA.[75]

The approaches of the judges to the declaration of incompatibility reveal fundamental differences in their constitutional reasoning. The minority emphasised that when issuing a declaration of incompatibility, the courts do not determine the issue; instead, they transfer the incompatibility to the legislature for resolution or, alternatively, to maintain the *status quo*. In contrast, the majority focused on the function of declarations: namely, to inform the parliament of the incompatibility. The judges also emphasised the relevance of institutional competency factors, such as access to expert opinion, greater representation of relevant parties, and so forth, in declarations of incompatibility. They argued that institutional limits are not removed, although they are not strictly understood as they were before the HRA 1998 in the context of human rights claims.

It is true that the declaration only remits the issue to the Parliament, therefore, it does not include making moral or social policy choices.[76] However, this entails the question of whether the Parliament is obliged to address the incompatibility or to what degree it is? As of November 2024, there have been 46 declarations of incompatibility, all of which have been addressed to remove the incompatibility except the 5 that are ongoing.[77] Even the most contentious case regarding prisoner voting rights,[78] which was the subject of considerable debate for a long time, has now been remedied in accordance with the Convention rights. This

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[74] ibid [344].

[75] ibid [327], [345].

[76] ibid [344].

[77] See Ministry of Justice, Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government's Response to Human Rights Judgments 2023–2024 (CP 104, April 2024).

[78] In *Hirst v UK* [2006] ECHR 681, the European Court of Human Rights ruled that the UK government's blanket ban on prisoner voting rights violated Article 3 of Protocol No. 1 to the Convention. This decision was followed by issuing a declaration of incompatibility in *Smith v Scott* [2007] CSIH 9.

resolution, however, came only after a lengthy period during which the government eventually implemented a series of minor amendments to existing electoral law, granting limited voting rights to only a selected group of prisoners. Whereas it is within the discretion of the Parliament to address the incompatibility declarations, Kavanagh argues that the evidence shows there is an emerging constitutional convention that Parliament will ultimately respond to such declarations, even if reluctantly and after significant delay.[79] It follows from this claim that the political cost of ignoring declarations of incompatibility has increased substantially, effectively constraining Parliament's practical freedom to disregard them. Still, Parliament is not legally bound to address the incompatibility.

As previously stated, institutional competency is a key reason for deference, that is to say, ‘giv[ing] weight to the opinions of those with greater expertise or knowledge’[80], and its significance varies depending on several factors including the facts and context. The majority of judges accept that under the HRA, the court has the authority to issue a declaration of incompatibility even in matters concerning morally contested questions where there is no objectively correct legal answer and where people might reasonably disagree based on different ethical or value judgments. The majority did not rule out the possibility of issuing a declaration. However, the declaration of incompatibility is a discretionary remedy and the majority of judges, based on both the relative institutional incompetence of the courts on the issue and the function of the declarations to inform the Parliament, decided not to issue one.

The *Nicklinson* case shows that even in the context of the declarations of incompatibility, which do not legally bind the Parliament and do not modify the law and, therefore, do not make a determinative judgement on the issue, judicial self-restraint is an issue depending on relative institutional competency factors. Nevertheless, as we shall see in the context of abortion, another area where a wide margin of appreciation is afforded to the contracting states by the

[79] Aileen Kavanagh, 'Declarations, Obligations, Collaborations' in *The Collaborative Constitution* (Cambridge University Press 2023) 363–402; Brenda Hale, 'The Fate of the UK Human Rights Act?' (2024) 3 EHRLR 212.

[80] Alison Young, 'In Defence of Due Deference' (2009) 72 MLR 554, 555.

Strasbourg Court[81], the Supreme Court adopted a different approach, deeming itself institutionally competent to issue declarations of incompatibility despite the morally contested nature of the subject matter.

The majority of judges eventually considered that no declaration of incompatibility should be issued. Previously in *Bellinger v Bellinger*, the House of Lords also refrained from interpreting the law in a way that was compatible with the Convention on the grounds that such compatible interpretation would result in dramatic social policy changes. In both cases, formerly the House of Lords, and the Supreme Court now, held that the HRA has not removed the limits of institutional competence. Institutional competency remains relevant, and must be regarded, even if incompatibility declarations — unlike interpretations under section 3 — do not result in legal or policy changes.

The courts have acknowledged the limitations on their constitutional role and adjudicative powers based on institutional competence, which affects and is affected by how they approach both section 3 and section 4. These limitations are an important aspect of the recognition of the limits of the HRA powers in practice. This necessarily entails a limit on the scope of judicial review, particularly regarding how far courts may intervene in matters traditionally reserved for Parliament. The judiciary recognised these limitations on its adjudicative power under the Human Rights Act 1998, despite the fact that these are not explicitly identified within the statute.

To determine when and how institutional limitations become determinative factors in the decision whether to issue declarations of incompatibility, it is necessary to look also at the case of *Re an application by the NIHRC for Judicial Review (NI)*.[82] The Supreme Court examined the compatibility of Northern Ireland's abortion laws,[83] which severely restricted access to abortion and criminalised abortion for both pregnant women and practitioners, with Articles 3 (the right not to be subjected to torture or inhuman or degrading treatment or punishment) and 8 (the right to respect for private and family life) of the

[81] *A, B and C v Ireland* App no 25579/05 (ECtHR, 16 December 2010).

[82] *Re an application by the NIHRC for Judicial Review (NI)* (n 21).

[83] Sections 58 and 59 of the Offences Against the Person Act 1861 and section 25(1) of the Criminal Justice Act (NI) 1945.

Convention. The Court had to determine whether the interference with Article 8 and Article 3 was justified and in accordance with the law, and whether it was necessary in a democratic society for the protection of health or morals, or for the protection of the rights and freedoms of others. Prior to this, however, the court was required to determine whether the issue in question was one that it was empowered to decide upon. The majority held that it was. Although the majority held that the Court had the institutional competence to address this morally contested issue, the case was ultimately dismissed on procedural grounds because the Northern Ireland Human Rights Commission lacked standing to bring it. Nevertheless, significant findings regarding the Court's institutional competence to review abortion legislation were made.

Four out of seven judges, including Lords Kerr, Mance, Wilson, and Lady Hale, agreed that denying a lawful abortion in Northern Ireland to a woman who wishes it in cases of rape, incest, and fatal foetal abnormality was not justified. They found that the law was incompatible with Article 8 of the Convention.[84] Lady Black agreed with this only in the case of a fatal foetal abnormality. In contrast to the majority opinion in the *Nicklinson* case, only a minority believed that such a controversial issue was a matter for Parliament alone, and not for the courts. This minority held that it was not appropriate for the court to adjudicate on the issue institutionally.[85] Their position was similar to that expressed in the *Nicklinson* case: they held that abortion law involves complex moral and ethical judgements on which reasonable people can profoundly disagree, and that Parliament is better placed to weigh competing interests and represent the values of society on such a contested issue. Lord Reed emphasised particularly that the Northern Ireland Assembly had considered and rejected proposals to reform abortion law in 2016, thus demonstrating that the democratic decision-making process was engaged with the issue. He also argued that judicial intervention would undermine the proper constitutional separation of powers, particularly regarding matters of significant moral controversy in which no clear public consensus exists. All of the judges agreed that it was not possible to interpret the relevant law in a compatible manner (some of the

[84] Lord Kerr and Lord Wilson also held that it was incompatible with Article 3 of the Convention as regards fatal foetal abnormality, rape, and incest.

[85] Lord Reed (with whom Lord Lloyd-Jones agreed) in *Re an application by the NIHRC for Judicial Review (NI)* (n 21) [353] – [355], [362] – [363].

significant statements of Lord Kerr on this issue will be discussed in detail under the 'Superseding the Parliament's Intention' heading below). The issue was therefore whether a declaration of incompatibility should be issued.

In parallel with her position in *Nicklinson*, Lady Hale emphasised that as the challenged issue concerned fundamental human rights, — an area in which the democratic legislature does not hold exclusive competence. Under the HRA, Parliament has authorised the courts to rule on the compatibility of legislation with Convention rights.[86] It is a well-established fact that courts have the authority, duty and competence to balance Convention rights.[87] She explained the meaning of preserving parliamentary sovereignty in the HRA and emphasised that sovereignty is protected by what happens after a declaration of incompatibility is issued. This means that the legally valid and unaffected status of the incompatible law is maintained. The sovereignty of Parliament is not, and cannot be, affected by the issuing of the declaration itself.[88]

It is also worth noting that in the Court of Appeal, the Lord Chief Justice had proposed a construction of the words that would allow an exception to the prosecution in cases where abortion is required to save the life of the mother from a condition of physical or mental devastation.[89] This construction would include instances where the mother's life was significantly adversely affected. However, the Court of Appeal by majority refused this construction on the ground that such a construction would change the effect of the legislation and would therefore be institutionally inappropriate. The Court of Appeal's decision to refuse the proposed construction was upheld, that such a radical departure from the law, even if it was done to a point that was reasonably tolerable in today's society, could not be achieved by judicial decision.[90]

In a similar argument to that presented in *Nicklinson*, Lord Kerr advanced the position that the margin of appreciation accorded to the contracting states by

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[86] *R (Lord Carlile) v Home Secretary* [2014] UKSC 60 [155, 156].

[87] ibid [156].

[88] *Re an application by the NIHRC for Judicial Review (NI)* (n 21) [38].

[89] This is how the wording of 'preservation of life' in the 1945 Act is interpreted.

[90] *Re an application by the NIHRC for Judicial Review (NI)* (n 21) [156].

the Strasbourg Court does not imply that the issue is solely within the purview of Parliament. The domestic courts, therefore, may or may not accord deference to the Parliament's decision, depending on the facts of the case and the context, depending on the relatively superior institutional competency of the Parliament on the issue.[91] Parallel with the majority, he stated that, as will be presented below, he would have issued a declaration of incompatibility had the standing condition been fulfilled.

In a minority opinion, on the other hand, Lord Reed, with whom Lord Lloyd-Jones agreed, emphasised the significance of political accountability in social and ethical policy matters. He also noted that the HRA did not remove the inherent limitations on the institutions, specifically, that courts lack both the democratic legitimacy and the institutional capacity to resolve deeply contested moral questions where no clear legal answer exists.[92] Nevertheless, he argued that the law on abortion was proportionate, as women were free to travel to England and Scotland to terminate a pregnancy according to the law of England and Scotland. Under the legislation of Northern Ireland, women seeking an abortion were entitled to receive advice from medical professionals regarding the availability of abortion services in other jurisdictions and their right to travel there. According to Lord Reed, this opportunity to terminate their pregnancy in England or Scotland also supported the proportionality of the law.[93] He ultimately argued that the question presented to the Court for resolution was one that encompassed intricate, highly sensitive and contentious moral judgments, which were to be resolved pre-eminently by a democratically accountable legislature.[94]

There were several resemblances between this case and that of *Nicklinson*. One of the most significant is that both cases prompted reflection of the courts on challenging, complex, and contentious moral judgments. On the other hand, one difference from *Nicklinson* was that, in *Nicklinson*, any declaration of incompatibility would have necessitated creating an entirely new regulatory

[91] ibid [291].

[92] ibid [344].

[93] ibid [358].

[94] ibid [362].

framework for assisted dying without clear guidance, resulting in a *volte-face* that would require Parliament to fundamentally reverse longstanding policy.[95] Furthermore, unlike the abortion case, assisted suicide had been the subject of an active debate in Parliament and solutions had been sought by Parliament for a considerable time.[96] That was not the case in Northern Ireland regarding abortion. The incompatibility of the abortion laws in Northern Ireland could be resolved by a relatively straightforward amendment recognising exceptions of fatal foetal abnormality, rape, and incest.[97] In this case, majority judges also placed a stronger emphasis that the issue would be referred to the parliament by the declaration and therefore would not be a usurpation of legislative power.[98]

It is noteworthy that in both cases the courts treated declarations of incompatibility differently. In the abortion case, the declaration was not issued due to the lack of standing of the applicant.[99] However, the judges argued as if the standing requirement had been fulfilled, and the majority held that they would have issued a declaration. Although the court emphasised the differences between the *Nicklinson* case and the Northern Ireland case, in legal practice, a declaration of incompatibility would have the same result in both cases, namely that the matter would be referred to Parliament. Parliament would then have the freedom to take no action regarding the incompatibility.

The *Nicklinson* case majority focused on the institutional incompetence of the courts in controversial and sensitive matters that encompass moral and religious concerns, where there is more than one rational choice between fundamental but mutually inconsistent moral values. It was still important that the declaration of incompatibility itself lacks legal force to alter legislation and does

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[95] ibid [40].

[96] Indeed, in the case of *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, which concerned the issue of prisoners' voting rights, a declaration of incompatibility was not issued by a unanimous decision. This was due to a number of factors, including the fact that a declaration had already been made on the same matter in the case of *Smith v Scott* [2007] CSIH 9, and that the issue was already under consideration by the UK Parliament; *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16

[97] *Re an application by the NIHRC for Judicial Review (NI)* (n 21) [298].

[98] ibid [300].

[99] Developments in standing are discussed in detail in Chapter 1.

not provide the final determination on such matters. However, the declaration would have required a significant change in the assisted suicide policy in order to ensure compatibility in *Nicklinson*. Yet, recognising exceptions to the criminalisation of abortion is also a significant policy decision that interferes with parliamentary choices. The availability of solutions to cure the incompatibility is the one of the two significant differences between the two issues. However, this should not be the determining factor in the proceedings, as the declaration itself does not provide a determinative solution to the issues raised and Parliament is free to do as it wishes. Eventually, how the court views its own institutional role made the difference.

The second main difference between the cases was the presence of an ongoing debate within Parliament. In *Nicklinson*, the judges considered the fact that the issue had been under active discussion for a significant period of time and deemed a declaration of incompatibility inappropriate. Although informing Parliament about possible incompatibilities with its international obligations is one of the functions of such declarations, Parliament had already been actively debating assisted suicide. Indeed, in *R (Animal Defenders) v Secretary of State for Culture, Media and Sport,*[100] the House of Lords, while acknowledging that there may be cases where an interference with Convention rights has been found to be incompatible with a Convention right,[101] said that since the purpose of a declaration is to draw the attention of Parliament and the public to the existence of an incompatibility with the Convention, and since in that case the Government and Parliament were already aware of that possibility, the Court must give due weight to the judgment of Parliament and may therefore decline to make a declaration of incompatibility.[102] However, this does not entail the conclusion that Parliament's awareness of incompatibility *must* result in the rejection of declarations of incompatibility. Jurisdiction does not always mean it should be exercised.[103] A court may properly decline to exercise jurisdiction if it

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[100] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* (n 4).

[101] ibid [42] (Lord Scott).

[102] ibid [46]; [52] (Lady Hale); [33] (Lord Bingham). It is possible for a court to refuse to make a declaration in cases where there is an alternative statutory route of appeal, and where there was another procedure that the claimant should have exhausted. Independent Human Rights Act Review (n 30) 188.

[103] Lord Steyn, 'Deference: A Tangled Story' (n 5) 349.

considers that the legislature or the executive is in a better position to decide the matter, depending on the issue. This is evident from the fact that the remedies in judicial review are ordinarily discretionary, as are the declarations of incompatibility. Furthermore, the legal process is susceptible to abuse. Opponents of a policy may seek to use judicial review to achieve their desired outcome through the courts, a concern that becomes particularly acute in the context of human rights claims with their potentially far-reaching implications.[104]

More importantly, the Court in *Nicklinson*, in examining a violation of Convention rights in matters which are arguably primarily a matter for the politically accountable legislature, held by a majority that it was institutionally inappropriate for the Court to decide the issue. In particular, Lord Sumption, with whom Lord Hughes agreed, argued that the issue was inherently a legislative matter for Parliament, which was better equipped to deal with the issue, had greater expertise in the matter and had greater democratic legitimacy to decide the issue. Other judges from the majority, too, considered that this particular issue was inappropriate for the courts to decide, as it would interfere with Parliament's institutional role and power of enacting radical and wide-ranging laws, which are not necessarily based on existing legal norms,[105] because of the far-reaching social policy implications and the departure from existing law in declaring incompatibility on this issue.[106]

In the Northern Ireland case, the majority did not share the view of the relative institutional incompetence of the courts in relation to the similarly controversial issue of abortion. The majority took the view that although a compatible interpretation would overstep the institutional limits of the courts by making a radical change in the law without recourse to existing legal norms as opposed to piecemeal, interstitial and incremental judicial law-making that is developed based on the existing legal resources, it was institutionally appropriate to make a declaration of incompatibility even on such a matter of moral and social

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[104] *SC, CB and others v Secretary of State for Work and Pensions* [2021] UKSC 26.

[105] Aileen Kavanagh, The Collaborative Constitution (CUP 2023) ch 3 ‘Institutions and Interactions’ and ch 7 ‘Judge as Partner’; John Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 41; Conor Gearty, 'The Human Rights Act comes of age' [2022] EHRLR 117, 119.

[106] *R (Nicklinson) v Ministry of Justice* (n 20) [148], [190], [293], [297], in particular, Lord Sumption at [230], [232].

controversy. In addition to the facts that influenced the Court's decision, such as societal consensus on the issue and legislative gridlock in the Northern Ireland legislature, it is seen that there has been a shift in the understanding of the institutional competence of the courts. This shift has resulted in a more nuanced factor in limiting the adjudicative practice of the courts.

In light of the case law and the provisions of the statute, it can be concluded that the duties and powers granted to the judiciary in sections 3 and 4 of the HRA did not remove the constitutional and institutional limits on the courts, even in cases of human rights claims.[107] The inherent limitations of the judiciary in determining issues of social and ethical policy remain in effect, although they are now perceived in a more intricate manner, regardless of the moral and ethical controversy surrounding the possible Convention-compatible solutions. While *Bellinger v Bellinger*, *Nicklinson* and the *Northern Ireland* case all indeed involved complex and sensitive social policy questions, the specific circumstances surrounding each case led the courts to different conclusions about their institutional competence to issue declarations of incompatibility. However, the exercise of discretion to grant an incompatibility declaration lacks consistency in how the courts will treat those limits. The weight accorded to institutional limitations fluctuates significantly between cases, as demonstrated by the contrasting approaches in *Nicklinson* and the *Northern Ireland* case. In *Nicklinson*, the majority heavily emphasised Parliament's superior democratic legitimacy and expertise in moral policymaking. Conversely, in the *Northern Ireland* case, similar considerations of democratic legitimacy and moral controversy were accorded substantially less weight, with the majority prioritising the judicial duty to protect fundamental rights despite comparable policy complexity and social sensitivity. This, consequently, creates uncertainty/unpredictability about the proper scope of judicial review in human rights matters and limiting predictability for litigants.

These cases, nevertheless, demonstrate a progression from the 'high water mark' of Convention-compatible interpretation under section 3 of the HRA to instances where the courts have exercised significant restraint due to institutional and

[107] *R (Lord Carlile) v Home Secretary* (n 86); *Bellinger v Bellinger* (n 22); *A and others v Secretary of State for the Home Department* (n 14).

constitutional limitations. Initially, the boundaries of interpretation were broadly defined, but the courts subsequently became increasingly cautious, even in relation to declarations of incompatibility under section 4. This judicial trajectory reveals that, despite section 3 providing a powerful interpretative tool, the courts have often hesitated to issue non-binding declarations of incompatibility where sensitive social policy issues are at stake. This approach provides valuable insight into the impact of the HRA on parliamentary sovereignty, revealing a judicial approach that acknowledges Parliament's legislative supremacy, though with some inconsistency in applying institutional competence principles.[108]

Last but not least, it is important to examine the *A and others v Secretary of State for the Home Department*[109] *('Belmarsh')* case with its relatively distinctive feature within the overall evolution. Given the established pattern of judicial restraint based on institutional competence concerns, particularly in matters involving national security and executive discretion[110], the House of Lords might reasonably have been expected to defer to the government's assessment. However, the *Belmarsh* case represents a notable departure from this general pattern of judicial restraint. Following the 9/11 attacks in the USA, nine foreign nationals challenged the Anti-terrorism, Crime and Security Act 2001, which authorised indefinite detention without trial under section 23. The House of Lords, by majority, declared the derogation order unlawful and found the measures disproportionate and discriminatory, violating Articles 5 and 14 of the ECHR.

It is important to note, however, that what makes *Belmarsh* distinctive is the judiciary's willingness to scrutinise executive action in national security matters; seemingly motivated by a determination to distance the judiciary from controversial historical precedents. The decision stands in stark contrast to the widely criticised cases of *R v Halliday, Ex p Zadig*[111] and *Liversidge v Anderson*,[112]

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[108] See Graham Lewis, 'Interpreting the Interpretive Obligation: Empirical Insights into the use of Section 3 of the Human Rights Act 1998' (2025) *Oxford Journal of Legal Studies* (forthcoming).

[109] *A and others v Secretary of State for the Home Department* (n 17).

[110] See ch 1.

[111] *R v Halliday, Ex p Zadig* [1917] AC 260.

[112] *Liversidge v Anderson* [1942] AC 206.

where the courts showed excessive deference to executive discretion during wartime, effectively sanctioning the sacrifice of individual liberty without adequate safeguards. As Lord Hope emphasised, the courts distinguished between 'matters of social or economic policy' and 'actions taken on behalf of society as a whole which affect the rights and freedoms of the individual,' asserting legitimate judicial intervention in the latter category to prevent the tyrannising power of the majority over minorities.[113]

However, this apparent shift towards judicial assertiveness proved to have narrow scope.[114] Subsequent cases demonstrated that high levels of judicial deference persist in national security and foreign policy matters. In *R (Lord Carlile) v Home Secretary*,[115] the courts returned to substantial deference despite human rights implications, while *R (Corner House Research) v Director of the Serious Fraud Office*[116] revealed how the mere invocation of national security considerations could trigger judicial restraint even in contexts where national security was not the primary subject matter. This trajectory reveals that while *Belmarsh* appeared to signal a fundamental rebalancing of executive-judicial relations, the practical impact remained confined to its specific circumstances, with courts continuing to exercise considerable restraint when national security considerations are invoked.

A more constitutionally significant — and arguably more challenging — tension arises from the judiciary's ability to modify legislation through interpretation under section 3. Unlike declarations of incompatibility, which leave the final determination with Parliament, section 3 enables courts to effectively rewrite statutes in ways that may diverge from their original purpose, thus raising more acute questions about the boundaries of the separation of powers. This is exemplified in cases such as *Ghaidan v Godin-Mendoza*,[117] and more recently *Mercer*.[118] It demands closer scrutiny and will now be examined.

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[113] A and others v Secretary of State for the Home Department (n 17) [108] (Lord Hope).

[114] See ch 1.

[115] *R (Lord Carlile) v Home Secretary* (n 86).

[116] *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60.

[117] *Ghaidan v Godin-Mendoza* (n 11).

[118] *Secretary of State for Business and Trade v Mercer* [2024] UKSC 12.

4.2.2 Judicial Interpretation: Balancing Legislative Modification and Parliamentary Sovereignty

Bellinger v Bellinger is a significant example of a restrictive application of section 3 interpretation, where the judiciary perceived significant institutional limitations in addressing a matter with profound social and legal implications. The House of Lords explicitly acknowledged its lack of expertise or mandate to redefine fundamental concepts like 'male' and 'female' in a way that would fundamentally alter the understanding of marriage and demonstrated that the perceived boundaries of judicial competence play a crucial role in determining the limits of section 3 interpretation. Thus, it was held that, despite the interpretative duty imposed by section 3 of the Human Rights Act 1998, this duty is inherently limited. Following the *Bellinger v Bellinger* decision, it was clarified that institutional limits remain relevant and that the courts should exercise restraint when faced with issues that require broad policy decisions or fundamental changes to legal concepts. The limits on the Convention-compatible interpretation were further refined in *Ghaidan v Godin-Mendoza*[119] ('Ghaidan').

Ghaidan reinforced the strength of the interpretative obligation under section 3 but simultaneously more precisely delineated its boundaries. It identified certain criteria to distinguish between permissible interpretation and impermissible amendment tantamount to judicial legislation under section 3. Notably, the expansive and controversial interpretative approach previously suggested in *R v A* was not endorsed. In contrast to *Bellinger's* more restrictive approach, in *Ghaidan,* the House of Lords confirmed that the duty of interpreting provisions compatibly with the Convention rights is a very strong one which may necessitate a departure from the legislative intention of Parliament. However, the House of Lords also made it clear that the courts cannot construe legislation in a way that is contrary to Parliament's overall intention within the statute, as evidenced by the statute's express wording or by necessary implication.[120] In other words, courts will interpret the law compatibly with the Convention as

[119] *Ghaidan v Godin-Mendoza* (n 11).

[120] ibid [121] (Lord Rodger): 'using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute.' See *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46.

long as the reading in or out 'goes with the grain'[121] of the legislation, rather than against it.[122] Additionally, words of legislation cannot be construed to enable Courts to take decisions beyond their institutional competence.[123] The phrase 'so far as it is possible to do so' was central to understanding the scope of this power/duty, and *Ghaidan* set the law as it has been since 2004, establishing important boundaries and clarifying that section 3 permits judicial reinterpretation but not judicial amendment that fundamentally alters the scheme of legislation.[124]

Ghaidan concerned the interpretation of Schedule 1, paragraph 2 of the Rent Act 1977.[125] It addressed the question of whether a homosexual partner could be the successor as husband or wife to a 'protected tenancy'. The defendant claimed, as a survivor of a homosexual couple, that his right to respect for private and family life (Article 8) and freedom from discrimination (Article 14) of the Convention were infringed if he could not succeed to the tenancy. Unanimously, the House of Lords decided that the provision, on its ordinary reading, would be incompatible with the Convention.[126] By majority, in a significant departure from their previous stance, they held that the definition of spouse in the Act must be interpreted to include couples in same-sex relationships to ensure compliance

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[121] *Ghaidan v Godin-Mendoza* (n 11) [121] (Lord Rodger); '"The grain" is understood as "the essential meaning of principle which Parliament intended"' *R (Vanriel) v Secretary of State for the Home Department* [2021] EWHC 3415 (Admin) [105].

[122] *Sheldrake v DPP; Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264 [28]: 'an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation.'

[123] Independent Human Rights Act Review (n 30) 206; *Ghaidan v Godin-Mendoza* (n 11) [33] (Lord Nicholls): 'Nor can Parliament have intended that section 3 should require us to make decisions for which they are not equipped'; [67], [68], [75] (Lord Millett).

[124] *Re S* (n 14) [40], [54]-[59]; *HMRC v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29 [89].

[125] '2(1) The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant of the dwelling-house by succession if and so long as he or she occupies the dwelling-house as his or her residence. (2) For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant. 3(1) Where paragraph 2 above does not apply, but a person who was a member of the original tenant's family was residing with him in the dwelling-house at the time of and for the period of two years immediately before his death then, after his death, that person or if there is more than one such person such one of them as may be decided by agreement, or in default of agreement by the county court, shall be entitled to an assured tenancy of the dwelling-house by succession.'

[126] *Ghaidan v Godin-Mendoza* (n 11) [100] (Lord Millet) (dissenting).

with Articles 8 and 14 of the Convention. In his leading judgment, Lord Nicholls explicitly stated that section 3 may require legislation to be interpreted in a manner that deviates from its otherwise unambiguous interpretation.[127] As a result, the homosexual partner was held to be within the meaning of 'husband and wife'.[128]

Nonetheless, the House of Lords unanimously acknowledged that although courts are allowed to modify the meaning and effect of the words where possible, the limit on the interpretation power under the HRA necessarily comes from the difference between interpreting and legislating.[129] The judges emphasised that the HRA did not remove the constitutional separation of powers between courts and Parliament, nor did it eliminate the institutional limitations on judicial competence to rewrite legislation.[130] Lord Nicholls stated this at paragraph 33 and maintained that interpretations under section 3 that contradict or undermine the core purpose or essential scheme of a statute would constitute a breach of constitutional roles and are impermissible:

> 'Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt *a meaning inconsistent with a fundamental feature of legislation*. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve.' (Emphasis added.)

Similarly, Lord Rodger pointed out at paragraph 121 that:

> '[I]f the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed

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[127] *Ghaidan v Godin-Mendoza* (n 11) [23 (Lord Nichols)]; [106] (Lord Rodger); Independent Human Rights Act Review (n 30) 208.

[128] *Ghaidan v Godin-Mendoza* (n 11) [35] (Lord Nicholls); [51] (Lord Steyn); See previously in *Fitzpatrick v Sterling Housing Association Ltd* [1999] UKHL 42, [1999] 4 All ER 705, where it was decided that homosexual partners were not within the meaning of the word 'family' under the Rent Act 1977.

[129] *Ghaidan v Godin-Mendoza* (n 11) [67] – [68] (Lord Millet): 'It can read in and read down; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point. […] In my view section 3 does not entitle the court to supply words which are inconsistent with a fundamental feature of the legislative scheme; nor to repeal, delete, or contradict the language of the offending statute.'

[130] See *Re S (Minors)* (n 14) [39] (Lord Nicholls): 'The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament.'

> on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, *an implication will go with the grain of the legislation*. By contrast, using a Convention right *to read in words that are inconsistent with the scheme of the legislation or with its essential principles* as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute.'[131] (Emphasis added.)

In *Ghaidan*, therefore, judges recognised that a remarkable power to modify the meaning of statutes was given to the courts under section 3, but that it is still limited by the institutional and constitutional competencies of those courts. The interpretative power cannot be exercised in a way that results in a judicial usurpation of Parliament's substantive policy-making function — that is, courts cannot use section 3 to effectively replace Parliament's policy choices with their own preferred alternatives. Accordingly, what Parliament intends in legislation is relevant (however, not determinative) when interpreting statutes, and Convention rights must be given effect in a manner that does not contravene the *overall* intention of Parliament as expressed in the language of legislation and in the essential principles of statutes. That is to say that judicial interpretations must respect and align with the fundamental purpose, scheme, and thrust of the legislation, even while modifying its application in particular circumstances.

Nevertheless, such a limit still bears the risk of potential uncertainties, which may still permit improper use of interpretative power and usurpation of legislative function, as it was claimed in Lord Millett's dissenting opinion. Lord Millett argued that the majority interpretation risked trespassing upon the prerogative of Parliament and that section 4 of the HRA proved that there could and would be cases where a compatible interpretation was not possible.[132] He disagreed with the majority's decision to include homosexual couples within the statute. Despite agreeing with the majority that the Rent Act 1977 violated the defendant's Convention rights, Lord Millett believed that an inclusive interpretation was not permitted. The majority's interpretation would imply a legislative function, according to him, as the merits of the relationship were irrelevant, and the statute was drafted to include only heterosexual

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[131] See *Fessal v Revenue and Customs* [2016] UKFTT 285 (TC).

[132] See *Re S* (n 14) [38] (Lord Nicholls).

relationships.[133] He held that Parliament's legislative policy and the statute framed in gender specific terms had not changed. Any necessary policy changes that align with the moral values of society must be made by the legislature itself and cannot be carried out through interpretative power within the HRA.[134] These differing interpretations illustrate how judges can legitimately disagree on what constitutes the 'fundamental' aspects of a statute. This suggests that the 'grain' is not a static, easily identifiable feature but rather a concept subject to judicial interpretation, influenced by evolving societal norms and human rights principles.

4.2.2.1 Defining the Boundaries: 'Grain of the Legislation' and 'Fundamental Features'

Lord Millett's concerns in *Ghaidan* highlighted the fine line between interpretation and legislation that courts must navigate under section 3. This distinction becomes clearer when comparing the *Bellinger v Bellinger* and *Ghaidan*. In *Bellinger v Bellinger*, the court's reluctance to interpret 'male' and 'female' in a manner inclusive of post-operative transsexuals stemmed from its recognition that such an interpretation would require a fundamental reconstruction of marriage as a social and legal institution—precisely the type of substantive policy change that Lord Millett warned against in *Ghaidan*. By contrast, the majority in *Ghaidan* viewed the extension of tenancy succession rights to same-sex partners as a more modest interpretative development that, whilst linguistically challenging, remained compatible with the legislation's overarching purpose of protecting established relationships. Despite its conceptual importance, the 'grain of the legislation', therefore, is a guiding but elusive principle. It presents significant challenges in its consistent application.

Nevertheless, *Ghaidan* is the leading authority demonstrating that the principle of parliamentary sovereignty is effectively maintained in relation to Convention rights and section 3 of the HRA. Parliamentary sovereignty, at its core, means that Parliament has the right to make law and that no other body can override

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[133] Young (n 44).

[134] *Ghaidan v Godin-Mendoza* (n 11) [67], [68], [78], [99] (Lord Millett).

its legislation.[135] This principle would be undermined if courts were permitted to adopt interpretations that fundamentally altered a statute's purpose or essential scheme.[136] Although *Ghaidan* established an authority for a powerful interpretative duty on the courts under the HRA, it also drew crucial boundaries between legitimate judicial interpretation and impermissible judicial legislation. The case distinguished between the nature of interpretation (modifying the application of existing statutory provisions) and legislation (creating entirely new legal frameworks or policies), emphasising that only Parliament possesses the latter power. Despite the absence of guidance on the interpretative power in the HRA, *Ghaidan* emphasised significant boundaries on the interpretative duty assigned to the courts.

It, therefore, established the following principles: Firstly, in accordance with the intention and authorisation of Parliament in the HRA 1998, it is possible that clear and unambiguous laws may be interpreted in a way that differs from the apparent intention of Parliament. Secondly, the power under section 3 is an interpretative power, distinct from the power to legislate, and Parliament remains supreme. The supremacy of Parliament is maintained by recognising the limit (that interpretation cannot contradict fundamental features of legislation or create entirely new statutory schemes) of the interpretative power. In other words, Convention-compatible interpretation cannot rewrite a statute so extensively that it effectively becomes a different law with different purposes. — it cannot contravene the fundamental principles of the legislation.

The 'grain of the legislation' standard was also elaborated in *Sheldrake v DPP*.[137] Lord Bingham further articulated a nuanced framework delineating the boundaries of Convention-compatible interpretation under section 3. He maintained that an interpretation would be unacceptable if it would ‘be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the

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[135] AV Dicey, *The Law of the Constitution* (Macmillan 1885) 39-40: ‘The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament [...] has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.’

[136] *Secretary of State for Business and Trade v Mercer* (n 118) [100] – [108].

[137] *Sheldrake v DPP; Attorney-General's Reference (No 4 of 2002)* (n 122).

substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation'.[138] These criteria effectively unpack the meaning of 'so far as it is possible to do so' within section 3 of the HRA. Lord Bingham observed that while the court in *Ghaidan* had departed significantly from the literal meaning of 'husband and wife' in the Rent Act, that interpretation nevertheless remained consistent with the legislation's broader purpose. In contrast, the House of Lords declined to read down a reverse burden of proof provision in the Road Traffic Act 1988, which required a defendant charged with being drunk, in charge of a vehicle, to prove they had no intention to drive. The appellant had argued that this reverse burden violated the presumption of innocence protected under Article 6 of the ECHR. The House of Lords, however, concluded that reading down this provision would fundamentally alter the regulatory scheme established by Parliament, by converting it from a legal burden to a mere evidential burden. The provision was deliberately designed to impose a full legal burden on defendants, to promote road safety. This comparison emphasises that the permissibility of interpretation under section 3 is highly context-dependent and is contingent on the extent to which a proposed departure from statutory language would respect or undermine Parliament's essential legislative purpose.

Nevertheless, *Ghaidan* still leaves significant interpretative challenges unresolved.[139] This persistent ambiguity is underscored by recent jurisprudence, notably the Supreme Court's decision in *Secretary of State for Business and Trade v Mercer*[140] ('*Mercer*'). The Court highlighted the line between permissible interpretation and impermissible judicial legislation remains a difficult line to draw. Determining what constitutes a 'fundamental feature' is highly dependent on the context of a case. The differing opinions within judgments, particularly Lord Millett's dissent in *Ghaidan*, illustrate how judges can legitimately disagree on what constitutes the fundamental aspects of a statute.

In *Mercer*, the Supreme Court offered, although limited, guidance on applying section 3 of the HRA. The Court identified two factors weighing against its use:

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[138] *Sheldrake v DPP Attorney-General's Reference (No 4 of 2002)* (n 122) [28] (Lord Bingham).

[139] For criticism towards interpretative power see Ekins and Gee (n 39).

[140] *Secretary of State for Business and Trade v Mercer* (n 118).

firstly, where no clear or sole legislative solution exists that ensures ECHR compliance whilst balancing competing rights; and secondly, where Parliament's intentions regarding such legislation remain uncertain.[141] The Court was cautious that the application of section 3 in these circumstances would constitute judicial legislation. This creates a constitutional tension — whilst courts may legitimately 'change the meaning and effect of legislation' even when unambiguous, they remain rightfully cautious about crossing the boundary into legislative territory, particularly when policy choices are involved.

4.2.2.2 The 'Grain' of Protest Law: Convention Compliance in *DPP v Ziegler*

A recent case highlighted interpretative tensions, as the Supreme Court's interpretation of a statute arguably borders on an impermissible judicial legislative approach. In 2021, in the context of freedom of assembly, in *DPP v Ziegler*,[142] the Supreme Court was criticised for overwriting Parliament's intention and altering the effect of statute.[143] On the question of whether four protesters who closed the way to the biennial Defence and Security Equipment International at the Excel Centre in London were guilty of a criminal offence under the statute, the Supreme Court held that interference with the protesters' Articles 10 and 11 rights must be proved to be proportionate — despite this requirement being absent from the relevant legislation. This judgment represents a significant illustration of the interpretative challenges regarding what constitutes a 'fundamental feature' of legislation.

When interpreting section 137 of the Highways Act 1980, which provides that 'if a person, without lawful authority or excuse, wilfully obstructs the free passage along a highway, he is guilty of an offence', the Supreme Court effectively incorporated a proportionality requirement into the statutory framework. The majority held that deliberate obstructive conduct with more than a de minimis impact[144] could constitute an offence under the Act, however, in accordance with sections 3 and 6 of the HRA, they interpreted the 'lawful excuse' element of

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[141] ibid [102] – [108].

[142] *Director of Public Prosecutions v Ziegler* (n 24).

[143] Tomkins (n 10).

[144] The protest was more than de minimis since the protester closed the way to the biennale, locked themselves and it took 90-100 minutes for the police to remove them.

the offence as requiring a proportionality assessment to ensure that any conviction would not disproportionately interfere with the defendant's rights under Articles 10 and 11 of ECHR (freedom of expression and assembly).

This reasoning echoes the constitutional tension identified in cases such as *Mercer*: while courts may legitimately modify statutory meaning — even when unambiguous — to achieve Convention compliance, they must exercise caution to avoid encroaching on Parliament's policy-making role. Notably, the Court's interpretation appeared to introduce an entirely new dimension to the concept of 'lawful excuse' by requiring a proportionality assessment in each case, effectively transforming the nature of the offence itself.

By requiring prosecutors to demonstrate that convictions for peaceful protest were both justified and proportionate — an element entirely absent from the original statutory framework — the Court appeared to significantly alter the legislative scheme rather than merely modifying its application.[145] The Court effectively added an extra dimension to the concept of a 'lawful excuse' by requiring a proportionality assessment to ensure that the conviction did not constitute a disproportionate interference.[146] This approach raised substantial practical challenges for the executive in treating proportionality as a fact-based evaluation and produced broader legal implications concerning all statutory offences engaging Convention rights. The Court's failure to address the established case law under section 3 of the HRA further suggests a potential departure from the boundaries established in *Ghaidan*.

The subsequent judicial treatment of *Ziegler* is particularly illuminating. Later cases, including the Supreme Court in *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill*, rejected the notion that *Ziegler* established a general principle requiring

[145] The majority of t he Supreme Court interpreted the statute to mean that 'if a person wilfully obstructs the highway in a manner that disproportionately obstructs free passage along it, he may be guilty of an offence but only if that would not be a disproportionate interference with his or her right to freedom of peaceful assembly under Article 11 ECHR'. See Tomkins (n 10) 3; See also Ekins (n 18), where Professor Ekins pointed out the risk and argued that 'section 3 should be amended to specify that it does not authorise courts, or anyone else, to read and give effect to legislation in ways that depart from the intention of the enacting Parliament'.

[146] Richard Martin, 'Convicting Peaceful Protesters: Proportionality's Proper Place at Criminal Trial' (2024) 44(2) OJLS 342.

proportionality assessments in all cases involving Articles 10 and 11.[147] The courts clarified that proportionality could be determined by the legislature itself, and offences could be inherently proportionate based on their statutory elements. This retreat signals a notable shift from the approach in *Ziegler*. The Court now recognises that Parliament can conduct the proportionality analysis during the legislative process rather than requiring courts to undertake case-specific evaluations.[148] By acknowledging this, the Supreme Court implicitly reinforced the boundaries of section 3's interpretative power, suggesting that courts should be reluctant to insert additional rights-based requirements where Parliament has already engaged in comprehensive balancing of competing interests (such as access to abortion services and freedom of protest in this case).

Speculatively, a similarly powerful interpretation could have been made in other important cases before the court, such as *Re an application by the NIHRC for Judicial Review (NI)*[149]**,** as discussed in the previous section. There, the Supreme Court unanimously agreed that it was not possible to interpret the relevant provisions in a way that is compatible with Convention rights. Lord Kerr considered in particular the possibility of interpreting the abortion laws in Northern Ireland in a manner compatible with Convention rights. He questioned whether the provisions that limit access to abortion and criminalise abortion except where necessary to preserve the life of the mother could include circumstances where the mother's life would be 'significantly adversely affected'. Before the Court of Appeal[150], Gillen LJ, and Lord Kerr in the Supreme Court held that it would be 'institutionally inappropriate' for the court to 'change the effect of the legislation, and it is not possible to stretch the concept of 'preservation of life' to include fatal foetal abnormality, rape, and incest.'[151]

One could argue that if the powerful approach taken in *DPP v Ziegler* as to the interpretative power/duty were applied to the provision of abortion in Northern

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[147] *Director of Public Prosecutions v Cuciurean* [2022] EWHC 736 (Admin) [67]; *R v Brown* [2022] EWCA Crim 125; *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32 [22].

[148] *The Safe Access Zones Bill Reference* (n 147) [22].

[149] *Re an application by the NIHRC for Judicial Review (NI)* (n 21).

[150] *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2017] NICA 42.

[151] ibid [91]; *Re an application by the NIHRC for Judicial Review (NI)* (n 21) [154], [156], [157].

Ireland, the Court could have interpreted the legislation to include cases of fatal foetal abnormality, rape, and incest. This would have limited the scope of abortion crimes as legislated in the Offences against the Person Act 1861 and the Criminal Justice Act (NI) 1945, while ensuring compatibility with Convention rights. The judiciary, however, concluded that it would be institutionally inappropriate to change the legislation's effect to this extent; the courts cannot substantially change the effect of legislation, even under the HRA.

Accordingly, the *Ziegler* case significantly illuminates fundamental questions regarding how judicial interpretation under the HRA 1998 directly impacts parliamentary sovereignty. The case demonstrates that judicial interpretation can substantively alter both the effect and application of legislation, which in practice does partially set aside Parliament's original intent. The doctrine of parliamentary sovereignty implies that while the courts play a crucial role in interpreting laws, their power does not extend to invalidating or overriding Acts of Parliament and that Acts of Parliament are the highest form of law in the UK legal system. *Ziegler*, however, is problematic in terms of the possibility that Parliament's overall intentions in statutes may be altered unpredictably by the court's interpretation, which could alter the effect of legislation beyond what the *Ghaidan* standard would consider permissible while ensuring compliance with the ECHR. In *Ghaidan*, it was clarified that the limitation is that the court cannot contradict the fundamental features of the legislation and therefore the overall intention of the legislature; still, the courts have been given a remarkable power to amend the law to ensure compatibility with the Convention, to the extent possible. The approach taken in *Ziegler* represents an unusually extensive application of this power that potentially crosses into judicial legislation by effectively rewriting a criminal offence, expanding the scope of judicial scrutiny, and establishing a court-created test absent from the original statutory framework.[152]

[152] Florence Powell and Stephanie Needleman, 'How radical an instrument is Section 3 of the Human Rights Act 1998?' (UK Constitutional Law Blog, 24 March 2021) <https://ukconstitutionallaw.org/2021/03/24/florence-powell-and-stephanie-needleman-how-radical-an-instrument-is-section-3-of-the-human-rights-act-1998//> accessed 1 June 2025; *Re an application by the NIHRC for Judicial Review (NI)* (n 21); *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687.

4.3 Conclusion

The scope of review has been significantly expanded in relation to Convention rights by the enactment of the Human Rights Act. This has occurred in two ways: firstly, by narrowing the range of non-justiciable issues and increasing the depth of review; and secondly, by imposing a duty on the courts to interpret statutes in a manner consistent with the Convention.[153] Furthermore, the Act has given domestic law status to new rights not recognised by common law. Although courts have limited ability to override any incompatibilities as to the Acts of Parliament, these have now become justiciable in relation to Convention rights. Furthermore, in order to ensure that legislation complies with the Convention, courts are able to modify it to a 'possible' extent that could, in certain cases, become excessive, for example, in the case of *Ziegler* (even though the Supreme Court later restricted the application of that decision).

It is noteworthy that both the initial grant of interpretative powers to the judiciary and their subsequent application have occurred within broad boundaries on judicial authority. It is evident that this broad scope may be perceived as a factor that enables the courts to adopt a dynamic structure, enabling them to address a diverse range of cases. Nevertheless, the authority vested in the courts by the HRA is significant and theoretically capable of disrupting constitutional balance given the extensive judicial power provided.[154] In practice, however, courts have exercised this authority in a manner that rebalances institutional relationships rather than challenging parliamentary sovereignty.

Upon examination of several landmark cases, it becomes evident that two critical elements are in flux: first, the institutional constraints on judicial power (both interpretative and declaratory); and second, the extent to which Parliament's original legislative intent must be preserved when courts apply

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[153] Jonathan Parker LJ in *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 [144]: 'In one sense the interpretative obligation in section 3 is the corollary of 'deference', in that the point at which interpretation shades into legislation will inevitably be affected by the degree of 'deference' which the courts should accord to the legislative body in recognising its discretionary area of judgment.'

[154] Lewis (n 108) 2; *Cumbria, Northumberland Tyne and Wear NHS Foundation Trust v EG* [2021] EWHC 2990 (Fam).

section 3. The HRA has effectively extended the power of the courts to adjudicate on Convention rights issues. Although the principle of parliamentary sovereignty has been retained; in the sense that the Act allows the courts to adjudicate on matters that are both political and legal, and allows the courts to modify legislation, the constitutional understanding of the principle has evolved from an absolute power of Parliament to a power where courts adjudicate upon them to the extent that Parliament has (eventually) permitted. The scope of judicial review, in the sense of the courts' ability to adjudicate upon matters, is contingent upon the specific facts of the case, the context, and the rights involved, as well as varying judicial approaches to their task.

It can be argued, then, that the scope of judicial review in relation to human rights and Acts of Parliament has been expanded in a number of ways, as discussed above. However, it does not necessarily follow that other institutions are similarly constrained in their ability to act. The legal protection afforded to human rights appears to be undergoing a process of dynamic and ultimately expansionary development. This can be observed in concrete cases such as *Ghaidan's* extension of tenancy rights to same-sex couples and *Ziegler's* incorporation of proportionality assessments into criminal offences — though subsequently clarified in later case law — developments that would have been unlikely through traditional statutory interpretation. Nevertheless, the expansion of the scope of judicial review has not come at the expense of parliamentary sovereignty.

Under section 6, the HRA continues to have an impact on the principle of parliamentary sovereignty beyond what has been discussed in this section. This includes situations where the executive is impeded from carrying out duties or restricted in using discretion that has been delegated to it by Parliament, in addition to the direct interpretative impact on Acts of Parliament through section 3. These additional dimensions of the HRA's constitutional impact will be examined in the following section.

5 An Analysis of the Impact of the Human Rights Act on the Judicial Review of Executive Decisions and the Scope of Judicial Review

5.1 Introduction

The 'scope of judicial review' delineates the extent to which courts can examine and potentially overturn discretionary decisions made by other branches of government, thereby defining the limits of judicial power in ensuring lawfulness, reasonableness, and procedural fairness. That scope and the relationship between the executive and the courts in judicial review proceedings have undergone a significant transformation since the enactment of the HRA 1998. Before the HRA, judicial review of executive decisions operated within a framework dominated by *Wednesbury* unreasonableness, which afforded substantial deference to executive decision-makers and limited courts to examining the process rather than the substance of administrative action. The HRA introduced a new ground of judicial review by giving effect to Convention rights, particularly under sections 2 and 6 of the HRA. This requires courts to assess whether executive acts are compatible with Convention rights and, crucially, whether any interference with such rights is proportionate to the aims pursued.

Historically, the British courts approached this oversight over the executive with a considerable degree of restraint, particularly concerning decisions in areas deemed to involve high policy or sensitive matters.[1] In order to show the broadening of justiciable issues in judicial review, the first chapter initially examined in detail several cases involving judicial review of prerogative powers and several statutory executive powers in the context of national security and foreign relations.[2] These include *Miller/Cherry*,[3] *R (Lord Carlile) v Home Secretary*,[4] *R (Bancoult) v Secretary of State for Foreign and Commonwealth*

[1] Adam Tomkins, *Public Law* (OUP 2003) ch 1.

[2] See ch 1.

[3] *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41.

[4] *R (Lord Carlile) v Home Secretary* [2014] UKSC 60.

Affairs (No 2),[5] *Secretary of State for the Home Department v. Rehman*,[6] *A and others v Secretary of State for the Home Department*,[7] *R (Abbasi) v Foreign Secretary*.[8] It was argued on the basis of those cases that the scope of judicial review has been expanded, particularly following the *GCHQ*[9] case, due to the fact that prerogative powers can be subject to judicial review, depending on the nature and subject matter in question. However, with regard to the exercise of prerogative powers, it was contended that the reasoning of the Supreme Court in *Miller/Cherry*[10] in relation to the question of the existence and scope of prerogative is particularly problematic in terms of allowing an excessive expansion of judicial control over matters of a high policy or political nature. This is excessive because the Court's test focusing on effects on Parliament's constitutional functions is so broad that virtually any significant prerogative decision could become justiciable, thereby eroding the traditional distinction between legal standards and political judgments. It was, therefore, claimed that the reasoning of the Supreme Court in *Miller/Cherry* provides a problematic means for the courts to review the manner in which prerogative powers are exercised — even those powers traditionally deemed non-justiciable on grounds of high policy or similar considerations — given that all unlawful decisions would be *ultra vires* and beyond lawful limits.

Secondly, in the first chapter, in the context of national security and foreign affairs, it was argued that decision-makers enjoy a high degree of deference regarding the exercise of statutory executive powers, mainly due to the existence of institutional and constitutional limits on the judiciary's authority.[11] Although there has been a shift from absolute immunity and exclusion from judicial review to a flexible degree of deference afforded to the executive, this is shaped by the weight given to the executive's expertise, access to evidence and information, decision-making process, institutional legitimacy and opens up a 'theoretical' way for judicial review in that courts will hear challenges but are

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[5] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61.

[6] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47.

[7] *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

[8] *R (Abbasi) v Foreign Secretary* [2002] EWCA Civ 1598.

[9] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

[10] *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* (n 3).

[11] See ch 1.

unlikely to find against the executive given the substantial deference applied. In the context of national security and foreign relations in practice, the scope of judicial review is limited in remedying unlawfulness. This effectively preserves executive autonomy in sensitive policy areas while maintaining the formal appearance of judicial oversight, creating a gap between the theoretical availability of review and meaningful legal accountability.

Following the close examination of the HRA's effect on the relationship between Parliament and the courts and consequently the scope of judicial review in the first section of this chapter, this section will examine the current scope of judicial review over executive decisions in light of the HRA, with a particular focus on the relationship between the courts and the executive. While the previous discussion highlighted the practical limitations of judicial review in national security and foreign affairs despite its theoretical availability, the HRA has introduced a different dynamic that potentially expands judicial scrutiny of executive action through human rights considerations.

In many cases in the UK, the role of the judiciary in examining complex policy decisions under the HRA 1998 has been tested. The determination of an appropriate degree of judicial intervention in these cases has been challenging, as it often requires the balancing of the qualified rights of the individual against the interests of the government or the public. This is referred to as the proportionality test and has been a significant issue in many cases. The discussion here begins by examining the pre-HRA framework of judicial review, focusing on the limitations of *Wednesbury* unreasonableness and the development of 'anxious scrutiny' in fundamental rights cases. It then analyses how the European Court of Human Rights ('ECtHR') exposed these limitations through landmark cases such as *Smith and Grady v United Kingdom*,[12] demonstrating the inadequacy of domestic remedies for Convention rights violations. The analysis proceeds to examine the transformative impact of section 6 HRA, which introduced proportionality as a new standard of review, before exploring how courts have balanced this enhanced scrutiny with respect for institutional boundaries through contextual deference. Finally, it assesses

[12] *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.

whether this new framework has achieved an appropriate constitutional balance between executive accountability and judicial restraint.

This chapter situates its analysis within the broader argument of the thesis: that the evolution of judicial review, particularly since the HRA, has contributed to a more robust and carefully calibrated system of constitutional governance. Rather than constituting judicial supremacy or undermining parliamentary sovereignty, the HRA, particularly the proportionality framework, reflects the ongoing creative tension between the rule of law and democratic authority. It will be argued that the HRA's proportionality framework has created a more intrusive form of judicial review that allows courts to scrutinise the merits of executive decisions to a greater degree than traditional judicial review principles would permit, thereby recalibrating the constitutional relationship between judicial and executive power. Nevertheless, courts remain mindful of their institutional, constitutional, and practical limitations and, in practice, exercise considerable judicial restraint when applying these expanded powers.[13] In this way, this section demonstrates how the development of proportionality under the HRA both exemplifies and tests the thesis's core claim: that the UK's evolving constitutional order is best understood as a principled and responsive process of evolution that balances effective judicial oversight with the continuing supremacy of Parliament.

5.2 The Pre-HRA Framework: *Wednesbury* and Executive Deference

Prior to the HRA, judicial review of executive decisions operated within a framework dominated by *Wednesbury* unreasonableness, which afforded substantial deference to executive decision-makers and limited the scope of judicial review to examining the process rather than the substance of administrative action. The incorporation of Convention rights through the HRA introduced a new ground of judicial review under section 6, requiring courts to assess whether executive actions are compatible with Convention rights and,

[13] David Yuratich, *Public Law: Principles to Practice* (OUP 2024) 436: 'The increased use of proportionality may not have particularly dramatic consequences because its application is heavily influenced by the concept of due deference.'

crucially, whether any interference with such rights is proportionate to the aims pursued.

Moreover, until the Convention was given effect within the domestic law with the HRA 1998 that came into force on 2 October 2000, the UK courts were unable to directly enforce the protection given to the Convention rights under the ECHR. The UK courts were limited in their capacity to apply the rights protected by the ECHR since the ECHR did not create legal obligations to be enforced within the domestic law. Instead, the courts had to rely on indirect methods, such as using the ECHR as a contextual framework for interpretation and examining the rationality of government decisions. This situation underwent a significant transformation following the enactment of the HRA, which rendered the ECHR directly applicable within the UK's domestic law. The enactment of the HRA was particularly done in order to ‘bring rights home’ and make the Convention rights domestically enforceable.[14]

5.2.1 The *Wednesbury* Case: Overview and Significance

Before the enactment of the HRA, judicial review of executive decisions regarding Convention rights was primarily based on common law principles, which protect individuals from arbitrary and abusive executive powers and with limited grounds for challenging such decisions. The main ground for the review of these decisions was *Wednesbury* unreasonableness, which was also known as *Wednesbury* irrationality, as established in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation.*[15] According to the *Wednesbury* standard, in general, courts could only intervene in executive decisions if a decision was so unreasonable that no reasonable decision maker could make it.[16] In other words, a decision would be unreasonable and would be quashed if it is beyond the range of responses that are open to a reasonable decision-maker, though in practice,

[14] *Rights Brought Home: The Human Rights* Bill (1997) Cm 3782; John Wadham and others, 'Enforcing the Human Rights Act' in *Blackstone's Guide to the Human Rights Act 1998* (8th edn, OUP 2024) ch 4.

[15] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; John Wadham and others, 'Enforcing the Human Rights Act' in *Blackstone's Guide to the Human Rights Act 1998* (8th edn, OUP 2024) ch 4.

[16] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (n 15) 230.

the application of this standard was often not as extreme as the original formulation suggests.[17]

Nevertheless, in practice, courts would occasionally intervene even when decisions did not quite reach the level of outright absurdity, as long as they significantly exceeded the range of responses that a rational authority would consider. Other grounds included illegality, where decision makers acted outside their legal powers or failed to consider relevant factors; and procedural impropriety, where a fair process, such as not being biased and hearing the other side, was not followed. These three grounds — illegality, irrationality and procedural impropriety — were famously set out by Lord Diplock in the *GCHQ*[18] case. Notably, Lord Diplock also anticipated that the principle of proportionality, which was already recognised in other European legal systems at that time, might become an additional ground of review in English law in the future.[19]

Before the enactment of the HRA, UK courts operated under the presumption that Parliament intended to legislate compatibly with the ECHR, unless a contrary intention was clearly expressed.[20] However, this presumption offered limited right protection, as proportionality was not recognised as a distinct ground for judicial review. Instead, it was considered merely as 'one indication of manifest unreasonableness' within the traditional *Wednesbury* framework.[21] Crucially, the courts lacked jurisdiction to rule directly whether a decision was compatible with the ECHR. This indirect approach to Convention rights, whereby domestic law was interpreted in light of international obligations, provided only

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[17] Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016); *De Smith's Judicial Review* (9th edn, Sweet & Maxwell 2024) ch 6; *Ala v Secretary of State for the Home Department* [2003] EWHC 521 (Admin) [44]–[45]; *Edore v Secretary of State for the Home Department* [2003] EWCA Civ 716; [2003] 1 WLR 2979 [20]; *R (on the application of Razgar) v Secretary of State for the Home Department (No 2)* [2003] EWCA Civ 840; [2003] Imm AR 529 [40]–[41]; *Huang v Secretary of State for the Home Department* [2005] EWCA Civ 105.

[18] *Council of Civil Service Unions v Minister for the Civil Service* (n 9).

[19] ibid 410 (Lord Diplock).

[20] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696; *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.

[21] *Halsbury's Laws of England* (4th edn, 1989) vol 1(1) para 144: 'The principle of proportionality is still at a stage of development in English law; lack of proportionality is not usually treated as a separate ground of review in English law, but is regarded as one indication of manifest unreasonableness.'

minimal protection to individual rights.[22] Consequently, individuals had to seek redress before the Strasbourg court, resulting in lengthy delays, significant costs, and the absence of effective domestic remedies for human rights violations.[23]

The enactment of the HRA transformed this situation in accordance with its stated aim of making Convention rights directly enforceable in domestic law,[24] by giving effect to the Convention in the UK domestic law, enabling direct consideration of Convention rights before domestic courts and creating, in effect, a new ground of judicial review. The Act introduced a more rigorous proportionality assessment for executive decisions, requiring courts to scrutinise whether interferences with qualified rights are justified and necessary in areas including national security, public health, public order and other social policies. The Act therefore broadened the traditional scope of judicial review, which had previously focused on the process rather than the outcome and substantive grounds of review.[25] Under HRA, the courts' focus is on determining whether the claimants' human rights have actually been violated, rather than on the lesser issue of whether the administrative decision-maker appropriately considered those rights.[26] The Act has given courts a significant role in determining whether the interference in the decisions under challenge is proportionate to Convention rights, though the extent of this judicial role versus Parliament's continuing authority to determine the boundaries of proportionate interference remains contested.

The *Wednesbury*[27] case was particularly concerned about a regulation imposed by the Wednesbury Corporation, prohibiting the entry of children under the age of 15 to cinemas on Sundays, regardless of whether an adult accompanied them. It was challenged on the grounds that it exceeded the corporation's legal authority

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[22] *Garland v British Rail* [1983] 2 AC 751; *R v Chief Immigration Officer*, *Heathrow Airport and another, Ex parte Salamat Bibi* [1976] 1 W.L.R. 979.

[23] *Rights Brought Home: The Human Rights Bill* (n 14).

[24] ibid.

[25] Aileen Kavanagh, 'Reasoning about proportionality under the Human Rights Act 1998: outcomes, substance and process' (2014) 130 LQR 235, 252.

[26] *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19; John F McEldowney, *Public Law* (5th edn, Sweet & Maxwell 2022) ch 17, section D.

[27] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (n 15).

and was against the Sunday Entertainments Act 1932, which allowed local authorities to grant licenses for cinemas to open on Sundays, 'subject to such conditions as the authority thinks fit to impose.'[28] In its ruling, the Court of Appeal established that the courts will only intervene in administrative decisions in cases where the decisions in question are deemed to be irrational or unreasonable to an extreme degree. As Lord Greene MR famously stated, the decision must be shown to have reached a level of unreasonableness that no reasonable authority could ever reach.[29] For a decision to be deemed unreasonable in this context, it must be shown that the decision-making authority failed to direct himself properly in law or failed to consider relevant factors or exclude irrelevant ones.[30]

The irrationality threshold established in *Wednesbury* that a decision was unreasonable only if it was 'so unreasonable that no reasonable authority could ever have come to it'[31] was a very high one. The test effectively demanded that the decision be so irrational that it would be considered absurd or perverse.[32] In the case of *Council of Civil Service Unions v Minister for the Civil Service*,[33] Lord Diplock articulated this extreme standard, describing an unreasonable decision as one that was 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'[34] The high threshold established by *Wednesbury* reasonableness was subsequently identified by the Strasbourg court as being too high and inadequate for the protection of Convention rights.[35]

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[28] Section 1 of the Sunday Entertainments Act 1932.

[29] Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (n 15) 230.

[30] See *R v Secretary of State for the Home Department, ex parte Brind* (n 20)

[31] Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (n 15)223, 230, 234; *Champion v Chief Constable of Gwent* [1990] 1 WLR 1 (HL) 16.

[32] Paul Daly, 'Responsive Reasons in Administrative Law: The Traditional Position' (Administrative Law Matters, 19 April 2024) <https://www.administrativelawmatters.com/blog/2024/04/19/responsive-reasons-in-administrative-law-the-traditional-position/> accessed 24 May 2025; *R v Secretary of State for the Home Department, ex parte Brind* (n 20).

[33] *Council of Civil Service Unions v Minister for the Civil Service* (n 9).

[34] *ibid* 410.

[35] *Smith and Grady v United Kingdom* (n 12).

The ECtHR in *Smith and Grady v United Kingdom*[36] demonstrated this inadequacy when examining the UK's ban on homosexuals in the armed forces. The Strasbourg Court found that while the domestic courts had applied *Wednesbury* reasonableness, this standard failed to provide sufficient scrutiny of measures that seriously interfered with private life under Article 8 of the ECHR. The Strasbourg court emphasised that where fundamental rights were at stake, a more intensive review was required than the highly deferential *Wednesbury* standard permitted. This inadequacy contributed to growing calls for enhanced judicial review and greater legal accountability in administrative decision-making. These pressures ultimately culminated in the incorporation of the ECHR through the HRA 1998.[37] Nevertheless, before HRA 1998 came into force and required judges to apply a proportionality test in cases involving interferences with Convention, in a number of cases, the rationality test had evolved incrementally to include a degree of proportionality assessment, as will be examined now.

5.2.2 Limited Evolution: Anxious Scrutiny in Fundamental Right Cases

The rigidity of the *Wednesbury* standard started to show cracks when courts were faced with cases concerning fundamental rights, especially when executive decisions could have severe impacts on individuals. In 1987, in *Bugdaycay v Secretary of State for the Home Department*[38] (‘*Bugdaycay*’), Lord Bridge introduced the concept of ‘anxious scrutiny’ concerning fundamental rights, particularly the right to life, in an immigration case.[39] The Secretary of State's decision to refuse leave to enter and remain in the UK was challenged by Mr Musisi on the grounds that his removal to Kenya would result in his death. Lord

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[36] ibid.

[37] Tomkins (n 1) ch 6; Jason Varuhas, 'Administrative Law and Rights in the UK House of Lords and Supreme Court' in Paul Daly (ed), *Apex Courts and the Common Law* (University of Toronto Press 2019) 225, 241–243; see Lord Cooke in *R v Chief Constable of Sussex, ex p International Trader v Ferry Ltd* [1999] 2 AC 418 and *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532; *R (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606.

[38] *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514.

[39] Anxious scrutiny afforded to fundamental rights can be seen in the following cases: *Phoenix Aviation* [1995] 3 All ER 37; *R v Ministry of Defence, ex p Smith* [1996] QB 517; *Brind* (n 20); *Thangarasa, R v Secretary of State* [2002] UKHL 36; Lord Carnwath, 'From Rationality to Proportionality in the Modern Law' (UCL-HKU Conference: Judicial Review in a Changing Society, 14 April 2014).

Bridge stressed the fundamental character of the right to life, noting that in cases where such a decision may endanger the applicant's life, the basis for the decision should be subject to the most anxious scrutiny. This suggested a more intrusive review in cases concerning 'basic rights' and arguably a lowered *Wednesbury* threshold in practice.[40] The anxious scrutiny in this sense came from the courts' constitutional role and duty to ensure citizens' rights are not abused by the unlawful exercise of executive power.[41]

Nevertheless, despite Lord Bridge's claim that courts should apply more intensive scrutiny in cases involving fundamental rights, the *Bugdaycay* decision ultimately reached the same conclusion that traditional *Wednesbury* review would have produced. The House of Lords still found that the Secretary of State's decision fell within the acceptable range of reasonable responses and was not irrational. As Craig observed, *Bugdaycay* therefore, represented a shift in judicial methodology rather than the substantive outcome.[42] In other words, while the outcome of similar cases may remain the same, the analytical framework and reasoning employed by judges to reach those conclusions have changed. Furthermore, significantly, Lord Bridge's formulation did not establish clear criteria for identifying which rights would constitute basic/fundamental rights that deserve anxious scrutiny. This left the boundaries of this form of enhanced review uncertain and subject to development through case law.[43]

Following *Bugdaycay*, in the case of *R v Secretary of State for the Home Department, ex parte Brind,*[44] ('*Brind*') the Home Secretary's directives to broadcasters to over-dub the voices of spokespersons from organisations that had been proscribed under the Prevention of Terrorism (Temporary Provisions) Act 1984 and the Northern Ireland (Emergency Provisions) Act 1978 to combat terrorism, were held to be reasonable in the sense of *Wednesbury*. The broadcasters argued that the Home Secretary had no power to impose such a

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[40] But see Lord Ackner in *R v Secretary of State for the Home Department, ex parte Brind* (n 20).

[41] *R v Ministry of Defence, ex p Smith (n 39),* 338B–C; Michael Fordham, 'What is "Anxious Scrutiny"?' (1996) 1(2) Judicial Review 81.

[42] Craig (n 17).

[43] Regarding property rights, see *R v Secretary of State for Transport, Ex parte de Rothschild* [1989] 1 All ER 933; regarding freedom of expression, see *R v Secretary of State for the Home Department, ex parte Brind* (n 20).

[44] *R v Secretary of State for the Home Department, ex parte Brind* (n 20).

restriction under the British Broadcasting Act 1981 and the licensing agreement, that the regulations were disproportionate and unjustified and, therefore, constituted a breach of the right to freedom of expression under the Convention. The House of Lords, firstly, emphasised that the ECHR was not part of UK domestic law and could not be invoked in the case, however, the Convention should be taken into consideration in interpreting the intentions of Parliament.[45] This concerned only provisions that were ambiguous in the sense that they could be interpreted either as complying with the Convention or as being contrary to it.[46] In such cases, the presumption to be applied was that Parliament intended to legislate compatibly with the Convention.[47] The House of Lords unanimously held that the proportionality doctrine could not be used as an independent ground for challenging the Home Secretary's decision and concluded unanimously that it was not allowed to intervene to quash the Secretary of State's decision, which was held reasonable in a *Wednesbury* sense.

Secondly, however, Lords Bridge and Roskill (as opposed to Lord Ackner) stated that proportionality could become one of the grounds of review through an incremental evolution of the case law.[48] They held, however, that this particular case was not an appropriate one for the court to take such a developmental stance.[49] Lord Ackner, on the other hand, argued legitimate concerns that proportionality would require the court to inquire into the merits of the decision, and that such a development can be done without usurpation of powers only by Parliament, not by the courts. He identified that enhanced scrutiny could blur the constitutional boundary between judicial review of legality and impermissible judicial interference with executive policymaking.[50]

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[45] See *Derbyshire County Council v Times Newspapers Ltd* (n 20).

[46] *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116; *R v Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi* (n 22).

[47] *R v Chief Immigration Officer, Heathrow Airport and another, Ex parte Salamat Bibi* (n 22); *Fernandes v Secretary of State for the Home Department* [1981] Imm AR 1; *Chundawadra v Immigration Appeal Tribunal* [1988] Imm AR 161; *JH Rayner Ltd v Department of Trade* [1990] 2 AC 418.

[48] *R v Secretary of State for the Home Department, ex parte Brind* (n 20), 749 (Lord Bridge); 750, 763 (Lord Roskill).

[49] As anticipated by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* (n 9).

[50] *R v Secretary of State for the Home Department, ex parte Brind* (n 20), 757 (Lord Ackner), also see 767 (Lord Lowry).

His insistence that such fundamental changes required Parliamentary rather than judicial authorisation underscored the need for democratic legitimacy in constitutional development. While Lord Ackner's concerns about constitutional propriety were valid, subsequent developments suggested that Lords Bridge and Roskill's incremental approach proved more workable. Still, the eventual Parliamentary incorporation of proportionality through the HRA 1998 vindicated Lord Ackner's insistence on democratic authorisation while confirming that some form of enhanced scrutiny was necessary for rights protection.

Finally, in *Brind*, the House of Lords built upon the precedent set in *Bugdaycay* by acknowledging that fundamental rights cases warrant more intensive review under the *Wednesbury* standard. However, despite applying this heightened scrutiny, the court still upheld the Home Secretary's decision.[51] Five years later, in *R v Ministry of Defence, ex parte Smith, ex parte Grady*[52] **(‘***Smith and Grady***’)** the *need* for more substantial justification for human rights interferences was again clearly emphasised. However, the enhanced scrutiny once again did not lead the court to grant the quashing orders sought by the appellants.

The *Smith and Grady* case concerned four appellants administratively discharged from the armed forces on the grounds of homosexuality. They challenged the dismissal decisions on the grounds of their irrationality, arguing that the human rights context was substantial in assessing whether the decision-maker had exceeded the margin of appreciation. Before the Court of Appeal, Lord Bingham and Lord Justice Thorpe agreed that the irrationality test is sufficiently flexible to accommodate both the necessity to defer to the expertise of the responsible decision-makers and to guarantee the rights of citizens. They confirmed that the more substantial the interference with human rights, the more justification the Court will require.[53] Consequently, the review becomes more rigorous when the rights are at stake and the Secretary of State must have *due* regard to human

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[51]ibid 748–749 (Lord Bridge); 11 (Lord Ackner); *Regina v Secretary of State ex parte de Rothschild* [1989] 1 All ER 933, 939 (Slade LJ): ‘Given the obvious importance and value to land owners of their property rights, the abrogation of those rights in the exercise of his discretionary power to confirm a compulsory purchase order would, in the absence of what he perceived to be a sufficient justification on the merits, be a course which surely no reasonable Secretary of State would take.’

[52] *R v Ministry of Defence, ex p Smith* (n 39).

[53] ibid 564-565.

rights and international obligations. Conversely, the test is less rigorous where the political judgment is greater.[54] Therefore, the *Wednesbury* unreasonableness test has been held to be a variable standard of review in the context of human rights. Nevertheless, once again, even under this heightened scrutiny approach, the policy in *Smith and Grady* was held rational, and it was decided that the court was not entitled to interfere with the executive's application of the policy.

Smith and Grady, along with the *Brind* and *Bugdaycay* cases, highlight the fundamental shortcomings of the *Wednesbury* reasonableness test in human rights cases. Under the traditional irrationality test, the domestic courts were unable to address the core issues of human rights analysis: whether the interference served a pressing social need, whether less restrictive alternatives were available and whether the policy was proportionate to its aims.[55] This inadequacy was subsequently revealed by the ECtHR, which ruled that the *Wednesbury* test had essentially precluded any meaningful evaluation of proportionality. The Strasbourg Court found that the domestic approach failed to provide an effective remedy as it did not assess whether the interference with the applicants' rights was justified or necessary.[56] The judgment highlighted that, despite its adaptability, the evolving *Wednesbury* test remained structurally inadequate for protecting fundamental rights. Ultimately, this deficiency paved the way for the adoption of proportionality analysis under the HRA 1998, ensuring a more rigorous, rights-focused approach to judicial review. Furthermore, it is revealed that while the UK courts had recognised a more flexible approach than the strict original *Wednesbury* test in human rights cases, the proportionality test as defined by the ECHR was a more demanding standard.

Indeed, shortly after the HRA came into force, *R (on the application of Daly) v Secretary of State for the Home Department*[57] (‘*Daly*’) approved the stronger test of irrationality that had been exercised in cases where a fundamental right

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[54] Such as national security (*Council of Civil Service Unions v Minister for the Civil Service* (n 9)); economic policy (*Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240); resource allocation (*R v Cambridge District Health Authority, ex parte B* [1995] 1 WLR 898); international relations (*R v Secretary of State for the Home Department, ex parte Launder* [1997] 1 WLR 839).

[55] *Smith and Grady v United Kingdom* (n 12) [137].

[56] ibid.

[57] *R (on the application of Daly) v Secretary of State for the Home Department* (n 37).

is at stake. Nevertheless, the HRA required courts to apply a further, even more rigorous test of proportionality in cases where Convention rights are at stake. *Daly* was a challenge to the requirement of a policy that a prisoner may not be present when his legally privileged correspondence was examined by prison officers, on the ground that it violated Article 8 of the ECHR, the right to communicate confidentially with a legal adviser of prisoners. The House of Lords held that the interference could not be justified as a necessary measure to maintain security and discipline and held that it was unlawful.[58]

Although Lords Bingham and Steyn, particularly in the *Daly* case, expected the same results under both common law and Convention provisions, Lord Steyn confirmed that the intensity of review is greater under the proportionality approach.[59] He went on to identify three main differences between proportionality and anxious review.[60] First, the principle of proportionality may require courts to assess the balance struck by decision-makers, not just whether it falls within a range of rational decisions. Second, it may require an examination of the relative importance attached to different interests and considerations. Anxious scrutiny does not allow courts to review the 'weight' given to different factors. Finally, anxious scrutiny does not allow courts to determine whether the interference is excessive in a democratic society. In comparison to *Brind* and *Smith and Grady*; *Daly* expanded the scope of judicial review beyond its conventional limits by applying the proportionality doctrine of the ECHR under the HRA.[61] This marks a significant departure from the traditional approach that underpinned *Wednesbury* standard, in that courts must now examine the substance of administrative decisions affecting Convention rights. They must look beyond whether decisions fall within the range of reasonable responses, and consider whether the right balance has been struck

[58] ibid [18], [19] (Lord Bingham).

[59] *R (on the application of Daly) v Secretary of State for the Home Department* (n 37) [27] (Lord Steyn); But see *Osborn v Parole Board* [2013] UKSC 61; *A v BBC (Scotland)* [2014] UKSC 25; Thomas Webb, *Essential Cases: Public Law* (6th edn, OUP 2023) ch 48.

[60] R (on the application of Daly) v Secretary of State for the Home Department (n 37) [27,28] (Lord Steyn)

[61] Janina Boughey, 'Administrative Law: The Next Frontier for Comparative Law' (2013) 62 ICLQ 55, 89.

between competing interests. The proportionality approach requires courts to ensure that even democratically approved policies respect individual rights.

The implications are therefore significant. Administrative decision-makers can no longer use broad discretionary powers to protect their decisions from close scrutiny when Convention rights are engaged. They are now required to demonstrate that their decision was not only rational but also a proportionate response that properly weighs individual rights against competing public interests. Finally, the *Daly* approach under HRA 1998 resolved the fundamental issue identified by the ECtHR in *Smith and Grady v United Kingdom,* British courts can now address the core issues in human rights cases, namely pressing social need, less restrictive alternatives and a proportionate response, rather than being confined to the narrower issue of administrative rationality. The after effect of the enactment of the HRA 1998 will now be closely examined.

5.3 Enactment of the Human Rights Act 1998

The degree of judicial scrutiny under the reasonableness ground of review immediately prior to the enactment of the HRA varied in intensity and has been described as maintaining a sliding scale of review.[62] As demonstrated above, various factors, including the significance of the rights affected, the nature of the administrative decision, and the degree of democratic accountability involved, determine the extent of the review. This scale ranges from standard *Wednesbury* rationality at one end to enhanced reasonableness review (‘anxious scrutiny’) at the other. However, even this most intensive form of domestic review fell short of the proportionality analysis required by Strasbourg jurisprudence, remaining fundamentally a rationality test rather than a true balancing exercise.[63]

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[62] *Kennedy v Charity Commission* [2014] UKSC 20; Laws LJ in *R v Education Secretary, ex parte Begbie* [2000] 1 WLR 1115; Paul Craig, 'Proportionality, Rationality and Review' (2010) Faculty Articles 2455, 286 http://www.repository.law.indiana.edu/facpub/2455 accessed 24 May 2025; but see Lord Carnwath, 'From Judicial Outrage to Sliding Scales – Where Next for Wednesbury?' (ALBA Annual Lecture, 12 November 2013); Tom Hickman, *Public Law after the Human Rights Act* (Hart 2010) ch 9, 258.

[63] *R (on the application of Daly) v Secretary of State for the Home Department* (n 37) [27].

Several changes have been made to the UK system of administrative law by the enforcement of the HRA. Briefly, the HRA, first, incorporated certain Convention rights in the UK domestic law without replacing the body of common law rights recognised by the courts. Convention rights are now independent rights. Parliament has legislated that they should be substantively enforced by domestic courts, similar to the way the ECHR enforces them. Then, section 2 of the HRA requires the courts to 'take into account' the jurisprudence of the Strasbourg court. This entails the application of the proportionality test, as developed before the ECtHR, despite the fact that Strasbourg jurisprudence is not technically binding on the courts. While UK courts initially developed a strong 'mirror principle' of closely following Strasbourg jurisprudence, as established in *R(Ullah) v Special Adjudicator*,[64] this approach has evolved to permit greater divergence where there are compelling domestic reasons. More recent cases, such as *Animal Defenders*,[65] *Horncastle*,[66] and *Manchester City Council v Pinnock*[67] demonstrated that UK courts will normally follow clear Strasbourg authority but may depart from it if there are valid reasons to do so, and UK courts consider domestic law prior to ECtHR jurisprudence.[68] It thus follows that the manner in which the courts approach claims concerning rights protected by the Convention has a significant impact on the scope of the judicial review. Section 3 of the HRA enables courts to interpret legislation compatibly with Convention rights, even where statutory language appears unambiguous, as demonstrated in cases like *Ghaidan v Godin-Mendoza*,[69] and discussed in detail in the previous section of this chapter.[70] Most importantly for the purpose of this section, section 6 made it unlawful for public authorities to act incompatibly with a Convention right, thereby creating a direct statutory ground for judicial review based on human rights violations and fundamentally reshaping the

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[64] *R (Ullah) v Special Adjudicator* [2004] UKHL 26; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23.

[65] *R (Animal Defenders) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312.

[66] *R v Horncastle and others (Appellants)* [2009] UKSC 14.

[67] *Manchester City Council v Pinnock* [2010] UKSC 45.

[68] *Osborn v Parole Board* (n 59); *Kennedy v Charity Commission* (n 62); *Re G (A Child) (Adoption: Unmarried couple)* [2008] UKHL 38; *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2.

[69] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

[70] See previous section of this chapter.

relationship between the executive and the courts by empowering the judiciary to directly assess the Convention compatibility of executive action.[71]

In particular, the HRA has enabled courts to conduct a more rigorous review of executive decisions under the proportionality test that the Strasbourg Court had developed, by requiring that any restrictions on rights be necessary in a democratic society and proportionate to achieve legitimate legislative aims. This is one of the most significant changes introduced by the HRA because, previously, judicial review under the traditional *Wednesbury* rationality test — discussed above — primarily focused on the procedural aspects of executive actions, ensuring that decisions were made lawfully, fairly, and within the given powers.[72] The set of common law rights recognised by the courts was narrow and uncertain. The HRA, particularly section 6, provides a specific statutory ground for challenging public authority actions as unlawful if they are incompatible with a Convention right.[73] In the light of sections 2 and 6, public authorities must ensure that their policies and actions are in compliance with the ECHR Rights protected under the HRA, and that any interference with qualified rights is proportionate and justified.[74] Consequently, the HRA has also introduced new challenges for administrative law across the UK's different legal jurisdictions, particularly concerning the re-established constitutional roles[75] and the capacity of the judiciary to evaluate certain complex policy decisions in a considered manner, by way of assessing the balance between the interests of the public and those of individuals with Convention rights.

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[71] Unless acting incompatibly with the convention is required as the result of or by the necessary effect of primary legislation as stated in section 6(2).

[72] Kavanagh (n 25).

[73] Tomkins (n 1) ch 6.

[74] Absolute rights namely Article 3 (prohibition of torture), Article 4 (prohibition of slavery and forced labour), and Article 7 (no punishment without law) are not permissible to be interfered with by the states.

[75] PS Hodge, 'The Scope of Judicial Law-making in Constitutional Law and Public Law' (2021) 26(2) Judicial Review 146.

5.4 Ensuring Human Rights Compliance in Executive Action

5.4.1 The Scope of Judicial Review under the Proportionality Test

Although the relationship between the courts and executive, previously characterised by substantial deference to the executive on sensitive policy matters, has been reshaped by the HRA 1998, the institutional and constitutional limits which shaped that relationship have been preserved, although applied more flexibly than before the HRA 1998 was enacted. As discussed elsewhere,[76] judicial review of the statutory executive powers had been highly dependent on the context and the rights at stake in a particular decision.[77] It will be argued that even in contexts where the executive has a greater degree of expertise or a more democratically legitimate power to decide than the courts, the courts are now nevertheless required, under the HRA, to undertake a proportionality assessment whenever Convention rights are engaged.[78] This obligation means that, even in areas traditionally afforded significant deference, courts must evaluate whether the executive's decision is a proportionate means of achieving a legitimate aim. As a result, courts may more readily quash decisions on the grounds of incompatibility with the Convention, since the proportionality test requires them to assess the balance struck by the decision-maker, rather than confining themselves to a secondary review of the decision's rationality. This approach typically entails a more intensive and substantive scrutiny than the traditional *Wednesbury* standard, extending beyond the narrow question of whether the decision was one that a reasonable authority could have reached.[79] Nevertheless, case law suggests that courts remain cognisant of their institutional and practical limitations and continue to exercise judicial restraint, though within this new constitutional framework.

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[76] See ch 1.

[77] *Daly* (n 37) 1636 (Lord Steyn): 'in law context is everything'.

[78] *International Transport Roth GmbH v Secretary of State for the Home Department,* [2002] EWCA Civ 158 [85]: '[…] greater deference will be due to the democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts.'

[79] Kavanagh (n 25).

The proportionality test necessarily entails an evaluative judgement because proportionality is contingent upon the relative weight assigned to competing interests. However, as Lord Steyn stressed in *Daly*, that '[the higher intensity of review under proportionality test] does not mean that there has been a shift to merits review'.[80] This statement was subsequently clarified in *Huang v Secretary of State for the Home Department*.[81] It was held that although the Convention requires a stricter standard of review, judges are not the primary decision-makers in determining policies. The courts are the primary decision-makers in determining whether a challenged decision is unlawful and incompatible with a Convention right.[82] Under the HRA, the courts do not assume the role of the decision-maker, but rather examine the policies and any justifications provided to ensure that there is adequate justification for interfering with Convention rights.[83] However, putting this distinction into practice has been challenging. The intensive scrutiny required for proportionality analysis sometimes blurs the line between reviewing the lawfulness of a decision and evaluating its merits. Initially, cases such as *Bank Mellat v HM Treasury (No 2)*[84] on the one hand, and *R (on the application of Begum) v Denbigh High School Governors*[85] and *R (Lord Carlile) v Home Secretary*[86] on the other, demonstrate the ongoing tension between maintaining judicial restraint and conducting a sufficient human rights review.

The Proportionality Test:

The proportionality formulation that was initially developed in UK human rights law was adopted from the Privy Council decision *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*[87] (*'De*

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[80] *R (on the application of Daly) v Secretary of State for the Home Department* (n 37) [28].

[81] *Huang v Secretary of State for the Home Department* [2007] UKHL 11.

[82] ibid [11]; *R (Begum) v Denbigh High School Governors* [2006] UKHL 15.

[83] *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39 [21] (Lord Sumption), [93] (Lord Reed); *Kennedy v Charity Commission* [2014] UKSC 20 [52] (Lord Mance).

[84] *Bank Mellat v HM Treasury (No 2)* (n 83).

[85] *R (Begum) v Denbigh High School Governors* (n 82).

[86] *R (Lord Carlile) v Home Secretary* (n 4).

[87] *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.

Freitas') case by reference to the Canadian case of *R v Oakes*,[88] and was presented in the following three-limb test format. Originally, the following three criteria must be considered in order to decide whether a restrictive decision is excessive or arbitrary:

> 'I. Whether the legislative objective is sufficiently important to justify limiting fundamental rights.
>
> II. [Whether] the measures designed to meet the legislative objective are rationally connected to it.
>
> III. [Whether] the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'[89]

In *Razgar*,[90] *Huang*,[91] *Quila*[92] and *Bank Mellat v HM Treasury (No 2),*[93] the deficiency in this formulation was acknowledged as the original formulation of the proportionality test, as set forth in *R v Oakes*, included the question whether the measure achieves a fair balance between the interests of the individuals affected and the wider community in proportionality assessment. Consequently, the need to strike a balance between the wider interests of society and those of individuals is now recognised as the fourth limb of the proportionality test. This alteration is consequently interpreted in later cases as an explicit acknowledgement of a previously implicit acceptance in *De Freitas*.[94]

The formal addition of the fourth limb, which requires an assessment of whether a fair balance has been struck, significantly enhances the proportionality test. It transforms the analysis from a simpler three-stage test into a more in-depth balancing exercise, compelling courts to engage in a more direct evaluative assessment of the outcome of the executive's decision. This is a generally positive change for the protection of Convention rights, as it provides a more

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[88] *R v Oakes* [1986] 1 SCR 103.

[89] *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* (n 87) [25].

[90] *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [17] – [20].

[91] *Huang v Secretary of State for the Home Department* (n 81) [19].

[92] *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45.

[93] *Bank Mellat v HM Treasury (No 2)* (n 83).

[94] Lewis Graham, 'Proportionality under the HRA: Are de Freitas and Daly Now Defunct?' [2024] PL 37, 42; but see *Department of Justice v JR123* [2023] NICA 30; [2023] 5 WLUK 544 (CA (NI)).

comprehensive judicial review framework that more closely aligns the domestic test with the broader balancing exercise undertaken by ECtHR. It ensures that courts directly consider the overall impact on the rights of the individual when weighed against the public interest, thereby strengthening the safeguarding of individual rights. However, the explicit requirement for courts to strike a fair balance necessarily involves making value judgements about the relative importance of individual rights versus collective interests. This strengthens the judicial role and potentially blurs the line more with merits review, as it requires judges to weigh competing policy considerations more directly.

While the expanded four-limb proportionality test provides a rigorous framework for judicial review, its application necessarily engages the courts in a delicate balancing act, requiring careful consideration of the executive's institutional competence and democratic legitimacy, which is often termed 'deference' and varies depending on the context. This will now be explored.

5.5 Proportionality, Deference and Institutional Boundaries

5.5.1 *Bank Mellat*: Establishing the Deference Framework

In *Bank Mellat v HM Treasury (No 2)*[95] *('Bank Mellat'),* the Supreme Court clarified and set out the four-limb proportionality test and underlined that the degree of deference to be given to the executive's assessments is context dependent. The Court examined the Treasury's financial restrictions order made against Bank Mellat, with a particular emphasis on the proportionality of the restrictions.[96] The UK government had imposed sanctions on Bank Mellat, which is an Iranian bank, due to the alleged links to Iran's nuclear proliferation, which had the potential to affect the UK's interests. The bank argued that the order was infringing its right to a fair trial, protected by Article 6 of the ECHR, and protection of property under the Protocol No. 1. The order was challenged on two main grounds. The procedural ground was that the Treasury failed to allow the Bank to make representations before making the order. The substantive

[95] *Bank Mellat v HM Treasury (No 2)* (n 83).

[96] Financial Restrictions (Iran) Order 2009, SI 2009/2725 made under section 63(2) of the Counter-Terrorism Act 2008.

ground was that the decision was irrational, disproportionate and discriminatory because the Treasury failed to give adequate reasons for making it, and their reasons were vitiated by irrelevant considerations or mistakes of fact. In the High Court, the Bank's application was dismissed under both heads. The Court of Appeal also dismissed the appeal on the substantive grounds unanimously and on the procedural grounds by a majority. [97]

The Supreme Court, on the other hand, ordered that the sanctions be quashed, marking a significant assertion of judicial oversight over government actions, particularly in the context of national security. The decision is important in showing the strong implementation of the proportionality principle in judicial scrutiny. It underlines the role of the courts in ensuring that government measures, even those justified on national security grounds, must comply with human rights standards and principles of proportionality. For the purposes of this chapter, the substantive ground is of importance in showing the effect of proportionality on the scope of judicial review over executive decisions.

The Supreme Court, by majority, allowed Bank Mellat's appeal, finding that the sanctions were disproportionate and had unfairly singled out the bank without sufficient justification. Regarding the substantive issue, Lord Sumption, with whom Lady Hale and Lords Kerr, Clarke and Carnwath agreed, delivered the majority opinion and emphasised that in matters of national security and foreign policy, the executive enjoys substantial discretion, a wide margin of appreciation, and the court should refrain from encroaching upon the decision-maker's role.[98] However, in applying the four-limb test to assess proportionality (whether the objective is sufficiently important to justify restricting a fundamental right, whether the measure is rationally connected to the objective, whether a less intrusive measure could have been employed[99] — where minority and majority differed — and whether a fair balance has been struck between the rights of the individual and wider public interest), it was contended

[97] *Bank Mellat v HM Treasury* [2012] QB 101.

[98] *Bank Mellat v HM Treasury (No 2)* (n 83) [21] (Lord Sumption), [98] (Lord Reed).

[99] Previously in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* (n 87) this was expressed as "whether the limitation upon the right in question is no more than is necessary to accomplish the objective pursued". These two phrases are being used interchangeably; but see *R (Aviva Insurance Ltd) v Secretary of State for Work and Pensions* [2022] EWCA Civ 15.

that proportionality must be applied rigorously across all rights contexts, including property rights.[100]

Although the financial sanctions were found to be rationally connected to the goal of frustrating Iran's nuclear weapon program, the distinction between Bank Mellat and other Iranian banks was found to be arbitrary and disproportionate by the majority, given that the Treasury's concern is an inherent risk of banking, which equally affects the other banks.[101] As other, less drastic measures had been considered to provide sufficient protection for other Iranian banks, the majority held that it was questionable whether it was necessary to require UK financial institutions to cease dealing with Bank Mellat.

It was unanimously agreed by the majority and minority judges that the degree of restraint exercised by courts in applying the principle of proportionality, that is to say the degree of weight or respect accorded to the assessment of the primary decision-maker, is dependent on the context and nature of the right at stake, as it was prior to the enactment of the HRA.[102] In this case the majority found that even in that national security context, the infringement of property rights was disproportionate. Lord Reed, in the dissenting minority opinion, nevertheless warned against the possibility of judicial creativity, emphasising that a judge could be prepared and able to devise less drastic or restrictive measures in nearly any situation.[103] He acknowledged that it is inherent to the proportionality assessment that an evaluative judgement will be made. However, he placed particular emphasis on the fact that the court is not permitted to substitute the decision-maker's assessment with its own, particularly in cases where the relevant practicalities and considerations of cost are not fully appreciated by the courts. He further emphasised that democratic responsibility and accountability for protecting citizens rest primarily with the government, particularly in sensitive areas such as national security and

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[100] *Bank Mellat v HM Treasury (No 2)* (n 83) [74] (Lord Sumption); *A and others v Secretary of State for the Home Department* (n 14); *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* (n 87); *R (Razgar) v Secretary of State for the Home Department* (n 90); *Huang v Home Secretary* (n 81).

[101] *Bank Mellat v HM Treasury (No 2)* (n 83) [21] – [22], [24], [27] (Lord Sumption).

[102] ibid [71] (Lord Reed).

[103] ibid [75] (Lord Reed).

international relations.[104] In their assessment of the proportionality of the measures taken against Bank Mellat, Lord Reed and Lord Dyson argued that any restrictions were 'reasonable'[105] and held that, the court's lack of expertise and evidence in this context requires substantial deference to executive judgment.[106] A year later, as discussed in more detail below, in the case of *R (Lord Carlile) v Home Secretary*,[107] Lord Sumption adopted a similar approach in the context of proportionality assessment, reducing it to a matter of reasonableness in relation to the exclusion decision of an Iranian politician on the grounds of national security given that the correctness of such assessments cannot be empirically tested.[108]

The tension between majority and minority approaches in Bank Mellat reflects broader questions about institutional competence in human rights adjudication. Executive decisions on matters of social or economic policy typically entail the evaluation of predictions or fundamental moral values that conflict with one another, and where more than one rational choice exists.[109] The judiciary inevitably lacks democratic accountability and the resources, including the capacity to consult extensively, to develop complex policies, particularly in sensitive areas such as national security and international relations. The consequences of such decisions may be far-reaching, particularly in terms of public expenditure and the allocation of public funds. It is therefore within the purview of the government and the legislature to make these decisions on behalf of the overall interests of the country.[110] Consequently, as discussed in detail in the first chapter, it is frequently reiterated by the judges in judicial review

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[104] ibid [71], [129] (Lord Reed), [164] (Lord Neuberger).

[105] ibid [116] (Lord Reed), [200] (Lord Dyson).

[106] ibid [97] (Lord Reed), [167] (Lord Neuberger).

[107] *R (Lord Carlile) v Home Secretary* (n 4); See also ch 1.

[108] ibid [32] (Lord Sumption).

[109] *A and others v Secretary of State for the Home Department* (n 7); *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.

[110] *R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2008] QB 289.

cases that the courts are not permitted to substitute their assessment for that of the executive.[111]

However, under the HRA framework, this institutional limitation operates differently. While courts cannot substitute their judgment for executive policy choices, they 'must form their own view on proportionality of the decision, or what is sometimes referred to as the balancing exercise involved in the decision'[112] when Convention rights are engaged. The capacity of the court to fulfil its duty under the HRA to ensure the protection of Convention rights from undue interference by public bodies is contingent upon forming an independent perspective on proportionality. This independent assessment is essential because proportionality is the key test for determining whether interference with Convention rights is justified under the HRA framework. In light of the HRA, traditional concerns about institutional incompetence are overcome when a decision allegedly contravenes a Convention right and the court is asked to adjudicate a human rights claim. Human rights compliance becomes a legal question for the courts to answer, including whether the balance struck by the executive between individual rights and competing public interests such as national security accords with the HRA.[113] Still, the institutional limitations discussed here are relevant in determining how much weight to give to the views of primary decision-makers, and it can be challenging because of the overlap of legal and political issues.

5.5.2 Contextual Application: The *Denbigh* Contrast

The context-dependent nature of judicial deference concerning Convention rights established in *Bank Mellat* is clearly illustrated by contrasting it with *R*

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[111] *R (Lord Carlile) v Secretary of State for the Home Department* (n 4) [31] (Lord Sumption); *Huang v Secretary of State for the Home Department* (n 81) [13] (Lord Bingham); *R (on the application of Daly) v Secretary of State for the Home Department* (n 37) [28] (Lord Steyn).

[112] *R (Lord Carlile) v Home Secretary* (n 4) [67] (Lord Neuberger), [105] (Baroness Hale); *Belfast City Council v Miss Behavin' Ltd* (n 26), [13], [24], [31], [44], [97]; *R (Begum) v Denbigh High School Governors* (n 2); *Bank Mellat v HM Treasury (No 2)* (n 83), [68] – [76]; *Singh LJ Dalston Projects Limited and others v Secretary of State for Transport* [2023] EWHC 1885 (Admin); *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56.

[113] Paul F Scott, *The National Security Constitution* (Hart 2018); Mark Elliott, 'Human Rights, Proportionality and the Judicial Function: R (Carlile) v Home Secretary in the Supreme Court' (Public Law for Everyone, 13 November 2014) https://publiclawforeveryone.com/2014/11/13/human-rights-proportionality-and-the-judicial-function-r-carlile-v-home-secretary-in-the-supreme-court/ accessed 24 May 2025.

(Begum) v Denbigh High School Governors[114] ('Denbigh'). While *Bank Mellat* demonstrated intensive judicial scrutiny of executive decisions even in national security contexts, *Denbigh* shows how courts adopt a more deferential approach when reviewing institutional decisions within areas of recognised expertise. In *Denbigh*, the House of Lords examined the balance between individual rights under the HRA 1998 and the operational decisions of public institutions, here focusing on a school's uniform policy. The House of Lords, in their assessment of proportionality, gave substantial weight to the school's assessments when balancing the Convention rights. The case concerned the question of whether Begum's right to manifest her religion under Article 9 of the Convention was infringed by the school's requirement that she wear the shalwar kameeze instead of the jilbab. It was considered whether her dress was being unjustifiably restricted and whether she was being denied access to education under Article 2 of the First Protocol on the right to education.

Before the House of Lords, the appeal made by the school against the decision of the Court of Appeal was upheld unanimously. The majority of the House of Lords found that there was no interference with Begum's right to manifest her religion at all, as she could have attended nearby schools that allowed the jilbab.[115] A minority of the judges, Lord Nicholls and Lady Hale, held the view that the uniform policy constituted an interference. However, they considered it to be proportionate, as it was inclusive without being mindless or oppressive, and therefore justified. Lord Bingham and Lord Hoffmann addressed the proportionality issue as if they were of the opinion that some interference had occurred with the claimant's Article 9 right.[116] The judges agreed that the level of interference was proportionate to the wider community interest.

The House of Lords' approach to proportionality contrasted markedly with the intensive scrutiny seen in *Bank Mellat*. Rather than conducting a detailed analysis of the school's policy choices, the Court accorded substantial deference to educational expertise and institutional competence in determining how best

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[114] *R (Begum) v Denbigh High School Governors* (n 82).

[115] *R (Begum) v Denbigh High School Governors* (n 82) [25] (Lord Bingham), [50] (Lord Hoffmann), [89] (Lord Scott).

[116] ibid [25] (Lord Bingham), [58] (Lord Hoffmann).

to balance the rights of individual pupils against the interests of the wider school community.[117] The Lords were particularly influenced by the school's comprehensive consultation process with community stakeholders, including local mosque representatives and by the policy's legitimate educational objectives of promoting social cohesion among students from diverse backgrounds.

The *Denbigh* decision illustrates a crucial principle: while the courts are the primary arbiter of whether the human rights of the relevant individuals have been infringed and whether the contested decisions are proportionate to the competing interests concerning the Convention rights, proportionality assessment is not an exclusively judicial exercise.[118] Rather, courts give variable weight to the assessments of different public authorities based on contextual factors. The weight given to the school in *Denbigh* was significantly influenced by the decision-making process, the nature of the rights at stake and the competence of the institutions involved. This contextual weighting serves an important constitutional function. As Lord Brown explained, by affording appropriate weight to primary decision-makers within the proportionality framework, courts maintain the crucial distinction between proportionality review and impermissible merits review.[119] This way, the court's role becomes one of evaluating whether the institution's balancing exercise was reasonable and Convention-compliant, rather than substituting its own policy preferences.

The high level of deference shown in *Denbigh* contrasts significantly with the *Bank Mellat* majority's approach, which applied stricter proportionality review even in a national security context. In *Denbigh*, the judiciary more readily accepted the school's expertise in educational and community relations, acknowledging the comprehensive and inclusive consultation process underlying its uniform policy. Conversely, the majority in *Bank Mellat* demanded a more robust justification for the Treasury's distinction between Iranian banks, despite the national security context. The variation in deference levels depends

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[117] ibid [84], [97] (Lord Scott).

[118] Kavanagh (n 25).

[119] *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53; [2007] 1 AC 650; *Daly (n 27) [28] (Lord Steyn):* '[the higher intensity of review under proportionality test] does not mean that there has been a shift to merits review.'

fundamentally on the court's evaluation of whether the public body possesses genuine expertise relevant to the particular decision in question. Therefore, the key difference does not lie in a distinct legal test being applied, but rather in the judiciary's assessment of relative institutional competence and the expertise required for the specific decision under scrutiny. However, this case-by-case assessment of institutional competence carries uncertainty about the intensity of review that public authorities can expect, potentially undermining the predictability and legal certainty — a variability that is nonetheless grounded in constitutional and institutional boundaries, rather than being unprincipled.

Similar to *Denbigh*, in *R (Lord Carlile) v Home Secretary*[120] (‘*Carlile*’), the Secretary of State was afforded substantial deference in its decision to maintain the exclusion from the UK of Mrs Rajavi, who was a prominent dissident politician in Iran and had been invited by UK parliamentarians for a discussion, on the grounds of national security and foreign policy. The case is discussed in first chapter in more detail.[121] Accepting the executive’s risk assessments regarding the UK's relationship with Iran and potential violent reactions, the Supreme Court ruled four-to-one that the interference with freedom of expression was proportionate and justified, affording even greater weight to executive expertise than in *Bank Mellat*.

Applying a highly deferential standard, the majority of the judges considered that they could not disagree with the executive's assessments unless there was clear evidence of lack of veracity or reliability in those assessments. Lord Neuberger and Lord Sumption further reinforced that in the absence of sufficient evidence, it was not within the purview of the judiciary to challenge the risks identified by the Foreign Secretary. They emphasised that it would require a compelling counter-argument to persuade the court to reach a conclusion that differed from that of the Home Secretary. The majority placed significant emphasis on the executive's institutional competence, particularly with regard to matters of national security involving complex predictions, and the executive's accountability through political processes.

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[120] *R (Lord Carlile) v Home Secretary* (n 4)

[121] See ch 1.

Lord Kerr dissented, acknowledging executive expertise whilst asserting that balancing Convention rights against security risks falls within judicial competence and represents a duty that the court must fulfil under the HRA. The court, under its duty to uphold Convention rights under the HRA, must independently determine whether any interference is proportionate and necessary, as required by parliamentary sovereignty. He concluded that the interference was not absolutely necessary and therefore unjustified. He was, however, in the minority, and the majority of the judges held that proportionality is not independent from the context, requiring substantial weight to be given to executive expertise and democratic accountability, even when reviewing human rights compliance.

The contrasting approaches in *Denbigh* and *Carlile* compared to *Bank Mellat* reveal that the judiciary remains cautious about overturning executive decisions, particularly when such decisions emerge from comprehensive consultation processes or involve complex moral and policy judgments. While the courts are statutorily required to assess the proportionality of the interferences as the primary decision maker, as outlined in section 6 of the HRA, this obligation does not entirely displace the institutional limitations of the court.[122] Consequently, the courts remain constrained from substituting the executive's evaluations on matters of social policy with their own. In this way, the court conducted a substantive review that is distinct from a merits review, despite its role as the primary decision-maker on the proportionality.

The application of proportionality analysis to a range of rights and contexts — including areas such as national security, which have traditionally been subject to significant deference[123] — fundamentally reconfigures the scope of judicial review. This is to say that it determines the extent of the judicial authority when reviewing the legality and validity of administrative decisions, actions, or failures to act. This scope directly correlates with the degree of deference afforded to the executive. Higher deference would mean a narrower scope of the judiciary to adjudicate, while lower deference broadens it. Although the

[122] *R (Nicklinson) v Ministry of Justice* (n 109) [167]; *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* (n 65) [53].

[123] For a detailed analysis see ch 1.

proportionality test has expanded the substantive grounds for judicial review beyond traditional *Wednesbury* reasonableness,[124] cases such as *Denbigh* and *Carlile* illustrate that its boundaries remain context dependent. Nevertheless, the HRA ensures that judicial review of executive acts under the Convention is inherently broader than under traditional common law frameworks, as courts are statutorily mandated to balance individual rights against public interests through a structured, rights-compatible manner.

Proportionality, therefore, provides a strong legal tool for deeper scrutiny, yet its application is often calibrated by the courts' recognition of their own institutional limits. This creates an evolving balance that raises fundamental questions about whether the HRA has truly transformed the scope of judicial review. In fact, strong judicial deference in national security or social regulation, where rights are often most at risk, arguably threatens to undermine the HRA's protective purpose. While some institutional restraint may be constitutionally appropriate, the reluctance to scrutinise executive claims in a strict manner would risk undervaluing the HRA's capacity to rebalance administrative law towards substantial safeguarding of rights. Although the context-dependent application of proportionality makes it difficult to provide a definitive assessment, there remains a legitimate constitutional concern that excessive deference may undermine the HRA's transformative potential. Although this concern is not without foundation, this thesis has demonstrated that such a context-sensitive deference itself reflects the principled allocation of institutional authority rather than a failure of judicial oversight.

[124] *R v Secretary of State for the Home Department, ex parte Brind* (n 20); *R v Ministry of Defence, ex p Smith* (n 39); *R (on the application of Daly) v Secretary of State for the Home Department* (n 37).

5.6 Judicial Paradox in Human Rights Adjudication: A Comparative Analysis of *Tigere* and *SG*

The cases *of R (Tigere) v Secretary of State for Business, Innovation and Skills*[125] (‘*Tigere*’) and *R (SG & Ors) v Secretary of State for Work and Pensions*[126] (‘*SG*’), both decided by the UK Supreme Court in 2015, highlight the inherent tensions in judicial review concerning the compatibility of policy decisions with Convention rights. These cases, notably, involved a three-to-two split in the Supreme Court, with a striking reversal of judicial positions between the two judgments, exposing differing approaches on the intensity of judicial scrutiny and the judiciary's role in protecting individual rights against executive policies.

Tigere concerned Ms Tigere's eligibility for a student loan. Despite her long-term residence in the UK and ‘discretionary leave to remain’, Ms Tigere was denied a student loan because she did not possess ‘indefinite leave to remain’ or British citizenship, a requirement for eligibility for student loans. She argued that this blanket exclusion was disproportionate and incompatible with Article 2 of the First Protocol (right to education) and Article 14 of the ECHR (prohibition of discrimination). The majority, including Lady Hale, Lord Kerr, and Lord Hughes, adopted an intensive review approach, prioritising individual rights. The majority concluded that although the state has no obligation to provide higher education, any provision must comply with non-discrimination principles. They emphasised that young people with strong connections to the UK through long-term lawful residence, such as Ms *Tigere*, should not face disproportionate barriers to accessing university. The majority argued that administrative convenience and short-term financial savings could not justify the substantial harm caused to individuals and long-term societal loss when qualified students were prevented from accessing higher education.[127] In contrast, the minority,

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[125] Richard Ekins, in *Protecting the Constitution: How and why Parliament should limit judicial power* (Policy Exchange, 2019), cites *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57 and *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2019] EWHC 452 (Admin) as examples of judicial overreach into the policy domain. However, the High Court’s ruling in the latter case was later overturned by the Court of Appeal in R (JCWI) v Secretary of State [2020] EWCA Civ 542, which upheld the Government’s appeal and found that any discriminatory effects of the Right to Rent scheme were justified.

[126] *R (SG & Ors) v Secretary of State for Work and Pensions* [2015] UKSC 16.

[127] *R (Tigere) v Secretary of State for Business, Innovation and Skills* (n 125), [41], [42] (Lady Hale); [58] (Lord Hughes).

Lord Reed and Lord Sumption, adopted a more deferential approach and argued that judicial intervention in such policy decisions should only occur if the policy was 'manifestly without foundation.'[128] In their view, the government's decision regarding student loan eligibility, even if it resulted in discriminatory outcomes, was a matter of resource allocation and public policy.[129]

The disagreement between majority and minority reflects fundamentally different conceptualisations of rights and judicial role.[130] The majority viewed education as crucial for individual development, demanding stringent proportionality analysis when discrimination occurs.[131] In contrast, the minority saw the case primarily as one concerning the allocation of resources, which typically requires a lower intensity of judicial scrutiny, reflecting a greater deference to the executive's policy choices.[132] These competing approaches highlight the ongoing tension between protecting individual rights and respecting democratic decision-making processes. However, the Supreme Court's decision in *R (SG & Ors) v Secretary of State for Work and Pensions* ('SG') reveals a significant paradox. Both *Tigere* and *SG* were decided in 2015, by a three-to-two regarding human rights challenges to government policy. Yet the prevailing judicial positions were completely reversed. Comparison of these two cases demonstrates tensions about the appropriate intensity of judicial review in human rights cases and the courts' role in protecting individual rights against executive policies.

The *SG* involved a challenge to the benefit cap regulations that limited non-working households to £500 per week, regardless of family size or local rental costs. The claimants argued this constituted indirect discrimination against women, violating Article 14, and disproportionately interfered with Article 1 of the First Protocol (property rights). In *Tigere*, Lady Hale was one of the judges advocating a rights-protective majority that applied intensive judicial scrutiny,

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[128] ibid [100]; See *Gogitidze v Georgia* (App No 36862/05), (ECtHR, 12 May 2015) para 97: 'a wide margin of appreciation is usually allowed to the state under the Convention when it comes to general measures of political, economic or social strategy, and the court generally respects the legislature's policy choice unless it is "manifestly without reasonable foundation".'

[129] *R (Tigere) v Secretary of State for Business, Innovation and Skills* (n 125) [74], [75].

[130] Yuratich (n 13).

[131] R (Tigere) v Secretary of State for Business, Innovation and Skills (n 125) [32].

[132] ibid [100].

while Lord Reed advocated judicial restraint in dissent. In *SG*, the prevailing positions reversed, Lord Reed was within a deferential majority applying minimal scrutiny, whilst Lady Hale stated a powerful dissent emphasising robust rights protection.

Lady Hale, in *Tigere*, emphasising the importance of the right to education, applied stringent proportionality analysis, finding that administrative convenience could not justify substantial individual harm. In *SG*, despite being in dissent, Lady Hale maintained this rights-protective stance. She argued that the benefit cap violated children's best interests under the UN Convention,[133] rendering the discrimination against women disproportionate, and asserted that 'depriving them of the basic means of subsistence cannot be a proportionate means of achieving' the government's aims.[134] Conversely, Lord Reed, who placed strong emphasis on legitimacy, expertise, and accountability in the executive's determinations regarding resource allocation, had previously advocated for judicial restraint in *Tigere* and was part of the deferential majority in *SG*. In *Tigere*, he advocated for a 'manifestly without foundation' test, arguing that courts should not substitute their judgment for democratically accountable decision-makers unless policies were clearly unreasonable. In *SG*, along with the majority opinion, he held that consideration of proportionality involved 'controversial issues of social and economic policy, with major implications for public expenditure'[135] and that 'determination of those issues is pre-eminently the function of democratically elected institutions. Unless manifestly without reasonable foundation, the assessment should be respected.'[136] The majority also underlined the fact that the regulations had been approved by both Houses of Parliament.

In *SG*, the majority concluded that children's interests under the UN Convention were not relevant to the proportionality analysis when the challenge pertained

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[133] The UNCRC, although incorporated in domestic law, was relevant when interpreting the ECHR, because the ECtHR often considers international human rights instruments when assessing the scope and application of Convention rights. The UNCRC provides authoritative guidance on children's rights, reinforcing the principle that a child's best interests must be a primary consideration in all actions concerning them.

[134] *R (SG & Ors) v Secretary of State for Work and Pensions* (n 126) [229].

[135] ibid [93] (Lord Reed).

[136] ibid [93], [96] (Lord Reed), [133] (Lord Carnwath).

to discrimination between men and women. Lord Reed argued that justification was required only for the measure's disproportionate impact on women, not its broader consequences.[137] Lady Hale and Lord Kerr, however, adopted a fundamentally different approach. Lord Kerr emphasised that the discriminatory impact was particularly felt by single-parent mothers, whose responsibilities included childcare, making the interests of mother and child 'indissociable'.[138] Lady Hale noted that children 'suffer from a situation which is none of their making and which they themselves can do nothing about'.[139]

Although *Tigere* has been explicitly cited by Professor Ekins as judicial overreach, showing little deference to policy decisions; the broader context illustrates a more complex picture.[140] Both cases were decided in the same year by close majorities, with contrasting outcomes that reveal deep judicial disagreement rather than systematic activism. The reversal of positions by several justices — notably Lord Hughes's switch from Lady Hale's rights-protective stance in *Tigere* to Lord Reed's deferential approach in *SG* — shows that judicial approaches are significantly influenced by specific policy contexts. This context-dependency of proportionality analysis, combined with the three-to-two division within the judiciary, suggests there is insufficient evidence to conclude that the judiciary is systematically overreaching. Instead, these cases demonstrate the dynamic tension between protecting individual rights and respecting the democratic decision-making process. Proportionality remains a topic of evolving debate rather than a systematically expansionist means for broadening the scope of rights.

5.7 The Doctrine of Proportionality Under Common Law

It was discussed above, particularly in *Daly*, that the proportionality test, as developed by the Strasbourg Court, is a more rigorous test than reasonableness. Lord Steyn determined three main differences in particular.[141] First,

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[137] ibid [76] (Lord Reed).

[138] ibid [266] (Lord Kerr)

[139] Ibid [227] (Lady Hale).

[140] Ekins (n 125).

[141] In *R (on the application of Daly) v Secretary of State for the Home Department* (n 37) [27], [28] (Lord Steyn).

proportionality requires courts to evaluate the actual balance struck by decision-makers, rather than merely determining whether the decision falls within a reasonable range. Second, in contrast with the proportionality test, the anxious scrutiny approach does not permit courts to reassess the significance or 'weight' attributed to the various factors by the decision-maker. Third, unlike proportionality, anxious scrutiny does not allow courts to evaluate whether an interference with rights is disproportionate in the context of a democratic society. In essence, the proportionality principle potentially allows for a more intensive judicial review of decision-making processes and outcomes. Nevertheless, depending on the context and circumstances of the cases in question, it is possible that these two tests may overlap, and proportionality assessment may be reduced to a matter of reasonableness in certain situations.[142] This may result from a higher degree of expertise or democratic legitimacy of the executive, or from contexts such as national security, foreign or economic policies. In such cases, the court may accord significant weight to the assessment of the decision-maker.

As demonstrated above, the proportionality test, as developed by the Strasbourg jurisprudence, pertains to Convention rights that are given domestic legal effect under HRA. In the context of fundamental rights, such as the right of access to justice and legal professional privilege, under common law, the reasonableness ground of review is a sliding scale, as the justification required to justify the interference with a right is variable and contingent upon the importance of the right and the extent of the interference, similarly to proportionality.[143] Over time, the concept of reasonableness has evolved from a strict *Wednesbury* test to an anxious review, whereby the more substantial the interference with fundamental rights, the greater the justification required by the court before determining the decision to be reasonable. In this context, proportionality can be considered to represent the intense end of the scale. In applying the proportionality test, the court is required to form its own view of the balance

[142] *Bank Mellat v HM Treasury (No 2)* (n 83) [116] (Lord Reed), [200] (Lord Dyson); *R (Lord Carlile) v Home Secretary* (n 4) [32] (Lord Sumption); *R (on the application of Daly) v Secretary of State for the Home Department* (n 37); *Kennedy v Charity Commission* (n 62) [54] (Lord Mance); Paul Craig, 'The Nature of Reasonableness Review' (2013) 66 Current Legal Problems 131.

[143] *R v Secretary of State for the Home Department, Ex p Bugdaycay* (n 38), *R v Secretary of State for the Home Department, ex parte Brind* (n 20), and *R v Ministry of Defence, Ex p Smith* (n 39).

struck by the decision-maker. Conversely, under the reasonableness ground of review, the court's role is to determine whether the decision falls within the range of rational balances that could have been reached. In contrast to the proportionality test, the reasonableness test does not require the court to judge the decision itself. Instead, the court asks whether a rational minister could have thought that the decision was proportionate.[144]

In several instances, the question was considered as to whether a proportionality assessment, which has been applied in the context of the Convention (and previously in the context of EU law), could be applied in the context of common law. The case of *Kennedy v Charity Commission*[145] (‘*Kennedy*’) concerned a journalist's request for information from the Charity Commission regarding its investigations about a charity, the Mariam Appeal. The Supreme Court examined the possibility of employing common law principles as an alternative means of accessing the relevant information, rather than relying exclusively on the protection of Article 10 of the ECHR under HRA. Contrary to what Lord Ackner argued in *Brind*,[146] Lords Mance and Toulson, with whom Lord Neuberger and Lord Clarke agreed, suggested that common law principles could evolve and be used to protect fundamental rights parallel to those in the ECHR, thereby indicating the potential for a return to prominence of the common law in the protection of fundamental rights.[147]

In the case of *Pham v Secretary of State for the Home Department*,[148] (‘*Pham*’) concerning the deprivation of citizenship, which was claimed to render the applicant stateless, the Supreme Court similarly discussed the question of whether proportionality could be a common law ground of review, separately from its use in Convention rights cases. The court considered the possibility of recognising proportionality as a general principle of judicial review in common

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[144] *Pham v Secretary of State for the Home Department* [2015] UKSC 19 [106].

[145] *Kennedy v Charity Commission* (n 62).

[146] *R v Secretary of State for the Home Department, ex parte Brind* (n 20), Lord Ackner argued that such a recognition would be a usurpation of power and requires Parliamentary action.

[147] *R v Secretary of State for the Home Department, ex parte Brind* (n 20) [46], [54], [133]; [51] (Lord Mance) that ‘[t]he common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle. […] The nature of judicial review in every case depends on the context.’

[148] *Pham v Secretary of State for the Home Department* (n 144).

law. It was emphasised that under ECHR — and previously EU law — the proportionality test is well-established. However, proportionality has not been generally incorporated into the principles of English public law 'although English law […] has for many years stumbled towards a concept which is in significant respects similar [to proportionality], and over the last three decades has been influenced by European jurisprudence even in areas of law lying beyond the domains of EU and international human rights law.'[149] This implies a problematic inconsistency that similar issues may be treated differently depending on whether the challenge is based on EU law, the Convention, or common law. Distinctions based purely on the legal source invoked are arbitrary and undermine the coherence of administrative law. It is reiterated that both under proportionality and reasonableness, depending on the context and the nature of the rights at stake, the intensity of the review might change. Thus, there is a suggestion that common law could develop in parallel with, but separately from, Convention rights protection.[150]

Again, in *R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs*,[151] the case concerned a challenge to the government's decision not to hold a public inquiry into the killing of civilians by British forces in Malaysia (formerly Malaya) in 1948 on the grounds Article 2 of the Convention and common law. The court considered the potential for proportionality to replace or supplement the Wednesbury unreasonableness test in judicial review cases that do not involve Convention rights (or EU law previously applied). While the court did not explicitly adopt proportionality as a general ground of review because its implications could be wide-ranging and profound in constitutional terms, the judges again acknowledged the possibility of future development.[152]

In *R (on the application of Youssef) v Secretary of State for Foreign and Commonwealth Affairs*,[153] Mr Youssef challenged the Secretary of State's decision

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[149] ibid [105] (Lord Sumption).

[150] ibid [98] (Lord Mance), [108] – [110] (Lord Sumption).

[151] *R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69.

[152] ibid [132] (Lord Mance): 'it would not be appropriate for a five-Justice panel of this court to accept, or indeed to reject, this argument.'

[153] *R (on the application of Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3.

to support his inclusion on a UN sanctions list, which froze his assets due to his association with Al-Qaida. He argued that a proportionality test should be applied in this case because of the gravity of the context, instead of the Wednesbury reasonableness. He claimed that conducting a proportionality review under the 'rationality' ground of review was consistent with the new approach suggested in the *Kennedy* and *Pham* cases. Lord Carnwath, with whom the rest of the judges agreed, stated that in the present case, a proportionality review can be applied instead of an irrationality test, but even with this approach, Mr Youssef has not provided sufficient grounds to quash the decisions made by the Secretary of State.[154]

Recent case law recognises the potential for applying proportionality to common law. However, it has not yet been established as a general ground for judicial review. This is primarily because common law continues to evolve alongside Convention law, allowing the concept of reasonableness to develop towards proportionality.[155] Conversely, the current legal framework creates an arbitrary disparity between fundamental rights protection under common law and Convention rights under the HRA.

The introduction of the proportionality test, which provides a more rigorous assessment than the reasonableness review, and the evolution of the reasonableness ground of review have significantly expanded the adjudicative powers of the courts over public authorities. Nevertheless, both the proportionality test under Convention law and the higher intensity reasonableness review involve varying degrees of deference to the executive's assessments, depending on the context. Given that the court is the primary decision-maker on proportionality issues, the proportionality review is the most stringent form of review. Therefore, in order to be recognised as a freestanding ground for judicial review under common law, it must receive authoritative

[154] ibid [59].

[155] Lord Phillips in *R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2004] QB 36; *Kennedy v Charity Commission* (n 62) [52] (Lord Mance).

judicial endorsement, and potentially Parliamentary intervention given the constitutional implications.[156]

Recent case law demonstrates that judges are taking an interest in this development, yet they are exercising caution, recognising that such a significant constitutional change requires careful consideration. The question of whether proportionality will be formally adopted or gradually develop within existing reasonableness principles remains unclear. Nevertheless, the movement towards aligning common law with Convention standards appears to be gradually gaining acceptance, suggesting that formal recognition may occur in due course.[157]

Furthermore, the recent government plans, such as the former Bill of Rights Bill 2022, which proposed the weakening of the HRA's human rights safeguards and the minimisation of the judicial reliance on Strasbourg jurisprudence, have further highlighted the potential for introducing proportionality as an independent ground of review in domestic law. However, as explained above, formal recognition of the proportionality ground of review would ultimately require Parliamentary intervention alongside judicial endorsement, given the potentially substantial constitutional changes involved. While the irrationality ground of review may become more aligned with proportionality in the foreseeable future, approaching its practical effect, it is crucial to recognise that truly independent proportionality review, with its constitutional consequences, can only be solidified through explicit parliamentary approval.

5.8 The Former Bill of Rights Bill 2022 and the Illegal Migration Act 2023

The judiciary, nevertheless, has been the subject of criticism on several occasions for impeding the implementation of executive policies.[158] In 2022, the

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[156] But see Timothy Endicott, 'Why Proportionality Is not a General Ground of Judicial Review' (2020) 1 Keele Law Review 1.

[157] Tomkins (n 1).

[158] For instance in the case of *A and others v Secretary of State for the Home Department* (n 7), the declaration of incompatibility on the grounds that the indefinite detention of foreign terrorist suspects without trial was discriminatory and disproportionate directly challenged the UK Government's counter-terrorism measures in the period following the 9/11 attacks and recently in 2023 the Rwanda policy, formally known as the Migration and Economic Development Partnership has been found unlawful on the ground that Rwanda was not a safe country to which asylum seekers could be removed.

Bill of Rights Bill was introduced to repeal and replace the Human Rights Act 1998, which had been included within the 2015 and 2019 Conservative Party manifestos.[159] Although the Bill was withdrawn in June 2023, it is important to reflect on its core characteristics to understand the nature of the risks it introduced. One of the main reasons for the introduction of the Bill was to limit the courts' powers in certain areas, particularly concerning the deportation of foreign criminals.[160] The Bill of Rights Bill sought to limit judicial scrutiny of government action by changing the proportionality test and effectively weakening the ability of the courts to test proportionality. Clause 7 of the Bill proposed that the courts should recognise that Parliament, in enacting a law, has already struck the right balance between policy objectives and Convention rights.[161] The courts would have had to give considerable weight to the principle that, in a parliamentary democracy, such balancing decisions are primarily a matter for Parliament. However, the Bill faced substantial opposition on the grounds such as that it would lead to more cases to be taken before the ECHR, weakening human rights protections, potential adverse impact on the devolved nations, and eventually being withdrawn in June 2023.[162]

The complexities surrounding human rights protections become particularly acute in Northern Ireland, where the ECHR plays a crucial constitutional role as a safeguard under the Belfast/Good Friday Agreement 1998. Any withdrawal from the ECHR could undermine the peace settlement and political gains achieved since 1998. This was exemplified in the Northern Ireland Human Rights Commission's successful challenge to the Illegal Migration Act 2023, where the High Court found that the Act's multiple provisions breached both the article 2 of the Windsor Framework (due to the diminution of rights guaranteed under the

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[159] *Strong Leadership: A Clear Economic Plan: A Brighter, More Secure Future, The Conservative and Unionist Party Manifesto 2015* (2015) 58.

[160] Particularly immigration policies: ibid.

[161] Article 7(2) of the Bill of Rights Bill 2022: 'The court must (a) regard Parliament as having decided, in passing the Act, that the Act strikes an appropriate balance as between the matters mentioned in subsection (1)(b)(i) to (iii), and (b) give the greatest possible weight to the principle that, in a Parliamentary democracy, decisions about how such a balance should be struck are properly made by Parliament.'

[162] Joint Committee on Human Rights, *Legislative Scrutiny: Bill of Rights Bill* (HC 2022-23, 451, 17 January 2023); Scottish Government, *UK Independent Human Rights Act Review: Our Response* (2 March 2021); Parliamentary Assembly of the Council of Europe, 'UK Reform of its Human Rights Legislation: Consequences for Domestic and European Human Rights Protection' <https://rm.coe.int/uk-reform-of-its-human-rights-legislation-consequences-for-domestic-an/1680ab5b09> accessed 24 May 2025.

Belfast/Good Friday Agreement) and multiple ECHR articles.[163] The highly controversial Illegal Migration Act 2023 was enacted, aiming to deter irregular migration. It significantly restricted access to the UK asylum system by rendering asylum claims inadmissible for individuals arriving irregularly. It also excluded most claims based on modern slavery or human trafficking unless there were compelling circumstances, and it reduced protections for children and pregnant people by expanding detention powers and removing safeguards for vulnerable groups.

The High Court decided to disapply offending provisions under section 7A of the European Union (Withdrawal) Act 2018[164] in Northern Ireland, and declared multiple sections of the Illegal Migration Act 2023 are incompatible with the Convention;[165] with an emphasis that such disapplication 'does not occur at the whim of the courts but represents the will of Parliament.'[166] Although the 2024 Conservative manifesto continued to promise to bring the Illegal Migration Act into force even after this ruling,[167] the election resulted in Labour's victory. The new Labour government subsequently enacted the Border Security, Asylum and Immigration Act 2025 and repealed significant provisions of the Illegal Migration Act 2023 — including those found incompatible with the Convention by the High Court — along with the Safety of Rwanda Act 2024 (as discussed below).

Legislative attempts to require courts to abandon or fundamentally weaken the proportionality test are incompatible with continued ECHR membership. Any significant limitation on judicial scrutiny of Convention rights would risk non-compliance with the UK's international obligations under Article 13 ECHR (right

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[163] *In the Matter of an Application by the Northern Ireland Human Rights for Judicial Review* [2024] NIKB 35, [174] – [176].

[164] Section 7A requires the UK to ensure that there would be no diminution of the rights set out in the Belfast/Good Friday Agreement as a result of its withdrawal from the EU, and mandates disapplication of any domestic law that is inconsistent with this obligation. The Court held sections 2(1), 5(1), 5(2), 6, 13(4), 22(2), 22(3) and 57 of the Illegal Migration Act 2023 are disapplied in Northern Ireland.

[165] Sections 2(1), 5(1), 6(3) and 6(7) were declared incompatible with Article 3 ECHR, sections 2(1), 5, 6, 22 and 25 were declared incompatible with Article 4 and sections 2(1), 5(1) and 6 were declared incompatible with Article 8 ECHR.

[166] *In the Matter of an Application by the Northern Ireland Human Rights for Judicial Review* (n 163) [175].

[167] Conservative and Unionist Party, *The Conservative and Unionist Party Manifesto 2024* (2024) <https://public.conservatives.com/publicweb/GE2024/Accessible-Manifesto/Accessible-PDF-Conservative-Manifesto-2024.pdf> accessed 1 July 2025, 36.

to an effective remedy), which requires effective domestic remedies, and would likely result in claimants seeking redress in Strasbourg and significant implications for the UK relationship with the contracting states of the ECHR.[168] The only means by which the Government could preclude the ECtHR's jurisdiction over these cases would be a formal withdrawal from the ECHR.[169] The experience with the Bill of Rights Bill demonstrates the constitutional, legal and political difficulties of such an approach, revealing that meaningful constraints on proportionality review are incompatible with continuing ECHR membership.

5.9 Beyond Proportionality: The Foundational Duty on Public Authorities (Section 6 of the HRA)

Whilst proportionality represents a substantial mechanism for judicial review under the HRA, it does not encompass the full constitutional impact of the HRA on executive decision-making. Certain areas of human rights protection operate outside the realm of proportionality analysis, involving absolute rights that admit no derogation and cannot be weighed against competing public interests.[170] These cases frequently generate a high degree of constitutional tensions between the judiciary and executive because they impose inflexible constraints on governmental action without offering the balancing mechanisms inherent in proportionality review.

One such right is the prohibition of torture and inhuman or degrading treatment or punishment, Article 3 of the ECHR. The absolute nature of Article 3 was firmly reinforced in an important national security deportation case: *Chahal v United*

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[168] One such potential consequence of the UK's non-compliance with the ECHR or withdrawal from the agreement could result in the suspension or termination of the Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part [2021] OJ L149/10; as Lewis Graham has observed in his detailed analysis of the *Unuane* and *Otite* decisions, the Strasbourg Court's approach reveals a troubling pattern of selective intervention that undermines the consistency expected from human rights adjudication. If Strasbourg maintains this cautious and inconsistent approach in future challenges to recent legislation, such as the Illegal Migration Act 2023, applicants may find it increasingly difficult to secure successful outcomes. See Lewis Graham, 'Boldness, Caution, Avoidance: Recent Cases Against the UK Before the European Court of Human Rights' (2024) 5 ECHR L Rev 65.

[169] Valsamis Mitsilegas and Elspeth Guild, 'The UK and the ECHR After Brexit: The Challenge of Immigration Control' (2024) 5 ECHR L Rev 116.

[170] Prohibition of torture and inhuman or degrading treatment or punishment (ECHR Article 3), Prohibition of slavery (ECHR Article 4), No punishment without law (ECHR Article 7).

Kingdom,[171] which remains pivotal to contemporary challenges. In *Chahal*, the Strasbourg Court held that Article 3 of the ECHR, the prohibition of torture, inhuman or degrading treatment, cannot be subject to exceptions, regardless of competing public interests.

The case concerned Mr Chahal, a Sikh separatist, who was subject to the risk of deportation to India despite substantial evidence that he would face torture if he returned. The UK government argued that his presence posed a serious threat to national security and that this risk justified deportation, even in the face of potential Article 3 violations. The Strasbourg Court, however, rejected this argument, establishing that Article 3's prohibition is absolute and cannot be balanced against national security considerations, public safety concerns, or any other competing interests.[172] The Strasbourg Court also found a violation of Article 5(4) of the Convention, which guarantees a right to judicial review of the lawfulness of detention. The *Chahal* judgment ultimately led to several important procedural changes, including the UK Government establishing the Special Immigration Appeals Commission ('SIAC') and the introduction of special advocates who represent appellants in closed hearings.

The constitutional significance of *Chahal's* absolute prohibition is clearly illustrated by the recent Supreme Court's 2023 judgment concerning the government's controversial Rwanda asylum policy.[173] This policy emerged partly in response to Brexit's termination of the Dublin Regulation, which had previously enabled the UK to return certain asylum seekers to EU member states, thereby complicating the UK's asylum governance framework and prompting the search for alternative third-country arrangements.[174]

Rwanda policy aimed to transfer certain asylum seekers to Rwanda for the determination of their claims and was premised on Rwanda constituting a 'safe third country'.[175] Importantly, however, the Supreme Court conducted its own

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[171] *Chahal v United Kingdom* [GC] App no 22414/93 (ECtHR, 15 November 1996).

[172] ibid [79] - [80].

[173] *R (AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42.

[174] Mitsilegas and Guild (n 169).

[175] The term 'safe third country' refers to a country where an individual's life or freedom is not endangered due to his/her race, religion, nationality, membership of a particular social group, or

assessment of the evidence, including reports from the UN Refugee Agency, rather than deferring to executive assertions of Rwanda's safety.[176] The Court unanimously concluded that the policy was unlawful under section 6 of the Human Rights Act because of the risk of ill-treatment, contrary to article 3 of the ECHR and due to substantial deficiencies in Rwanda's asylum system. These deficiencies created real risks that individuals could be subsequently returned to countries where they faced persecution, thus violating the principle of non-refoulement embedded within both the HRA and domestic immigration legislation.

Notably, assertions of the government concerning the policy's purpose in discouraging illegal migration, reducing expenses, and alleviating pressure on the asylum system were not considered in the Article 3 evaluation. This is because Article 3 establishes an absolute right against inhuman or degrading treatment, which cannot be balanced against competing policy considerations, regardless of their perceived importance.[177] This situation exemplifies the constitutional conflict identified in *Chahal*: when government policy conflicts with absolute rights, the judiciary must uphold the absolute prohibition without exception, regardless of the government policy's political legitimacy or perceived importance. Notably, subsequent legislative measures illustrate the tensions between human rights protections and executive authority.

Following the Supreme Court decision, instead of a previously legally non-binding memorandum between Rwanda and the UK, a new legally binding treaty with Rwanda was signed in December 2023. Additionally, the Safety of Rwanda (Asylum and Immigration) Act 2024 was introduced on 7 December 2023 and came into force on 25 April 2024 in order to overrule the Supreme Court decision. The Act required judges to treat Rwanda as safe even if evidence showed otherwise. Importantly, the Act under section 5 statutorily allows ministers to ignore interim measures issued by the Strasbourg Court, which

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political opinion. Furthermore, that country is obligated to uphold the principle of non-refoulement, as established in the Refugee Convention and the Convention Against Torture.

[176] *R (AAA and others) v Secretary of State for the Home Department* (n 173) [52].

[177] Cathryn Costello, 'Defining Protection: Refugeehood, Non-refoulement, and Human Rights' in *The Human Rights of Migrants and Refugees in European Law* (OUP 2015); *R (AAA and others) v Secretary of State for the Home Department* (n 173) [56], citing *Secretary of State for the Home Department v Rehman* (n 6) [54] (Lord Hoffmann).

potentially puts the UK in violation of its Convention obligations. Although interim measures were not legally binding in domestic law already, the Act restated this position in order to demonstrate the government's rejection of external judicial interference and its commitment to asserting parliamentary sovereignty over international court orders. Nevertheless, following the general election in July 2024 and the subsequent change in government, the Rwanda policy underwent a significant shift. The new Labour Government scrapped the Rwanda policy and enacted the Border Security, Asylum and Immigration Act 2025, and repealed the Safety of Rwanda (Asylum and Immigration) Act 2024.[178] These legislative responses show how absolute rights can create serious constitutional problems when governments try to use Parliament to overturn court decisions. This highlights the basic tension between democratic control and absolute human rights that cannot be limited under the HRA framework and strengthens the case for withdrawal from the ECHR among its proponents.

5.10 Conclusion

The judicial approach examined throughout this analysis — from the pre-HRA limitations of *Wednesbury* unreasonableness through to the contextual application of proportionality in contemporary cases — demonstrates that courts have maintained appropriate constitutional boundaries while exercising their expanded review powers under the HRA. The above case law suggests that the judiciary is not over-reaching in its scrutiny of executive decisions under the HRA. However, it is undeniable that the HRA provides a powerful mechanism for the courts to adjudicate on politically sensitive matters and possibly lead to substantial tensions between the courts and the executive.

In the context of the HRA, the proportionality test developed under the ECHR, which designates the courts as the primary decision-makers, has been a significant factor in reshaping the boundaries of judicial review. The incorporation of the proportionality test under the ECHR, and earlier under EU law, has given the courts an important role in constitutional governance and

[178] 'Scrapped Rwanda scheme has already cost £700m in 'most shocking waste of taxpayers' money ever seen', home secretary says' (Sky News, 22 July 2024) <https://news.sky.com/story/scrapped-rwanda-scheme-has-already-cost-700m-in-most-shocking-waste-of-taxpayers-money-ever-seen-home-secretary-says-13183364> (accessed 9 June 2025)

rights adjudication, representing a significantly intensification of review that accelerated what common law had only been incrementally approaching. Nevertheless, the application of the proportionality test remains sensitive to the context, the rights at stake and the institutional limitations of the judiciary. The consistent judicial recognition of these limitations exemplifies the principled and context sensitive calibration of constitutional governance where courts have enhanced their oversight capacity while preserving the democratic legitimacy of executive decision-making.

As a result, while the HRA has undoubtedly strengthened the judiciary's oversight of executive power, this increased authority remains bounded by constitutional principles — most notably the separation of powers, parliamentary sovereignty and the rule of law. Thus, the essential balance between judicial oversight and executive discretion is recalibrated rather than superseded. The HRA thus serves as a crucial safeguard, providing more immediate and predictable protection for individual rights than the incremental development of common law principles. While the common law has evolved in a similar direction regarding human rights protection, the uncertainty surrounding which rights are fundamental under common law makes the HRA's codified framework particularly valuable. The HRA's statutory mechanism exemplifies how parliamentary consent to enhanced judicial oversight can strengthen rather than undermine democratic authority.

Chapter 3: The Legal Status of Unlawful Acts and the Scope of Judicial Review

6 The Legal Status of Unlawful Acts

6.1 Introduction

The legal status of unlawful administrative acts — whether they are deemed void or voidable — has a fundamental impact on the scope of judicial review and the remedies available to courts when exercising their supervisory jurisdiction. Yet this relationship operates bidirectionally: courts' constitutional, remedial, and practical concerns in exercising judicial review equally influence how they characterise the legal status of administrative acts in the first place. This theoretical framework determines whether courts treat administrative decisions as legally null and void from the outset or as flawed but legally effective, requiring judicial intervention to set them aside. Consequently, the theoretical foundations outlined here establish the parameters within which courts may legitimately scrutinise executive action, thereby directly influencing both the practical reach and constitutional positioning of judicial review. The interconnection between them has been brought into particular focus by the Judicial Review and Courts Act 2022 ('JRCA'), which has (re)introduced tensions between the traditional nullity doctrine and more nuanced remedial approaches.

Following the report of the Independent Review of Administrative Law ('IRAL'), the government introduced the Judicial Review and Courts Bill 2021 in July 2021, proposing several significant changes, such as making possible suspending quashing orders and limiting the retrospective effects of quashing orders[1] The Bill received Royal Assent and became the Judicial Review and Courts Act 2022 on 28 April 2022. Paradoxically, while aimed at curtailing judicial influence over executive actions, the Act potentially conferred greater discretionary power upon the judiciary.[2] This chapter argues that the JRCA 2022 has created a

[1] Section 29A(1) of the Judicial Review and Courts Act 2022: 'Further provision in connection with quashing orders (1) A quashing order may include provision (a) for the quashing not to take effect until a date specified in the order, or (b) removing or limiting any retrospective effect of the quashing. […]'.

[2] Tom Hickman, 'Quashing Orders and the Judicial Review and Courts Act' (UK Constitutional Law Blog, 26 July 2021) < https://ukconstitutionallaw.org/2021/07/26/tom-hickman-qc-quashing-orders-and-the-judicial-review-and-courts-act/> accessed 16 April 2025.

complex and somewhat contradictory framework for judicial review in the UK. On the one hand, it has the potential to narrow the scope of review by reviving aspects of the pre-*Anisminic*[3] approach, thereby strengthening ouster clauses. Conversely, it introduces more flexible remedial powers that may encourage increased judicial intervention. This tension requires a reassessment of the orthodox approach regarding the legal status of unlawful acts. It challenges the post-*Anisminic* concept of a single category of error of law that renders all unlawful acts null and void *ab initio*.

The issue examined here is also directly related to the courts' approach to ouster clauses, which seek to limit or exclude judicial review of executive decisions. An ouster clause effectively attempts to empower administrative bodies to act as final arbiters of their own legal authority, potentially allowing them to operate beyond the jurisdictional boundaries Parliament originally intended to establish through enabling legislation. It, therefore, raises the question of reconciling the rule of law, which does not allow an authority to determine and alter the scope of its own powers, and the principle of parliamentary sovereignty, which allows Parliament to grant authority to determine the scope of powers.

The conceptual foundation of this constitutional dilemma can be traced to the historical distinction between jurisdictional and non-jurisdictional errors of law, which has influenced how courts approach the validity of administrative actions.[4] The judiciary's traditionally restrictive treatment of ouster clauses has evolved through a conceptual shift from distinguishing between void and voidable acts to differentiating between unlawful and lawful administrative actions. It will be argued in the following sections of this chapter that the JRCA 2022 potentially reinforces the efficacy of ouster clauses by necessarily recognising voidable unlawful decisions, thereby echoing pre-*Anisminic* jurisprudence and potentially limiting judicial review for non-jurisdictional errors.

This chapter begins with an analysis of the theories of unlawful acts, together with an examination of the historical background of the treatment of errors of

[3] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

[4] PS Hodge, 'The Scope of Judicial Law-making in Constitutional Law and Public Law' (2021) 26(2) Judicial Review 146.

law. It is intended to enable a full understanding of the impact of the recent Judicial Review and Courts Act 2022. It then proceeds to explore the implications of the Act on the landscape of administrative law in the UK.

6.2 The Legal Status of Unlawful Acts

6.2.1 The Distinction between Jurisdictional and Non-jurisdictional Errors of Law

The orthodox (*ultra vires*) and alternative theories of errors of law offer contrasting explanations of the legal status of flawed acts and the role of courts in quashing these acts. The approach taken, whether orthodox or alternative, has implications for the role of the judiciary in quashing these acts, the legal effects on other actors and related acts, and the court's remedial discretion. This, in turn, affects the scope of judicial review, that is, the extent and limits within which courts review the lawfulness of decisions taken by public bodies. Given that parliamentary sovereignty prevents statutes from being set aside, quashed, or overridden, this chapter examines administrative and judicial acts rather than legislative ones. However, since devolved parliaments do not possess the same legislative sovereignty as the Westminster Parliament, the legal status of acts by devolved parliaments will also be evaluated where relevant.

The contrasting theories as to the legal effects of unlawful acts are of particular relevance in the context of ouster clauses. Ouster clauses, by closing or limiting the way to judicial review, are one of the fundamental limiting factors affecting the scope of judicial review. Such clauses are important in the sense that they interfere with the right of citizens to have access to the courts and disable the High Court from performing its functions of ensuring uniformity of the law,[5] doing justice,[6] protecting individual interests against the general public interest,[7] and supervising the executive, lower courts and tribunals to maintain their lawful limits[8] thus directly concern the rule of law. The rule of law, at its

[5] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

[6] CF Forsyth, *The Rock and the Sand* (2013) 18 Judicial Review 360, 362; *National Westminster Bank v Spectrum Plus Limited* [2005] UKHL 41.

[7] Forsyth (n 6) 361.

[8] *R (Cart) v Upper Tribunal* [2011] UKSC 28.

core, requires that government may act only where it has legal power to act.[9] In the context of judicial review, this translates to the specific requirement that the lawfulness of executive conduct can be tested through independent and impartial tribunals established by law and that such executive conduct itself is subject to the law.[10] Ouster clauses, which aim to exclude judicial review of executive actions, therefore potentially create significant tension with the principle of the rule of law, one of the fundamental constitutional principles of the British constitution, along with parliamentary sovereignty.[11]

The significance of this tension becomes clearer when the rule of law is considered in its constitutional context. The rule of law has deep historical roots in the common law tradition, with some of its foundational elements traceable to the Magna Carta of 1215, although its modern conception is the product of centuries of legal and political evolution.[12] Recently, the significance of the rule of law within the British constitutional framework has been reaffirmed in the Constitutional Reform Act 2005, which explicitly recognises it as a fundamental constitutional principle. The rule of law can additionally be viewed as supporting the principle of parliamentary sovereignty in certain respects, particularly in the sense that it provides mechanisms through which the courts ensure that executive actions conform to the legal boundaries established by Parliament. It maintains the balance of power between the government branches by ensuring that all government actions are subject to legal scrutiny. It is a safeguard against the arbitrary use of power by public bodies. As a result, the courts often took a restrictive view of ouster clauses. Consequently, it is crucial to understand the application of ouster clauses to accurately interpret the theoretical framework of the legal status of unlawful acts and the practical implications of the JRCA 2022 for the legal status of unlawful acts.

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[9] Adam Tomkins, *The Constitution after Scott: Government Unwrapped* (OUP 1998) 45-46.

[10] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (9th edn, Macmillan 1945) 188, 193; Tom Bingham, *The Rule of Law* (Penguin Books 2010) 8; *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [68].

[11] Adam Tomkins, 'Crown Privileges' in M Sunkin and S Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (OUP 1999); *R (Jackson) v Attorney General* [2005] UKHL 56 [107] (Lord Hope); Hodge (n 4).

[12] Hodge (n 4).

Until the *Anisminic*[13] case (or, more precisely, the following case law) established that there is a single category of errors of law which makes all errors of law jurisdictional, a distinction was made between errors made without jurisdiction — that is, without the authority to decide[14] — and those made within it. As a gradual development of administrative decisions and due to the need to prevent administrative decisions from being reviewed unduly, the distinction between the jurisdictional and non-jurisdictional errors of law was articulated, first in *R v Bolton*[15] in 1841 and was universally adopted in later cases.[16] Jurisdictional errors of law could be nullified through a writ of certiorari due to the fact that they were deemed to have been made without the necessary legal authority. On the other hand, errors made within jurisdiction, where the authority to make a decision existed, but there was an error in the decision-making process, were typically protected from being quashed by certiorari unless the error was manifest directly on the record itself, without the need for further scrutiny or interpretation.[17] This distinction was, therefore, significant in determining the extent to which judicial oversight could be applied to administrative decisions. This distinction, however, has been rendered obsolete after *Anisminic*, in which it was decided that even if the decision-maker is authorised to enter upon the inquiry (and so has jurisdiction in the narrow sense), if the decision-maker misunderstands the law, it will result in a nullity.

In terms of ouster clauses' ability to exclude judicial control over public authorities' decisions, prior to *Anisminic Ltd v Foreign Compensation*

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[13] *Anisminic* (n 3).

[14] Ivan Hare KC, Catherine Donnelley SC and Joanna Bell, *De Smith's Judicial Review* (9th edn with 1st supplement, Sweet & Maxwell 2024).

[15] *R v Great Bolton* [1841] 1 QB 66.

[16] Philip Murray, 'Process, Substance and the History of Error of Law Review' in Bell J, Elliott M, Varuhas J and Murray P (eds), *Public Law Adjudication in Common Law Systems* (Hart Publishing 2016), 99-100; *R v Arkwright* [1848] 12 QB 960; *R v Jarvis* [1854] 3 E & B 640; *R v Ratepayers of Northowram and Clayton* [1865] LR 1 QB 110; *R v Local Government Board* [1873] LR 8 QB 227; *R v Lee* [1876] 1 QBD 198; *R v Justices of the Central Criminal Court* [1886] 17 QB 598; *Ex parte Daisy Hopkins* [1891] 61 LJQB 240; *R v Lord Mayor of London, ex parte Boaler* [1893] 2 QB 146.

[17] *R v Central Criminal Court Justices* (1886) 17 QBD 598, 602; *R v Grant* (1850) 19 LJMC 59; *Kemp v Neville* (1862) 10 CB(NS) 523, 549-552; *R v St Olave's Southwark, District Board of Works* (1857) 8 E & B 659; *R v Bradley* (1894) 70 LT 349; *Shridramappa Pasare v Narhari Bin Shivappa* (1900) LR 27 IA 216, 225; *R v Cheshire Justices Ex p Heaver* (1913) 108 LT 374; *R (Limerick Corp) v LGB* [1922] 2 IR 76, 93; *R v Weston-Super Mare Justices Ex p Barkers (Contractors) Ltd* [1944] 1 All ER 747 cited in Hare, Donnelly, Bell and others, (n 14).

Commission,[18] ouster clauses did not protect jurisdictional errors of law from judicial scrutiny. Jurisdictional errors of law and the errors appearing on the face of the record were generally judicially reviewable in order to protect the rule of law and to ensure the bodies stay within their authorised limits.[19] This was done mainly by way of interpretation rules or on the ground that 'Parliament could not have intended a tribunal of limited jurisdiction to be permitted to exceed its authority without the possibility of direct correction by a superior court.'[20] However, the courts were more tolerant of such clauses in certain situations, such as time-limited clauses, which was an issue in the case of *Smith v East Elloe Rural District Council.*[21] This case was a challenge to a compulsory purchase order made by East Elloe Rural District Council on the grounds that the order was made in bad faith.[22] The House of Lords ruled that the order could not be challenged because of an ouster clause in the Acquisition of Land (Authorisation Procedure) Act 1946, which allowed such orders to be challenged only within a limited time. This decision demonstrates the effectiveness of certain ouster clauses, as even allegations of bad faith[23] were treated as non-jurisdictional errors and thus fell outside the scope of judicial review. In contrast, the landmark case of *Anisminic*,[24] which will be discussed now, marked a significant shift, where the judiciary effectively limited the application of ouster clauses by treating jurisdictional errors as reviewable, regardless of legislative attempts to exclude them.

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[18] *Anisminic* (n 3).

[19] *R v Nat Bell Liquors Ltd* [1922] AC 128, 159-160; *R v Minister of Transport Ex p HC Motor Works Ltd* [1927] 2 KB 401; *R v Minister of Health* [1939] 1 KB 232, 246, 249; *R v Medical Appeal Tribunal Ex p Gilmore* [1957] 1 QB 574, 583-585, 588; *Gilmore* [1957] 1 QB 574; Notes [1957] PL 89; *Fenwick v Croydon Union Rural Sanitary Authority* [1891] 2 QB 216; *Attorney General v Hanwell UDC* [1900] 1 Ch 51.

[20] Hare, Donnelly, Bell and others (n 4) [4-025].

[21] *Smith v East Elloe Rural District Council* [1956] AC 736; *R v Secretary of State for the Environment, Ex parte Ostler* [1977] QB 122.

[22] William Wade, Christopher Forsyth and Julian Ghosh, *Wade & Forsyth's Administrative Law* (12th edn, OUP 2022) ch 9, 229.

[23] Which was deemed as a jurisdictional error in *Anisminic* (n 3) 171 (Lord Reid).

[24] *Re Racal Communication Ltd* [1981] AC 374 (Lord Diplock); *O'Reilly v Mackman* [1983] UKHL 1 (Lord Diplock); *R v Hull University Visitor, Ex parte Page* [1993] AC 682; *Boddington v British Transport Police* [1998] UKHL 13; *Lumba v Secretary of State for the Home Department* [2011] UKSC 12; *Cart* (n 8).

6.2.2 Undermining the Distinction: A Closer Look at *Anisminic*

The evolution of judicial review in the 20th century was notable for substantial shifts in response to the expanding role of the state. As the scope and complexity of government functions expanded, the traditional, limited approach to judicial review came to be seen as inadequate. It became increasingly challenging to identify errors of law, whether jurisdictional or non-jurisdictional, based on the available (less-detailed) records.[25] Accordingly, a significant development occurred with the *Dyson v Attorney General*[26] case in 1911, which introduced the use of declarations as a tool in the judicial review process. These declarations gained popularity due to their comparative procedural flexibility in comparison to the more rigid writ of certiorari, a flexibility that would later play a crucial role in the *Anisminic* litigation.

Anisminic was a company that applied for compensation for its losses during the Suez Crisis. The company's application was rejected by the Foreign Compensation Commission ('the Commission') on the ground that the claimant's successor in title to the property was not a British national. Section 4(4) of the Foreign Compensation Act 1950 provided an ouster clause for the determinations of the Commission as follows: '[t]he determination by the commission of any application made to them under this Act shall not be called in question in any court of law.' Since the Commission was acting within its jurisdiction to embark on an inquiry in the narrow sense, and because Anisminic was unable to show an error of law on the face of the record, the Company sought a declaration that the decision of the Commission was null and void.

The House of Lords ruled by a majority that the Commission, in finding that the successor in title was not British, was adding a further condition to the statutory conditions and was considering a matter which it had no right to consider. It held that any legal error made by a public body could render its decision invalid regardless of whether the error concerned the body's legal authority to make the decision (and so was, in the old scheme, jurisdictional) or was a mistake in the law's application within the body's authority (a non-jurisdictional error). The

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[25] *R v Nat Bell Liquors Ltd* (n 19); Clive Lewis, *Judicial Remedies in Public Law* (6th edn, Sweet & Maxwell 2020) ch 6.

[26] *Dyson v Attorney General* [1911] KB 410.

House of Lords based its judgment on the ground that the unlawful decision of the Commission was not a 'determination' within the context of the Section 4(4) of the Foreign Compensation Act 1950 Act which protected the determinations of Commission: because of the error of law, the determination in question was therefore a nullity in law. This decision effectively undermined the distinction between different types of errors of law and, by holding that an unlawful decision was not a 'determination', the Court provided a new method of circumventing ouster clauses, thereby allowing courts to review decisions that might otherwise have been protected from judicial scrutiny. This interpretation facilitated the judicial review of the decisions of public bodies even in instances where ouster clauses are present. Additionally, it considerably expanded the scope of judicial review, reflecting a legal response to the strong growth of administrative decisions and their power to interfere with people's daily lives.

Prior to examining the theories concerning the legal status of unlawful acts, it is essential to examine the reasoning presented in *Anisminic* and subsequent authorities. Contrary to the later authorities, *Anisminic* itself, in fact, did not clearly establish that all errors of law are jurisdictional that makes the decision null and void. Lord Reid in particular recognised that there are errors of law which do not render decisions a nullity.[27] He stated that the errors which rendered the determination of the Commission a nullity were not just ordinary errors of law but 'of a particular kind of error'.[28] He and Lord Wilberforce recognised that some apparent non-jurisdictional errors carry the decision

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[27] *Anisminic* (n 3) 171: '[T]here are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. *if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly*.' (Emphasis added); ibid 174: 'If the commission were entitled to enter on the inquiry whether the applicants had a successor in title, then their decision as to whether TEDO was their successor in title would I think be unassailable whether it was right or wrong: it would be a matter remitted to them for their decision. The question I have to consider is not whether they made a wrong decision but whether they inquired into and decided a matter which they had no right to consider.'

[28] David Feldman, 'Anisminic Ltd v Foreign Compensation Commission [1968]: In Perspective' in S Juss and M Sunkin (eds), *Landmark Cases in Public Law* 80.

outside of the lawful jurisdiction of the decision maker.[29] In other words, although the decision maker had jurisdiction to enter into the inquiry, he ended up with a decision which he did not have the power to make and so exceeded his jurisdiction. Lord Reid contended that there were no degrees of nullity, where some of the nullities were protected from judicial review while some other were not. However, this does not necessarily imply that all errors of law are nullities.[30] Therefore, *Anisminic* undermined the distinction between jurisdictional and non-jurisdictional errors of law by recognising that some of what were previously called non-jurisdictional errors may result in excess of the jurisdiction, which would mean the decision is null and void, but without fully abolishing it.

The post-*Anisminic* jurisprudence[31] interpreted the *Anisminic* decision as having abandoned the distinction between jurisdictional and non-jurisdictional errors of law, or between errors which are apparent on the face of the record and those which are not. This was done by extending the doctrine of *ultra vires* to any error of law.[32] Later authorities' treatment of *Anisminic* has clearly determined that there is a single category of errors of law, and that all errors of law render the unlawful decision null and void *ab initio*. In *O'Reilly v Mackman*[33] Lord Diplock stated precisely that:

> '[t]he breakthrough that the Anisminic case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported "determination", not being a "determination" within the meaning of the empowering legislation, was accordingly a nullity.'[34]

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[29] *Anisminic* (n 3) 209-210.

[30] But see *Boddington v British Transport Police* [1998] UKHL 13 (Lord Irvine).

[31] *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56 (Lord Denning); *O'Reilly* (n 24)*; Page* (n 24); *Boddington* (n 24)*; Lumba* (n 24)*; Cart* (n 24).

[32] *Boddington* (n 24).

[33] *O'Reilly* (n 24).

[34] (Emphasis added.) *O'Reilly* (n 24) 278 (Lord Diplock); *Re Racal Communications* (n 24) (Lord Diplock).

The conclusion that *Anisminic* established that any misdirection or legal error made in the decision-making process could be quashed due to an error of law, has been upheld in numerous cases.[35]

The effective abolition of the distinction between jurisdictional and non-jurisdictional errors of law, and the subsequent formation of a unified category of errors of law, which are null and void *ab initio*, directly expanded the scope of judicial review; it enabled the courts to treat all legal errors as jurisdictional and allowed courts to review and potentially quash decisions based on any error of law, including those previously classified as non-jurisdictional and could potentially have been protected by ouster clauses. By treating all legal errors as jurisdictional, courts gained the capacity to circumvent ouster clauses that had previously been successful in protecting non-jurisdictional errors.

It is additionally worth noting that this expansion of reviewable errors has also contributed to a subtle shift in the nature of judicial review itself. The distinction between an appeal that considers the merits of the claims and a judicial review that assesses the legality of the acts appears to have become less clear-cut.[36] This is due to the fact that judicial review can now entail a wider range of cases and a more comprehensive scrutiny of the decision itself, as opposed to merely the process, which renders it more akin to an appeal.[37] The shift in judicial approach, whereby all errors of law are treated as potentially reviewable, has enabled courts to undertake a more comprehensive examination of legal interpretations and allowed courts to examine the reasoning behind decisions in greater depth, potentially addressing the substance of the issues in question. Consequently, the previously clear delineation between the role of

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[35] *R v Lord President of the Privy Council, ex parte Page* [1992] UKHL 12; *R v Greater Manchester Coroner, Ex parte Tal* [1985] QB 67; *Boddington* (n 24)*; McLaughlin v Cayman Islands* [2007] UKPC 50; *Page* (n 24).

[36] Paul Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57 CLJ 63, 67: 'Sir John Laws argued that once the distinction between jurisdictional and non-jurisdictional errors was discarded, there was no longer any need for the ultra vires principle as such, since the courts were in reality intervening to correct errors of law. […] "Ultra vires" is, in truth, a fig-leaf; it has enabled the courts to intervene in decisions without an assertion of judicial power which too nakedly confronts the established authority of the Executive or other public bodies'; Independent Review of Administrative Law, Independent Review of Administrative Law: Report (Ministry of Justice 2021) [3.6].

[37] See *R (Privacy International) v Investigatory Powers Tribunal* (n 5) [123] (Lord Carnwath).

appeals (examining the merits) and judicial reviews (examining the legality) has become less distinct.

In conclusion, the *Anisminic* represented a significant shift in the landscape of judicial review, effectively eliminating the distinction between jurisdictional and non-jurisdictional errors of law. In light of this background, an examination of the theoretical frameworks that address the legal status of unlawful acts becomes pertinent. The question of whether such acts are inherently void or merely voidable has significant implications for the field of administrative law. An examination of these theories will assist in understanding the judicial mechanisms available for challenging unlawful decisions — such as collateral challenges — and the extent to which unlawful acts can be invalidated. Such examination also provides insight into the extent of judicial scrutiny over administrative discretion and the judicial remedies that may be employed against unlawful decisions. This theoretical analysis presents a framework through which the evolving relationship between the judiciary and the executive in modern governance can be viewed, reflecting broader constitutional principles and the ongoing tension between parliamentary sovereignty and the rule of law — a tension that, as this chapter argues, has been brought into sharp focus by the JRCA 2022.

6.3 Competing Theories Concerning the Legal Status of Unlawful Acts

6.3.1 The Orthodox Theory of Administrative Unlawfulness: The *Ultra Vires* Doctrine

According to the orthodox theory, endorsed by Wade and Forsyth, among others,[38] an unlawful act carried out by administrative bodies or inferior courts had no legal existence from the beginning.[39] Given that the unlawful act is beyond the legal boundaries at the time the decision is made, it is void from the moment that decision is made.[40] This is based on the proposition that jurisdiction

[38] William Wade and Christopher Forsyth, Administrative Law (10th edn, OUP 2009); Paul Craig, *Administrative Law* (9th edn, OUP 2021); *Ridge v Baldwin* [1964] AC 40 (Lord Reid).

[39] *Ridge v Baldwin* [1964] AC 40 (Lord Reid).

[40] Forsyth (n 6*)* 368.

is the foundation of judicial review. Consequently, an unlawful act cannot be regarded as 'voidable', which would imply a period of valid existence until it is quashed by a court.[41]

Despite the theoretical coherence of this position, the orthodox theory gives rise to a significant paradox in administrative law. While it maintains that unlawful acts are a nullity *ab initio* in their ontological status, these same acts often produce practical effects that continue until formally challenged. As Adams explains, this ontological perspective insists that the act's invalidity is not created by judicial decision but rather stems inherently from its nullity in law from the moment of its creation.[42] This tension between legal theory and practical reality has become a central challenge in administrative law jurisprudence.

Indeed, an unlawful act *appears* to exist and often produces legal consequences until a court declares its invalidity, contrary to theoretical non-existence in law.[43] Moreover, in a number of instances, including when the time limits set out in legislation for challenging an act have expired or when courts have exercised their discretion to deny remedies, the practical effects of an unlawful act may continue for an indefinite period. This creates a complex relationship between legal theory and practical reality, as the orthodox theory maintains that these apparent legal consequences are not legally authorised and existent in law. This results in a paradox where effects that should not exist in law continue to shape

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[41] Christopher Forsyth, 'The Legal Effect of Unlawful Administrative Acts: The Theory of the Second Actor Explained and Developed' (2001) 35 Amicus Curiae 20; See *Director of Public Prosecutions v Head* [1959] AC 83 (Lord Denning dissenting); In *Bugg v Director of Public Prosecutions* [1993] QB 473 (the Divisional Court's conclusion was later found wrong by Lord Irvine in *Boddington* (n 24)).

[42] Thomas Adams, 'The Standard Theory of Administrative Unlawfulness' (2017) 76(2) CLJ 289; Independent Review of Administrative Law (n 36) [3.58]; *Boddington v British Transport Police* [1998] UKHL 13 (Lord Browne-Wilkinson).

[43] Adams (n 42); *Smith v East Elloe Rural District Council* (n 21), 769: '*An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective or its ostensible purpose as the most impeccable of orders.'* cited in Forsyth (n 41). However, Forsyth rejects this determination which is a description of a voidable act which is effective until set aside by a court. He claims accord with *Anisminic* and *ultra vires* theory, voidable act to be within power of the decision maker and exist in order to be set aside. However, he claims unlawful acts are already null and void.

legal relationships.[44] This formulation reveals an inherent tension between the absolute nature of legal nullity and the realities of administrative practice and judicial discretion.

6.3.1.1 The Paradox of Legal Nullity and *De Facto* Effects

In the case of *Boddington v British Transport Police*,[45] the House of Lords ruled that a defendant may challenge the regulations under which they are prosecuted on the grounds that an *ultra vires* regulation is a nullity and has no legal effect, including in other contexts of criminal and civil law. Lord Irvine further explained that the apparent validity of an unlawful act derives from a presumption of validity, which assumes that an act is lawful and valid until it is proven otherwise. This, however, does not imply that the legislation or act in question is valid until it is quashed prospectively. The act would be assumed to be good until recognised as unlawful and as having no legal effect at all.[46] He thus asserted that the validity of the act in question was perceived and treated as if it existed.[47] But when the court determines the invalidity, it recognises it from the beginning rather than from the point of the court's decision. In this sense, the court quashing the unlawful act merely acknowledges and confirms the act's legal non-existence rather than actively creating its invalidity. This case is of substantial importance in establishing the collateral challenge principle, which is the right to challenge the lawfulness of administrative acts in criminal and civil proceedings where the court has no power to quash the administrative acts. This is explored separately and in detail below.

Wade explains the appearance of the existence of the unlawful acts on the basis that the concept of nullity is a relative notion. According to this idea of relativity, the recognition of the true position of the nullity of an unlawful act depends on the correct person, in the correct proceedings, successfully

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[44] Christopher Forsyth, '"The Metaphysic of Nullity" Invalidity, Conceptual Reasoning and the Rule of Law', in Christopher Forsyth, and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (Oxford, 1998), 142, 159.

[45] *Boddington* (n 24).

[46] '[T]he true effect of the presumption is that the legislation or act which is impugned is presumed to be good until pronounced to be unlawful, but is then recognised as never having had any legal effect at all.' *Boddington* (n 24).

[47] Mark Elliott and Jason Varuhas, *Administrative Law* (5th edn, OUP 2016) ch 3.

challenging the unlawfulness.[48] Without such a challenge commenced by the person who has standing, courts cannot invalidate the decision, and although the acts or decisions are null and void, 'their meaning is relative, depending on the court's willingness to grant relief in any particular situation.'[49] According to the orthodox theory, judicial discretion in this respect, however, does not make an unlawful act valid but makes it functionally unchallengeable. In other words, even though the act remains unlawful in theory, it continues to operate as if it were valid because no legal action has successfully nullified it. This results in a paradoxical situation, whereby the act is 'theoretically void' (legally invalid) but 'functionally voidable' (capable of being invalidated).[50] This creates a situation where an act can be simultaneously unlawful in theory but unchallengeable in practice.

Indeed, in *Ahmed (No 2),*[51] the Supreme Court was asked to suspend the quashing order in *Ahmed*[52] to allow time for Parliament and the Government to address the unlawfulness in the Orders regulating the freezing of terrorist assets, which may otherwise make the measures futile and devoid of practical consequence. The Court, by majority, however, declined to suspend its previous quashing order. Their reasoning was that the quashing order merely declared the existing legal reality regarding the unlawful act, which had already been found to be null and void *ab initio*. Suspending the quashing order would effectively obfuscate this true legal position as to the act's lawfulness — a concern explicitly voiced by Lord Phillips at para 8, with whom five of the remaining six judges agreed. Similarly, in *Secretary of State for the Home Department v JJ,*[53] the court declined to revoke or modify control orders, as would be permitted by section 3(12)(c) of the Prevention of Terrorism Act 2005; on the ground that 'there is

[48] Lewis (n 25) ch 5, section C.

[49] Forsyth (n 6) 368; Forsyth (n 44) 144; Wade and Forsyth (n 38) 253; Forsyth (n 41); *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 365 (Lord Diplock); *R (New London College) v Secretary of State for the Home Department* [2013] UKSC 51 [45-46] (Lord Carnwath).

[50] Forsyth (n 44) 143.

[51] *HM Treasury v Ahmed (No 2)* [2010] UKSC 5.

[52] *Ahmed v HM Treasury (No 1)* [2010] UKSC 2.

[53] *Secretary of State for the Home Department v JJ* [2007] UKHL 45.

simply nothing to revoke'.[54] The control orders in question were already null and void due to their unlawfulness.

Yet the operation of the orthodox theory in practice reveals important tensions. The central claim of the orthodox theory that all unlawful acts are null and void from the beginning does not fully correspond to reality[55] — most significantly because declarations and quashing orders, which the orthodox theory treats as equivalent in their consequences, operate quite differently, as illustrated in cases like *Ahmed v HM Treasury (No 2)* and *R (Hurley and Moore) v Secretary of State for Innovation, Business and Skills.*[56] These differences give rise to theoretical inconsistencies with the orthodox ultra vires theory of unlawful acts. Declarations allow unlawful measures to continue functioning in practice despite their theoretical nullity, creating a legal ambiguity where authorities and third parties continue to respect measures that are supposedly void. This is evident in *Hurley and Moore* where, despite finding that the government had not fully fulfilled its obligations under domestic anti-discrimination legislation, particularly the public sector equality duty, the court decided to issue a declaration rather than quash the regulations. The decision not to quash the regulations was primarily motivated by pragmatic considerations, as the court concluded there was partial compliance with the duty and quashing would result in substantial administrative chaos.

Similar approaches were taken in several cases, like *R v Greater London Council Ex p Blackburn*,[57] *R v Hereford Corp Ex p Harrower*,[58] and *R (Cali) v Waltham Forest LB*,[59] (the latter two being particularly important given the discussions about delaying the consequences of the court's decisions, as will be discussed

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[54] ibid [26] (Lord Bingham).

[55] Independent Review of Administrative Law Report (n 36) [3.60]; *R (Privacy International) v Investigatory Powers Tribunal* (n 5) (Lord Carnwath); *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 1 WLR 890; *Reference by the Attorney General and the Advocate General for Scotland - UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64.

[56] *R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin); *Walton v The Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51; Forsyth (n 6).

[57] *R v Greater London Council Ex p Blackburn* [1976] 1 WLR 550.

[58] *R v Hereford Corp Ex p Harrower* [1970] 1 WLR 1424.

[59] *R (Cali) v Waltham Forest LB* [2006] EWHC 302 (Admin).

separately and in more detail below)[60] where the courts chose to issue declarations that the relevant policies were unlawful rather than quashing orders.[61] In *Blackburn*, the Court of Appeal issued a declaration rather than quashing the Greater London Council's licensing policy for films. Lord Denning emphasised two main reasons for this approach: first, it allowed for the clarification of legal principles without disrupting the existing licensing framework; and second, it provided the council time to reform its policies without causing chaos in film censorship regulation. Immediate quashing would have created logistical difficulties for cinemas operating under the prior system.[62] The judges recognised the practical complexities in film censorship regulation and acknowledged that Parliament, not the courts, was the appropriate body to undertake comprehensive reform in this area.

In contrast, quashing orders reflect *Anisminic's* theoretical position more closely, resulting in immediate administrative gaps that require quick responses, as seen in *Ahmed (No 2)*. Moreover, declarations were historically contingent upon the presence of jurisdictional errors, as their function was limited to the declaration of the existing legal position.[63] This inconsistency demonstrates that while courts assert the orthodox theory that unlawful acts are void from inception, they frequently deviate from this principle when confronted with practical governance challenges. The tension between *Anisminic's* theoretical stance and judicial remedy practice highlights a significant conflict in administrative law, one that the recent Judicial Review and Courts Act 2022 sought to address through the codification of suspension remedies, which I discuss in more detail below.[64] The practical reality remains that declarations and quashing orders are used in ways which rely on them having distinct effects, contradicting the theoretical position that they should function identically.

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[60] See section 6.4.3 (Suspending and Prospective Quashing Orders) below.

[61] This procedural approach is analogous to that of a suspending quashing order, although the latter is arguably more potent in that it ultimately explicitly quashes the challenged act after a specified delay. Both remedies afford public authorities an opportunity to review and potentially rectify their policies. Suspending quashing orders is discussed in detail later in this chapter.

[62] *R v Greater London Council Ex p Blackburn* (n 57) 551.

[63] *Dyson v Attorney General* (n 26).

[64] See section 6.4.3 below.

The tension between theoretical nullity and practical remedy discretion is precisely why remedial discretion is so important in administrative law. This discretion acknowledges that certain unlawful actions may produce significant consequences, and that the invalidation of such acts could potentially undermine the rule of law and adversely affect third parties who have relied on them. This discretion enables judges to practically validate the effects of an unlawful act, even though it is legally void. This is significant because it allows for the practical implications to be considered, preventing potential administrative chaos and ensuring the legal system remains functional and effective. By exercising this discretion, judges can balance the need to uphold the law with the necessity of maintaining order and stability in the administration of justice.

Despite the majority approach in *Ahmed v HM Treasury (No 2),* which confirmed that the court cannot legally validate an invalid act by refusing a remedy, according to Forsyth, there is still scope for reconciling the court's discretion in relation to the protection of the public interest in order to prevent administrative chaos within the orthodox theory. As happened in *Hurley and Moore,*[65] in a situation where substantial compliance with the law and trivial non-compliance is found, the 'intent of the legislature will be that invalidity should not be visited upon a decision because of some minor non-compliance.'[66] Forsyth's argument suggests that courts can exercise their discretion in a way that acknowledges the legal invalidity of an act while also considering broader public interest concerns and allowing courts flexibility in addressing unlawful administrative actions without completely abandoning the orthodox theory.

According to Nadhamuni, on the other hand, the reconciliation comes from the fundamental purpose of judicial review itself: to protect the rule of law. The orthodox theory, which states that unlawful administrative acts are null and void, is itself founded upon the principle of the rule of law, namely the notion that all actions must comply with the law. However, the rule of law has multiple components, including legal certainty and the notion that everybody should be subject to and act in accordance with the law. When courts consider these

[65] *Hurley and Moore* (n 56).

[66] Forsyth (n 6) 377.

factors when deciding what remedies to grant, the judiciary is fulfilling its function by balancing the various components of the rule of law. Therefore, Nadhamuni suggests that the courts' exercise of remedial discretion is a nuanced application of the rule of law.[67] However, because of the incoherence between the orthodox theory and the remedial discretion as discussed, this requires recognising a category of errors of law that are 'voidable', meaning valid until set aside by the courts and retrospectively held to never have existed, depending on the court's discretion. This would mean, contrary to the position clarified by developments after *Anisminic*, that not all errors of law are in a single category which makes the unlawful decision null and void *ab initio*.

An alternative explanation for the practical effects of unlawful acts is that the effects such acts have on the other actors are factual rather than legal. Even though an unlawful act is legally void, it does not necessarily mean the subsequent acts flowing from the unlawful act must also be void.[68] According to what Forsyth calls 'second actor theory', 'the factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second.'[69] In such a case, the validity of the act of the second actor depends upon the powers of the second actor and not on the lawfulness of the first act. Since multiple acts can be performed by the same actor, Feldman rightly suggests that the focus should be on the independent powers to do second or subsequent acts, not the actors.[70]

Second actor theory, in respect of severing the statuses of subsequent legal acts, has been applied in the Supreme Court. In *Secretary of State for the Home Department v Draga*,[71] the Court of Appeal ruled that an invalid statutory instrument can validly be the legal reason for a detention until the invalidity of that Order is recognised by the Court. However, this decision was overturned by

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[67] V Srirangam Nadhamuni, 'Suspending Invalidity While Keeping Faith with Nullity: An Analysis of the Suspension Order Cases and their Impact on our Understanding of the Doctrine of Nullity' [2015] PL 596-613.

[68] Forsyth (n 49) 144.

[69] ibid 147; *D4 v Secretary of State for the Home Department* [2021] EWHC 2179 (Admin) [51].

[70] David Feldman, 'Error of Law and Flawed Administrative Acts' [2014] CLJ 275, 282; *R (DN (Rwanda)) v Secretary of State for the Home Department* [2020] UKSC 7.

[71] *Secretary of State for the Home Department v Draga* [2012] EWCA Civ 842.

the Supreme Court in 2020 in *DN (Rwanda).*[72] *Draga* and *DN (Rwanda)* were challenges to the detentions pending deportation on the grounds that the underlying deportation orders were unlawful. In *DN (Rwanda), the* Supreme Court, in accordance with the second-actor theory, looked at, firstly, whether the detention and deportation could be treated separately and whether there was a separate rule of law that made the subsequent act founded upon the first decision valid, notwithstanding the unlawfulness of the first one. Secondly, the Court examined if the second decision, even if not directly based on the first, was still affected by the unlawfulness of the initial decision to the extent that it rendered the second decision unlawful.[73] On the ground that deportation and detention pending deportation were uniquely linked, the Supreme Court held that the null and void deportation decision could not lawfully be the basis for the detention. The second actor theory retains the possibility that some subsequent acts may be valid despite being based on an unlawful first act.

It is crucial to acknowledge that if the orthodox theory were not followed and an alternative approach permitting 'voidable' unlawfulness were adopted, the court could have arguably exercised its remedial discretion to suspend its order in cases like *Ahmed (No 2).* In light of the Supreme Court's ruling in that case, which aligns with the above-cited case law following *Anisminic* and is based on the idea that there is a single category of legal errors that render the unlawful act null and void *ab initio*, a significant theoretical stance has been favoured. It is argued below, however, that the Judicial Review and Courts Act 2022 has necessarily modified the default position that all errors of law are null and void *ab initio*. The following sections will examine this in greater detail, with a focus on the specific context of suspending orders and prospective-only orders.

6.3.1.2 Ouster Clauses and Collateral Challenges

Finally, it is essential to consider the extent to which the orthodox theory can justify the treatment of ouster clauses and collateral challenges by the courts. Firstly, regarding the question of ouster clauses, the orthodox theory provides a compelling rationale for the court's restrictive approach to their enforcement. In

[72] *R (DN (Rwanda)) v Secretary of State for the Home Department* [2020] UKSC 7.

[73] Tom Hickman, 'The Consequences of Nullities' (2020) 79 CLJ 384.

accordance with the principle of legality, which requires clear and unambiguous wording to breach fundamental principles and rights including access to justice and the rule of law, the judiciary precludes the application of ouster clauses on a key logical basis: since unlawful acts are null and void ab initio under the orthodox theory, they cannot be protected from judicial control.[74] This approach is grounded in the understanding that the *ultra vires* principle functions as a concomitant element of both Parliamentary sovereignty and the rule of law.[75] The orthodox *ultra vires* doctrine reinforces parliamentary sovereignty by asserting that administrative actions must remain within the bounds of powers conferred by Parliament. Simultaneously, it provides a mechanism through which the courts can uphold the rule of law by scrutinising administrative actions for compliance with legislative intent. Without such judicial scrutiny, an ouster clause could improperly permit a decision-maker with limited jurisdiction to determine the limits of their own powers, potentially acting contrary to the authority of Parliament itself.

The orthodox approach provides theoretical coherence to the principle of legality. This is because, under the orthodox theory, unlawful administrative acts never legally existed. However, a logical incompatibility arises with ouster clauses: such clauses can only protect legally existent acts, but cannot logically extend to protect acts that are, in legal terms, non-existent. Consequently, ouster clauses can be interpreted as applying only to lawful determinations without contradicting parliamentary sovereignty, as Parliament presumably did not intend to protect legal nullities from judicial scrutiny. In the context of ouster clauses, this connection allows courts to interpret such clauses restrictively, presuming that Parliament, in accordance with the rule of law, did not intend to exclude judicial oversight of unlawful acts.[76]

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[74] In *Anisminic* for example the challenged determination of the Commission was quashed notwithstanding an ouster clause protecting Commission's determinations, based on the fact that the purported determination is not a 'determination' and the ouster clause cannot protect it. For a detailed analysis of principle of legality see the final section of this chapter below.

[75] Adam Tomkins, 'The Struggle to Delimit Executive Power in Britain' in *The Executive and Public Law: Power and Accountability in Comparative Perspective* (OUP 2005) 41.

[76] This approach also presents a complex balancing act. While it aims to uphold parliamentary sovereignty by ensuring that limited decision-makers comply with their legally defined powers, it carries the risk of overstepping into the area of judicial activism. The courts must be cautious not to impose their own will instead of that of Parliament, as doing so would constitute an

Secondly, the orthodox theory provides a crucial justification for collateral challenges to unlawful administrative acts. Collateral challenges serve as an essential mechanism that alleviates the limitations on judicial review, preventing null and void acts from remaining unchallenged yet effective in practice, and protects individuals' rights to defend themselves against claims founded on unlawful administrative action.[77] *Boddington* v *British Transport Police*[78] affirmed the collateral challenge principle that allows individuals to challenge the legality of administrative actions as part of their defence during criminal (and civil) proceedings where the court has no power to quash the underlying administrative acts. The House of Lords ruled that a defendant may challenge the regulations under which he or she is prosecuted because (in accordance with the orthodox theory) an *ultra vires* regulation is a nullity and has no legal effect even without a quashing order being made.

An individual may be ineligible to submit a judicial review claim, may be denied permission to pursue such a claim, or may choose not to challenge an unlawful act. When such limits on judicial review do not allow an unlawful act to be quashed, collateral challenges ensure that the nullity of the act is recognised at the appropriate moment in order to prevent injustice. In collateral challenges, the court hearing the case typically lacks the power to issue a quashing order because collateral challenges are raised indirectly in proceedings that are not specifically designed to address the validity of administrative acts. Therefore, for a collateral challenge to succeed, the unlawful act must be considered inherently void rather than merely voidable to form the basis of the court's decision.[79] The orthodox theory thus provides a robust justification for the availability of collateral challenges to unlawful acts — a justification that would be untenable if unlawful acts were merely voidable and legally effective until quashed.[80]

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usurpation of legislative authority and potentially undermine the principle of parliamentary sovereignty that they seek to protect.

[77] *Wandsworth London Borough Council v Winder* [1985] AC 461, 509D (Lord Fraser).

[78] *Boddington* (n 24).

[79] Forsyth (n 41).

[80] Elliott and Varuhas, *Administrative Law* (n 47) ch 3.

6.3.2 Alternative Theories: Recognising Voidable Unlawful Acts

Contrary to the modern orthodoxy, several authors such as Feldman and Adams argue that not all unlawful acts are null and void *ab initio*.[81] One of the main reasons for this is the fact that the apparently unlawful acts have legal (and not just factual) effects. As Lord Browne-Wilkinson in *Boddington* noted, a 'subsequent recognition of [the] invalidity cannot rewrite history as to all the other matters done in the meantime in reliance on [the] validity.'[82] Adams claimed that — rather than unlawful acts being void *ab initio* — unlawfulness puts a duty on the courts to invalidate the act but that, until set aside by a court, unlawful acts have legal effects.[83] Thus, courts will invalidate the unlawful acts retrospectively.[84] He argues that it is because of the public feature of administrative authorities, contrary to private powers, that they have 'a specific capacity: the power to interpret their own jurisdiction.'[85] What it implies is that administrative authorities have a degree of autonomy in determining the scope of their powers and responsibilities, which is crucial for understanding their role within the legal and governmental framework. Contrary to private powers, when administrative bodies act based on their interpretation of the conditions empowering them, their decisions carry legal effect due to their inherent authority to make binding determinations about their jurisdictional scope.

The alternative perspective is primarily based on the premise that common law constitutes the foundation for judicial review against the *ultra vires* theory of

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[81] Feldman (n 70); Adams (n 42); See also Finnian Clarke, 'Habeas Corpus and the Nature of "Nullity" in UK Public Law' (UK Constitutional Law Blog, 8 October 2019) <https://ukconstitutionallaw.org/2019/10/08/finnian-clarke-habeas-corpus-and-the-nature-of-nullity-in-uk-public-law/> accessed 1 July 2025.

[82] *Boddington* (n 24)*;* Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979) 108: 'The fact that a [body] may make a binding decision does not mean that it cannot err. It means that its decision is binding even if it is mistaken. My declaration of the legal situation is not binding at all because it is not binding if it is mistaken. *To be a binding application of a norm means to be binding even if wrong, even if it is in fact a misapplication of the norm*' (Emphasis added.)

[83] See *Page* (n 24); *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23.

[84] Adams (n 42) 290.

[85] Adams (n 42) 303.

judicial review.[86] This interpretation maintains that, as common law delineates the limits of lawful and unlawful actions, it consequently possesses the authority to ascertain the extent and character of the remedies available when those limits are transgressed. This approach suggests a more nuanced and flexible understanding of the legal status of unlawful acts, whereby the common law's role extends beyond the mere identification of unlawfulness to include the determination of the consequences and remedies for such actions. It implies that the courts have the power to develop the common law incrementally over time.[87]

6.3.2.1 Legal Effects of Unlawful Acts

Contrary to the orthodox theory that unlawful acts have no legal effects, Feldman gives several examples where such acts are (treated as) valid and argues that not every error of law will lead to an excess of jurisdiction: where judges distinguish the mandatory and directory preconditions to be a decision-maker and treat the latter as valid in some circumstances,[88] where the flaws might not affect the outcome i.e. a legitimate expectation of being consulted or common law's requirements of fairness[89] or where a person expressly and consciously waives his right to rely on a breach of the duty of fairness.[90] Adams further successfully defends the legal validity of the unlawful acts in subsequent matters done in reliance on the unlawful act's validity. He provides the example of the case of *Ridge v Baldwin*,[91] where Charles Ridge was removed from his position without the provision of a hearing. Ridge challenged the removal, and the House of Lords ruled that the dismissal decision was made without regard to the principles of natural justice and therefore void.[92] Adams draws attention to

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[86] Alison Young, 'To Quash or Not to Quash: When Should Courts Suspend or Limit the Retrospective Effects of a Quashing Order?' (2023) 28(3) Judicial Review 200.

[87] ibid 210.

[88] *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390; *Wang v Commissioners of Inland Revenue* [1994] 1 WLR 1286, 1296 (Lord Slynn) cited in Feldman (n 70) 296-297; See also Forsyth (n 6) 377.

[89] *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms* [1972] 1 WLR 190 cited in Feldman (n 70) 296-297.

[90] *R (Hill) v Institute of Chartered Accountants in England and Wales* [2012] EWHC 1731 (Admin) (Lang J).

[91] *Ridge v Baldwin* (n 38).

[92] *Ridge v Baldwin* (n 38) 80.

the fact that the aim of Ridge to challenge his removal was not to return to his former position but to be able to resign from that position. This is because the dismissal and resignation affected his pension rights. He argues that, contrary to the orthodox theory that unlawful acts are void *ab initio*, the local police authority, despite acting unlawfully, was nevertheless capable of producing valid *legal* consequences. The effects of an unlawful dismissal here was not just factual but also legal.[93] An unlawful act resulted in changes in Ridge's legal rights, therefore it cannot be deemed null and void in law from the start, as the orthodox theory claims. The second actor theory fails to provide a satisfactory explanation for how mere factual existence can result in changes to pension rights, given that the legal consequences of dismissal differ significantly from those of resignation. In Ridge's case, the legal nature of the initial act (dismissal or resignation) directly affected subsequent legal entitlements, and Ridge's pension rights were contingent not only on his factual departure from office, but also on the particular legal identification of that departure. Importantly, even though the original dismissal decision was deemed unlawful due to procedural impropriety, the legal classification of Ridge's termination as a 'dismissal' (rather than a 'resignation') continued to have legal significance when determining his pension rights. This lends strong support to Adams' argument that unlawful administrative acts can still function as legally effective causes within a chain of legal consequences.

6.3.2.2 Courts' Legal Duty to Invalidate and Revisiting the Anisminic

Adams, in his alternative theory, successfully argues that unlawful administrative acts are not automatically void *ab initio* but are instead voidable, retaining legal validity unless and until a court formally issues a quashing order. He explains how limits on judicial review — such as time and standing requirements — allow unchallenged unlawful acts to continue producing legal effects, as they are considered valid until formally invalidated. According to Adams, the court's duty to invalidate unlawful acts does not negate this voidable status but rather allows for discretion in how this duty of invalidation is fulfilled.[94] He contends that invalidation is not the courts' sole obligation and

[93] Adams (n 42) 297.

[94] ibid 309.

that they may deviate from this duty when compelling reasons exist, exercising their remedial discretion.[95] Adams also addresses collateral challenges and frames them as an alternative independent mechanism for courts that lack the capacity to invalidate decisions to consider questions of legality.[96]

It is worth noting here briefly that Adams' approach aligns with the provisions of the Judicial Review and Courts Act 2022 (as explained in detail below) particularly the inserted section 29A(5) to the Senior Courts Act 1981 which stipulates that when an act is upheld by a suspended or prospective quashing order, it should be treated 'as if its validity and force were, and always had been, unimpaired by the relevant defect.' This represents a significant shift from the traditional view of unlawful administrative acts as void *ab initio* to a more flexible approach where certain unlawful acts can be treated as valid until explicitly quashed by a court order. This aligns closely with Adams' alternative theory, which proposes that unlawful acts should be considered voidable rather than automatically void. By providing a legal basis for treating certain unlawful acts as voidable, the JRCA 2022 not only reinforces an alternative theoretical framework but also suggests a broader trend in administrative law towards more pragmatic remedies and a more flexible approach to addressing unlawful administrative actions. This is discussed in more detail in a separate subsection below.

In various cases, the judiciary also recognised the limitations of the *Anisminic* doctrine, which asserts a single category of legal errors rendering unlawful acts void *ab initio*. This doctrine, and in fact the very concept of jurisdiction or nullity itself, was found several times to fail to capture the complexities of legal practice and is considered somewhat artificial and technical.[97] Contrary to authorities relying on the *Anisminic* principle, Lord Donaldson MR in *R v Secretary of State for the Home Department ex p Cheblak*[98] distinguished a detention made without legal authority or beyond the detainer's powers (a jurisdictional error), and the decisions which are within the legal powers of the

[95] ibid 310.

[96] ibid 303.

[97] *R (Cart) v Upper Tribunal* (n 8); *Hare, Donnelly, Bell and others* (n 14) [4-046].

[98] *Cheblak* (n 55).

decision-maker but are flawed because of procedural errors, misappreciation of the law, consideration of irrelevant matters or exclusion of relevant matters, or unreasonableness of the decision (non-jurisdictional errors). He argued that these flawed decisions are valid until quashed by a court and are, therefore, voidable.[99] Indeed, *In re UK Withdrawal from the European Union (Legal Continuity) Bill*[100], the Supreme Court, departing from a straightforward application of the *Anisminic* principle in the context of devolved legislation, determined that there is a distinction between a lack of legislative competence and broader grounds for judicial review based on public law. Specifically, if the Scottish Parliament enacts legislation beyond its legal authority, such legislation is considered a nullity, meaning it is not legally valid. However, the Supreme Court held that if a Scottish law is found to be unlawful on more general public law grounds, it does not automatically become a nullity.[101] From a different perspective, Lord Dyson in *R (Cart) v Upper Tribunal*[102] and Lord Carnwath in *R (Privacy International) v Investigatory Powers Tribunal*,[103] criticised the notions of jurisdiction and nullity, arguing that they are artificial constructs. Lord Carnwath stated that 'it is highly artificial, and somewhat insulting, to describe the closely reasoned judgment [of the Investigatory Powers Tribunal] as a "nullity", merely because there is disagreement with one aspect of its legal assessment.'[104]

The debate surrounding the legal status of unlawful acts helps to clarify recent developments in administrative law. The evidence derived from practice and the case law supports, in certain respects, the critiques of the orthodox theory, demonstrating the complex nature of the effects of unlawful acts in practice. The result is the emergence of alternative theoretical frameworks suggesting that unlawful acts may retain legal efficacy until formally invalidated by a judicial order. Furthermore, this analysis demonstrates the dynamic relationship between legal theory and practical challenges, as well as legislative

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[99] *Cheblak* (n 55) 894C-E.

[100] *Reference by the Attorney General and the Advocate General for Scotland - UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* (n 55).

[101] ibid [26].

[102] *Cart* (n 8) [111] (Lord Dyson).

[103] *R (Privacy International) v Investigatory Powers Tribunal* (n 5).

[104] ibid [82].

interventions. This is exemplified by the introduction of suspended and prospective-only quashing orders, which represent a significant shift in remedial approaches within administrative law. This theoretical foundation provides a crucial context for understanding the practical implications of recent legislative changes and judicial practices in administrative law, which will be examined in greater detail in subsequent sections.

6.4 The Judicial Review and Courts Act 2022: Codification of New Remedial Power

6.4.1 Remedies Under JRCA 2022: Challenging Orthodox Administrative Law Theory

This subsection considers the suspension of quashing orders and prospective orders introduced by JRCA 2022 and the legal status of unlawful acts following the statutory introduction of these remedies. It particularly examines the implementation of 'new' remedial powers and their compatibility with the aforementioned theories of administrative law. It then argues that these remedies require a departure from orthodox theory because they allow unlawful acts to remain valid either temporarily or, more importantly, permanently. This challenges the notion of a single category of error of law that renders unlawful acts void *ab initio*. The significance of this analysis extends to the very scope of judicial review itself, as these remedial innovations fundamentally alter when and how courts may intervene in administrative decisions and substantively reshape the boundaries and effectiveness of judicial oversight in public law. The argument of this section is that the orthodox theory does not fully account for current practices and jurisprudence, and that it needs to be rethought in the light of suspension and prospective orders.

Furthermore, this chapter contends that while the remedies under JRCA 2022 have the potential to limit the scope of judicial review by allowing unlawful acts to remain in effect (either temporarily or permanently), thereby potentially limiting the judiciary's ability to adjudicate upon executive action in order to uphold the rule of law, they may paradoxically encourage more frequent judicial intervention. This is because the impact of judicial orders on the public and administration can now be limited and, in this sense, require a lesser degree of

democratic legitimacy. The statutory introduction of these remedies thus has implications for the rule of law, the separation of powers and the overall effectiveness of judicial review in modern governance, as it introduces a nuanced shift in the balance between judicial oversight and executive action, potentially altering the dynamics of administrative law and the courts' approach to reviewing government decisions.

6.4.2 Background of the Judicial Review and Courts Act 2022

The Act was enacted at a time of political and legal tension over the role and scope of judicial review. Several high-profile cases played a significant role in these tensions, most notably *Miller,*[105] in which the Supreme Court held that the government could not use prerogative powers to trigger Article 50 without parliamentary approval, and *Miller/Cherry*,[106] in which the government's prorogation of Parliament was held unlawful. Furthermore, in addition to these, *R (Privacy International) v Investigatory Powers Tribunal,*[107] which limited the effect of ouster clauses, and *R (UNISON) v Lord Chancellor*,[108] on employment tribunal fees, were perceived by the government as judicial encroachment on political territory.[109] In response to these concerns, the government launched the Independent Review of Administrative Law ('IRAL') in 2020. The IRAL report, published in March 2021, recommended modest reforms and acknowledged the general wellbeing of judicial review. Following the IRAL report, suspended and prospective quashing orders were enacted under the JRCA 2022, which received Royal Assent on 28 April 2022. Despite making only modest changes compared to the Bill, the Act is a significant legislative intervention in judicial review remedies — an area historically developed through common law principles.

Section 1 of the Act expressly empowers courts to suspend quashing orders to take effect at a future date and to limit or remove the retrospective effect of

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[105] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[106] *R (Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland* [2019] UKSC 41.

[107] *R (Privacy International) v Investigatory Powers Tribunal* (n 5).

[108] *R (UNISON) v Lord Chancellor* (n 10).

[109] Richard Ekins, 'Protecting the Constitution: How and Why Parliament should Limit Judicial Power' (Policy Exchange, 2019) <https://policyexchange.org.uk/wp-content/uploads/2020/01/Protecting-the-Constitution.pdf.> accessed 1 July 2025.

such orders, allowing courts to determine that unlawful administrative acts should be treated as effective for a specified period. JRCA 2022 marks a notable shift in administrative remedies in introducing greater flexibility that challenges the orthodox understanding of the concept of administrative unlawfulness. The Act thus provides greater flexibility by enabling courts to adopt a more nuanced approach, acknowledging that immediate invalidation of administrative decisions may sometimes result in greater public harm than allowing temporary validity of otherwise unlawful acts and represents a pragmatic legislative recalibration of judicial review remedies.

Legislation:

Section 1 of the Act inserts Section 29A to the Senior Courts Act 1981 and provides:

> ‘29A. Further provision in connection with quashing orders:
>
> (1) A quashing order may include provision—
>
> (a)for the quashing not to take effect until a date specified in the order, or
>
> (b)removing or limiting any retrospective effect of the quashing.
>
> (2) Provision included in a quashing order under subsection (1) may be made subject to conditions.
>
> (3) If a quashing order includes provision under subsection (1)(a), the impugned act is (subject to any conditions under subsection (2)) upheld until the quashing takes effect.
>
> (4) If a quashing order includes provision under subsection (1)(b), the impugned act is (subject to any conditions under subsection (2)) upheld in any respect in which the provision under subsection (1)(b) prevents it from being quashed.
>
> (5) Where (and to the extent that) an impugned act is upheld by virtue of subsection (3) or (4), it is to be treated for all purposes as if its validity and force were, and always had been, unimpaired by the relevant defect.
>
> (6) Provision under subsection (1)(a) does not limit any retrospective effect of a quashing order once the quashing takes effect (including in

> relation to the period between the making of the order and the taking effect of the quashing); and subsections (3) and (5) are to be read accordingly.
>
> (7) Section 29(2) does not prevent the court from varying a date specified under subsection (1)(a).
>
> (8) In deciding whether to exercise a power in subsection (1), the court must have regard to—
>
> (a) the nature and circumstances of the relevant defect;
>
> (b) any detriment to good administration that would result from exercising or failing to exercise the power;
>
> (c) the interests or expectations of persons who would benefit from the quashing of the impugned act;
>
> (d) the interests or expectations of persons who have relied on the impugned act;
>
> (e) so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act;
>
> (f) any other matter that appears to the court to be relevant.'

Section 1 of the Judicial Review and Courts Act 2022, therefore, provides two significant powers to redress unlawful acts. In particular, it allows courts to delay the effect of quashing orders until a future date, maintaining the effectiveness of the unlawful act until that date. Additionally, courts may limit or remove the retrospective effect of a quashing order, effectively treating the unlawful act as valid for the period before the order takes effect. In addition, the court may impose conditions on these suspended or limited quashing orders. These provisions address the need for legal certainty and good administration by allowing courts to mitigate the potential disruption caused by quashing orders. The Act provides a non-exhaustive list of factors for courts to consider when ordering a suspension or limiting the retrospective effect of their order, which are examined in detail later in this section. Before exploring these factors, it is important to examine the purpose and operation of suspended quashing orders and prospective quashing. This examination will provide the necessary context

for understanding the implications and applications of these new remedial powers in the context of judicial review.

6.4.3 Suspending and Prospective Quashing Orders

The difference between a suspended order and a prospective-only order lies in the temporal effect of the court's decision. In the context of a suspended order, the court's decision retains its retroactive effect, in other words, it applies to the actions or events that took place prior to the order. However, the implementation of the order is postponed to a future date. This delay allows the order to eventually take effect as if it had been applied immediately, thereby ensuring that the unlawful acts are addressed retrospectively. The suspension provides a period in which the parties concerned can be prepared for the changes brought by the court's decision, without changing the retrospective nature of the court's decision. Prospective orders, on the other hand, apply only to actions in the future and do not affect past events for any person or entity other than the applicant, or any claims that have been challenged in proceedings already commenced. Consequently, the court's decision has limited or no retroactive effect. Both suspended orders and prospective orders thus represent a departure from conventional retroactive effect.

Both types of order have previously been subject to judicial and parliamentary debate. In fact, in several statutes, Parliament has expressly enabled the court to make these types of orders in more limited contexts.[110] In *R v Governor of Brockhill Prison Ex p Evans (No 2)*[111], the House of Lords addressed the issue of the prospective application of court rulings, particularly in cases involving personal liberty and claims for damages due to unlawful detention. The court emphasised the general principle that judicial decisions should be applied

[110] Section 102 of the Scotland Act 1998, Section 110 of the Government of Wales Act 1998; Section 81 of the Northern Ireland Act 1998, *National Westminster Bank v Spectrum Plus Limited* (n 6)[17]; *HM Treasury v Ahmed (No 2)* (n 51) [16] (Lord Hope): 'Rule 29 of the Supreme Court Rules 2009 (SI 2009/1603) states that the Court has all the powers of the court below, and section 40(5) of the Constitutional Reform Act 2005 gives the Court power to determine any question necessary to be determined for the purposes of doing justice *in an appeal*. CPR 40.7(1) provides: "A judgment or order takes effect from the day when it is given or made, or such later date as the court may specify." [...] I do not think that the Court lacks the power to specify a later date for the taking effect of the orders it proposes to make should it consider that it should do so.'

[111] *R v Governor of Brockhill Prison Ex p Evans (No 2)* [2001] 2 AC 19.

retrospectively, declaring what the law has always been. Nevertheless, they acknowledged the potential for exceptional circumstances where prospective overruling might be appropriate, such as the overturning of long-standing precedents where retroactive application would invalidate numerous transactions. The Lords rejected the prospective application in this particular case, on the grounds of the importance of personal liberty and the unfairness of such an approach. While the possibility of prospective declarations had been discussed, particularly in the context of the Human Rights Act 1998, no such declarations had been made at the time of the decision.[112] The case left open the possibility of prospective overruling in exceptional cases where unscrambling long-settled transactions might cause undue injustice to defendants.

Furthermore, in *National Westminster Bank v Spectrum Plus Limited & Ors,*[113] the House of Lords accepted that prospective quashing is inherent in the power to administer justice fairly, although it was not exercised in that case. The power to issue prospective rulings may — it said — be exercised in exceptional circumstances, considering factors such as the establishment of a new legal principle, the potential impact of retrospective application on the new rule's effectiveness, and the risk of substantial inequity resulting from retrospective application, but subject to statutory exceptions such as the HRA 1998.[114] However, the House of Lords (and later the Supreme Court) has been cautious in exercising particularly prospective quashing power because of the potential trespass on legislative functions.[115] Permitting unlawful acts to retain validity prospectively risks the perception of the court engaging in policy-making regarding the implications of illegality, a function traditionally reserved for Parliament. By issuing prospective-only orders, the court goes beyond the interpretation and application of existing law, as it makes substantive determinations about the timing and scope of the consequences of unlawfulness. These determinations potentially encroach upon Parliament's constitutional role

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[112] *R v Governor of Brockhill Prison Ex p Evans (No 2)* (n 111)*; National Westminster Bank v Spectrum Plus Limited* (n 6) [40] – [43] (Lord Nicholls).

[113] *National Westminster Bank v Spectrum Plus Limited* (n 6); R (Black) v Secretary of State for Justice [2017] UKSC 81 [35]; *Fishermen and Friends of the Sea v The Minister of Planning, Housing and the Environment* [2017] UKPC 37 [53]; *Mossell (Jamaica) Limited (T/A Digicel) v The Office of Utilities Regulation* [2010] UKPC 1 [44]

[114] *National Westminster Bank v Spectrum Plus Limited* (n 6) [39], [40], [69], [71], [126], [162].

[115] See *R (Black) v Secretary of State for Justice* (n 113).

as the principal body responsible for shaping policy. This is also one of the points that has recently been criticised in relation to the JRCA 2022.

Suspending its quashing order would effectively mean that the court was 'continu[ing] to adopt [the relevant body's] illegal act'.[116] The justification for such a power is often based on practical considerations, as illustrated in cases such as *Ahmed v HM Treasury (No 2)*.[117] In such cases, the suspension of a quashing order may be considered necessary to give Parliament and the government sufficient time to address the unlawfulness found, which otherwise may become futile and amount to nothing practically and, particularly, due to the practical effects on other actors. The concept of suspended quashing, however, poses a significant challenge to the orthodox theory of judicial review, particularly in its implications for the treatment of unlawful acts. According to this theory, unlawful acts are considered void *ab initio*. However, the power to suspend a quashing order in the 2022 Act effectively allows the courts, now with statutory authorisation, to allow these void acts to retain both factual and arguably legal effect for a specified period of time.[118] This apparent contradiction raises important questions about the nature of legal validity and the role of the judiciary.

The orthodox theory's assertion that, under a single category of errors of law which are null and void *ab initio*, a court merely declares the non-existence of an unlawful act when quashing it, has become even more controversial. The very concept of suspension implies that the decision in question is indeed unlawful but that its effects can be temporarily maintained. Otherwise, the court's power to suspend is eventually pointless. This logic challenges the basic principles of the orthodox theory of unlawfulness since suspension can only be justified if a decision is both unlawful and capable of being delayed.[119] Moreover, the power to suspend quashing orders, as understood within the context of orthodox theory, enables the judiciary to confer *de facto* legitimacy upon even

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[116] Jonathan Morgan, 'Oh Lord make me pure – but not yet: Granting Time for the Amendment of Unlawful Legislation' (2019) 135 LQR 585.

[117] *HM Treasury v Ahmed (No 2)* (n 51).

[118] See Adams (n 42).

[119] Adams (n 42) 290, 308.

jurisdictional errors of law.[120] While not as problematic as prospective quashing, given that suspended quashing applies retrospectively with a delay, it nonetheless presents a scenario where the judiciary could effectively authorise the executive to circumvent parliamentary intent, particularly in cases where a quashing order may never come into force. To illustrate, in the case of *Ahmed*, had the quashing been suspended, the freezing orders would have remained in force and, following the rectification of the unlawfulness, the rectified orders would have 'continued' to have legal effect. Consequently, suspension would result in legal bindingness for the period of delay, thereby also leaving the applicant with the sole option of seeking compensation.

As seen above, not all unlawful acts are quashed; courts sometimes choose to make declarations rather than quashing orders for pragmatic reasons. Furthermore, although suspended quashing orders may appear to be a novel development, the judicial review system has in fact always used a variety of mechanisms to delay (the effect of) remedies. For instance, in *R v Hereford Corp. Ex p Harrower*[121] the court adjourned the case before issuing a writ of mandamus and ordered the mandamus to remain pending for 14 days, giving the council time to formally suspend its standing orders before implementation. The case arose from a challenge brought by electrical contractors against Hereford Corporation for failing to adhere to its standing orders during a procurement process. They sought mandamus to compel the corporation to comply with its standing orders before finalising the contract. The court ultimately suspended the issue of the order for mandamus for 14 days, allowing the council time to formally suspend the standing orders if they chose to do so. If the council failed to act within this period, the mandamus would be issued and take effect, ensuring the corporation's compliance with its standing orders.

There are, however, important differences between adjourning a case and suspending the coming into force of quashing orders. In the *Hereford* case, the court did not legally uphold an unlawful decision but provided a window of time for the authority to rectify its actions using its existing statutory powers. It did

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[120] Hickman (n 2)

[121] *R v Hereford Corp Ex p Harrower* [1970] 1 WLR 1424; *McKee v Belfast Corporation* [1954] NI 122.

not validate any unlawful action but merely postponed the enforcement of a positive obligation. The unsigned status of the contract proved decisive, as the court recognised the council's inherent power to suspend its own standing orders. In contrast, suspended quashing orders temporarily maintain the validity/effectiveness of decisions which have been found already to be unlawful, often to avoid administrative disruption. The difference becomes even more apparent when considering the orthodox theory of *ultra vires* which underlies quashing orders. Under this theory, unlawful decisions are null and void from inception because they exceed legal authority, and quashing orders simply formally invalidate such decisions without delay or ambiguity. Unlike mandamus, which permits procedural adjustment, quashing orders theoretically assert the immediate invalidity of *ultra vires* acts, leaving no room for temporary preservation. Suspended quashing, therefore, creates a logical paradox: how can courts delay the effects of their decision on something that, according to the orthodox theory, never possessed legal validity? This tension reveals the theoretical inconsistencies in current judicial review practice and suggests the need to reconsider the orthodox theory of errors of law guiding remedial powers in administrative law.

More recent cases further illustrate courts' pragmatic approaches challenging the orthodox theory. In *R (Cali) v Waltham Forest LBC*[122] the court chose to issue a declaration that the relevant policies were unlawful, rather than making quashing orders while preserving the claimant's right to return to court at a later date. In this case, the court found the local authority's housing allocation scheme unlawful because it failed to account for cumulative housing needs. Despite these findings, the court declined to immediately quash the scheme because of the significant disruption to housing allocations and potential delay in assistance for other applicants in urgent need that doing so would have caused. Instead, the court adjourned the application for mandatory relief 'generally with liberty to restore,' giving the council four months to review and amend its policy while preserving the claimant's right to return to court to seek the mandatory relief if the council failed to adequately remedy the deficiencies in its policy. This approach allowed the authority time to remedy the deficiencies without

[122] *R (Cali) v Waltham Forest LB* (n 59).

immediate judicial interference while retaining judicial oversight if compliance was not achieved.

These interconnected remedies/procedures of adjourning, granting liberty to restore, and suspending quashing orders represent different points on a single spectrum, each serving distinct but related purposes. In *Hereford*, the court employed a form of adjourned mandamus requiring compliance with standing orders by delaying the issue and enforcement of a mandatory order for 14 days, providing the Council an opportunity to formally suspend its standing orders by itself before the mandamus would take effect. This approach differs from both granting of liberty to restore and suspending quashing orders, though it shares elements with each. Unlike liberty to restore, where a claimant must actively return to court to pursue the remedy after a period of adjournment (as in *R (Cali) v Waltham Forest LBC*), the adjourned mandamus in *Hereford* would automatically take effect after the specified period unless the authority took specific action. This automaticity resembles suspending quashing orders, yet the remedies serve fundamentally different purposes: while suspending quashing orders (as in *Ahmed (No 2)*) temporarily preserve the validity of unlawful decisions to prevent administrative disruption, the adjourned mandamus in *Hereford* did not validate any unlawful action but instead provided a period for procedural correction. The three mechanisms can therefore be understood as progressive developments in administrative law's remedial flexibility. Suspending quashing orders (now statutorily recognised in the JRCA 2022) provide a more structured approach to managing the transitional effects than is offered by the other mechanisms.

Moreover, in respect of quashing orders and declarations, the case of *Ahmet v HM Treasury (No 2)* reveals the practical and theoretical differences between declarations and quashing orders, which gives rise to theoretical inconsistencies with the orthodox *ultra vires* theory of unlawful acts. An unlawful act is defined as null and void from its inception under this theory, thus a declaration merely states an existing fact: that the act was void from its inception. Theoretically, therefore, there should be no functional distinction between a declaration and a quashing order, as both simply express the act's inherent invalidity. While this logic aligns with the historical rationale for declarations in judicial review proceedings, as discussed earlier in this chapter — representing a pragmatic

evolution in response to the often limited records and the expanding scope of administrative decision-making — contemporary practice reveals that courts perceive a practical difference between declarations and quashing orders, often favouring the former to mitigate potential adverse consequences associated with quashing orders. The conceptualisation of declarations as merely a statement of the existing legal situation must be re-evaluated if declarations are to be effective in invalidating acts prospectively while preserving past decisions.[123] Since *Ahmed v HM Treasury (No 2)* confirmed/cleared that such a suspending power of the quashing order cannot be exercised on the ground of the orthodox theory of unlawfulness, this issue, however, must be — and has been — addressed through legislative intervention. The JRCA 2022 explicitly gave the courts the power to suspend quashing orders in certain circumstances, thus amending the legal status of unlawful acts and the remedies regime for judicial review in the UK.

On the other hand, the concept of prospective overruling in administrative law presents a more significant departure from traditional judicial practices, as it requires the court to balance competing interests and is more likely to interfere with vested rights. Therefore, it raises important questions about the role of courts in the legal system. Through prospective overruling, courts declare a decision unlawful but limit the effect of quashing to operate only from a specified future date forward. The reason for proposing prospective overruling was explained by the Government as being to protect individuals and organisations who have relied on what they reasonably believed to be valid administrative acts by protecting them from adverse consequences if those acts are subsequently found to be unlawful on judicial review.[124]

Similar to suspending orders, one of the principal objections to this approach was articulated in the Canadian case of *Re Edward and Edward*[125], as referenced in *National Westminster Bank v Spectrum Plus Limited & Ors*.[126] Prospective overruling could potentially undermine the courts' duty to maintain their

[123] Lewis (n 25) [6-033].

[124] Sally Lipscombe and others, 'Judicial Review and Courts Bill 2021-22: Progress of the Bill' (House of Commons Library, 2022) 12.

[125] *Re Edward and Edward* (1987) 39 DLR (4th) 654

[126] *National Westminster Bank v Spectrum Plus Limited* (n 6).

independent, neutral, and non-legislative role, potentially distorting public expectations of the judicial function and that 'confidence may recede at the point where the courts are not seen as adjudicative agencies but as legislators.'[127] The inclusion of this in the 2022 Act means giving an important power to *effectively re-write* the powers given by the Parliament by way of judicial discretion for the period between the unlawful act and the ruling is made. When examined against the backdrop of parliamentary sovereignty and the traditional understanding of ultra vires doctrine, the significance of this power becomes more evident. When Parliament grants statutory powers to public bodies, it establishes both the scope and limits of those powers. By allowing decisions made outside those limits to have legal effect for a certain period of time, nonetheless, the courts are in effect, temporarily modifying the legal limits established by Parliament. An unlawful decision, which would be void *ab initio* under the orthodox theory, even if made with a jurisdictional error, would be given legal effect for a certain period by an exercise of the courts' discretion — in effect, a judicial modification of the statutory boundaries set by Parliament.

Lord Nicholls also highlighted some other controversies regarding the use of prospective overruling, such as creating discrimination between claimants, or having a discouraging effect on challenging acts through judicial review. Where the court selectively distinguishes between proceedings already commenced and prospective proceedings, whose claimants may not have been properly advised and may not have been aware that they had a claim. If the court decided that its decision would only have prospective effect, the successful claimant — and prospective claimants - would be discouraged because they would be excluded from the benefits they could obtain before the date of the court's decision.[128] Despite these concerns, it is noteworthy that prospective quashing is already recognised within the scope of remedial powers available to courts. Consequently, it is unlikely that its exercise will become significantly more

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[127] *Re Edward and Edward* (n 123) 654; *National Westminster Bank v. Spectrum Plus Limited & Ors* (n 6) [22]; Lord Devlin, '*The Courts and the abuse of power*' The Times, 27 Oct. 1976. cited in Tom Bingham, 'Should Public Law Remedies be Discretionary?' in *The Business of Judging: Selected Essays and Speeches* (OUP 2000) 194: 'The British have no more wish to be governed by judges than they have to be judged by administrators.'

[128] *National Westminster Bank v Spectrum Plus Limited* (n 6) [27].

frequent. However, the explicit statutory affirmation of this power through the legislation gives it a greater degree of authority and potential, based on a democratic mandate from Parliament. This may potentially catalyse a more frequent exercise of prospective quashing orders. Thus, it is a significant evolution in administrative law, and it may recalibrate the boundaries of judicial authority, potentially expanding the scope of judicial discretion in remedying unlawful administrative acts.

There are several common criticisms towards both the suspending and prospective overruling powers of the courts. A primary concern stems from section 29A(5) of the Senior Courts Act 1981, as amended by the JRCA 2022, which provides 'where (and to the extent that) an impugned act is upheld by virtue of [suspending] or [prospective orders] *it is to be treated for all purposes as if its validity and force were, and always had been, unimpaired* by the relevant defect' (emphasis added). This provision potentially undermines the right to collateral challenge, as it effectively renders unlawful acts immune from such challenges during the suspension period or prior to the effective date of a prospective ruling.[129] Furthermore, the Act shifts the responsibility for addressing unlawfulness, and consequently the associated accountability, from Parliament and the executive — who are accountable to the people — to the judiciary, which is not directly accountable to the electorate. It directs the judiciary to perform quasi-legislative functions while providing only quite loose guidance as to how to exercise these significant powers, rather than, for example, legislating retrospectively, which would be equally detrimental to justice.[130]

Prospective-only orders involve a quasi-legislative exercise of the judiciary because such a power gives effect to an unlawful act that is contrary to higher law for a limited period of time (the time between when the act was done and when the quashing order is made). As a consequence, the unlawful act, which

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[129] Independent Review of Administrative Law Panel Report (n 36) [3.66]; Public Law Project, Second Reading Briefing: *Judicial Review and Courts Bill* (House of Commons, 2021) [11], [12]; Liberty, Second Reading Briefing: *Judicial Review and Courts Bill* (House of Commons, 2021) [16]-[19]; JUSTICE, Second Reading Briefing: *Judicial Review and Courts Bill* (House of Commons, 2021) [13], [14].

[130] See *R v Governor of Brockhill Prison Ex p Evans (No 2)* (n 111); *National Westminster Bank v Spectrum Plus Limited* (n 6) [38], [74], [125]; *Fishermen and Friends of the Sea v The Minister of Planning, Housing and the Environment* (n 113); *R (Black) v Secretary of State for Justice* (n 113).

contradicts the will of Parliament under the law, would be recognised as valid, even if only for a limited period.[131] Such a quasi-legislative function exercised by the judiciary has the effect of disadvantaging some groups of people. When courts issue prospective-only orders, they are effectively creating rules that validate past unlawful conduct while invalidating identical conduct in the future and resulting in discrimination without democratic accountability: those who were affected by the unlawful act prior to the court's decision may not benefit from the decision, resulting in unequal treatment and a sense of injustice. While prospective-only orders can mitigate the chaos of retroactive application, they also risk preserving an inequality by denying a remedy to those who suffered under the unlawful act that was struck down. Although the Act provides that the court will take into account the interests of the other people in this regard, this does not guarantee that the people will be protected from legal damages.[132]

Similarly, in the context of the JRCA 2022, the suspension of a quashing order, can arguably mean giving temporary validity (or practical effectiveness) to the unlawful — therefore, on the orthodox theory, null and void — acts by way of judicial exercise.[133] This also effectively grants the courts a quasi-legislative power, allowing them to temporarily uphold measures that would otherwise be considered legally non-existent. Although the Supreme Court rightly recognised that the Court has a suspending power in *Ahmed (No 2),* it held that suspending the effect of a previously decided quashing order would raise a false impression. This is because of the modern conception that unlawfulness means that the relevant act is null and no effect in law *ab initio*. Consequently, suspending the implementation of a quashing order would obscure its intended effect and presents a paradox: it operates to temporarily maintain the legal effect of an act that, in strict legal terms, never existed.[134]

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[131] *National Westminster Bank v Spectrum Plus Limited* (n 6) [28]; Hickman (n 2).

[132] Section 29A(8) of the Judicial Review and Courts Act 2022 provides that 'In deciding whether to exercise a power in subsection (1), the court must have regard to […] (c) the interests or expectations of persons who would benefit from the quashing of the impugned act; (d) the interests or expectations of persons who have relied on the impugned act'.

[133] Hickman (n 2).

[134] HM Treasury v Ahmed (No 2) (n 51) [24].

6.4.4 After the JRCA 2022: Recognising voidable unlawfulness

Forsyth proposed a decade ago that the distinction between non-jurisdictional and jurisdictional errors be revisited, particularly in relation to legislative acts or decisions made by specific courts. He suggested that in certain instances, courts should be granted discretionary powers similar to those provided in for example the Scotland Act 1998, which renders the legislative acts of Scotland voidable rather than automatically void.[135] The power to suspend the effect of a finding of invalidity in Scotland Act 1998, as well as the Government of Wales Act 1998, and the Northern Ireland Act 1998, are constrained in their scope of application.[136] They pertain exclusively to acts of devolved parliaments and to executive actions of devolved governments and are limited in their territorial reach. By contrast, the provisions of JRCA 2022 apply universally to all judicial review proceedings, regardless of the nature of the challenged act or the identity of the decision-maker. This broader application has significant implications for the entire system of judicial review in the UK, potentially altering how courts address unlawful administrative acts across all sectors and levels of government.

I argue, therefore, that the Act modifies the orthodox view as to the unlawfulness of decisions. It is now necessary to recognise that there is a category of voidable unlawful decisions which are not void and null from the beginning depending on the statutory and practical context. One example of such recognition can be found in the *Continuity Bill Case*,[137] where the Supreme Court indicated that:

> '[t]here is a difference between a want of legislative competence and more general grounds for judicial review on public law grounds. The result of a want of legislative competence is that a Scottish enactment is a nullity ("not law"): see section 29(1) of the Scotland

[135] Forsyth (n 6) 377-378; See also Feldman (n 70); *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin)*; R (Cart) v Upper Tribunal* [2010] EWCA Civ 859; Section 102 of the Scotland Act 1998,

[136] See also Reg 101 of the Public Contracts Regulations 2015. This regulation has also very limited application area in contrast to JRCA 2022.

[137] *Reference by the Attorney General and the Advocate General for Scotland - UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* (n 55).

> Act. A Scottish enactment which is held by a court to be unlawful on more general public law grounds is not necessarily a nullity.'[138]

The recognition of this category in the 2022 Act therefore aligns with existing jurisprudence, suggesting that the modification is not entirely novel but rather a formalisation of emerging judicial perspectives.[139] It is also useful for preserving the distinction between judicial review and appeal which is one of the concerns regarding the abolition of the distinction between errors of law, which was previously discussed at the beginning of this chapter.

Problematically, the statutory endorsement of suspended and prospective-only decisions, coupled with the necessary recognition of voidable unlawful decisions in the JRCA 2022 (as discussed in detail above), could potentially revive aspects of the pre-*Anisminic* approach. This situation has paradoxical implications for the scope of judicial review. On the one hand, the recognition of voidable unlawful decisions could, in this way, strengthen the effectiveness of ouster clauses, potentially limiting the scope of judicial review in cases where errors are deemed to be non-jurisdictional. This would represent a partial return to the pre-*Anisminic* approach, where certain administrative decisions were shielded from judicial scrutiny. Paradoxically, however, the introduction of more flexible remedial powers through suspended and prospective orders, now backed by statutory intervention, may encourage more frequent judicial intervention, potentially making courts more inclined to engage in review. This tension between potentially limited reviewability (due to the resurgence of the jurisdictional/non-jurisdictional distinction) and increased judicial willingness to intervene (facilitated by more flexible remedies) creates a nuanced and somewhat contradictory landscape for judicial review. It suggests that while the theoretical scope of review may be narrowed in some respects, the practical frequency and impact of judicial intervention may simultaneously increase.

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[138] ibid [26].

[139] ibid; *R v Wicks* [1998] AC 92; *R (Hurley and Moore) v Secretary of State for Innovation, Business and Skills* (n 56); *Walton v The Scottish Ministers* (n 56); *R (Privacy International) v Investigatory Powers Tribunal* (n 5) [84] (Lord Carnwath).

Prior to concluding the chapter, it is essential to examine the factors that courts must consider when issuing suspension or prospective orders as outlined in the JRCA 2022. The following section will address this matter.

6.5 Judicial Considerations in Remedial Discretion under the JRCA 2022

Judicial discretion in administrative law cases serves as a crucial mechanism for balancing individual rights with broader public interests, particularly in averting potential administrative chaos.[140] This discretionary power, while significant, is not unfettered; it operates within a framework of rules and principles, albeit not always clearly defined, which often render its scope narrower than initially perceived.[141] Lord Bingham observed that not all public law remedies are discretionary, as evidenced by the habeas corpus cases. However, issuing of quashing orders is largely discretionary. But there remains ambiguity regarding the court's authority to refrain from quashing errors of law that lack jurisdiction and are evident on the face of the record.[142] This tension between judicial flexibility and the need for legal certainty is reflective of the ongoing challenges in administrative law and, indeed, is evident from the considerations identified in JRCA 2022. Although the Act sets out a number of factors that must be taken into account by courts when exercising their discretionary powers in relation to the suspending and prospective quashing orders, it is not clear how these factors should or will be balanced.[143] As amended by the JRCA, Section 29A (8) of the Senior Courts Act 1981 provides:

‘In deciding whether to exercise a power in subsection (1), the court must have regard to—

> (a) the nature and circumstances of the relevant defect;
>
> (b) any detriment to good administration that would result from exercising or failing to exercise the power;

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[140] Forsyth (n 6) 361.

[141] Bingham (n 127) 185-186.

[142] ibid.

[143] Young (n 86).

> (c) the interests or expectations of persons who would benefit from the quashing of the impugned act;
>
> (d) the interests or expectations of persons who have relied on the impugned act;
>
> (e) so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act;
>
> (f) any other matter that appears to the court to be relevant.'

This is a non-exhaustive list of considerations that courts must take into account when using their remedial discretion as to issue suspended or prospective-only quashing orders. Young categorises them into three primary themes as upholding the rule of law,[144] protecting third-party rights,[145] and facilitating good administration[146].[147] In addition to any factor which might be deemed to be relevant,[148] these include the nature and circumstances of the relevant defect, the potential impact on good administration, and the interests and expectations of various stakeholders. The court is required to weigh the benefits of quashing the impugned act against the reliance interests of those affected by it. Additionally, the provision mandates consideration of any remedial actions or undertakings proposed by responsible parties, thus, requires a careful balancing act between the benefits of quashing the impugned act and the reliance interests of affected parties, while also considering any proposed remedial actions or commitments. Among the various considerations outlined in the Act, two factors are particularly significant for the purposes of this chapter. Firstly, the nature and circumstances of the relevant defect is a crucial consideration, as this factor might potentially reintroduce distinctions between different types of errors that were eliminated by *Anisminic*. This consideration has been

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[144] The nature and circumstances of the relevant defect and any other matter that appears to the court to be relevant.

[145] The interests or expectations of those who would benefit from the quashing of the impugned act, or who have relied on the impugned act.

[146] Any detriment to good administration that would result from exercising or failing to exercise the power' to grant a suspended or prospective-only quashing order, and so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given by a person with responsibility in connection with the impugned act.

[147] Young (n 86).

[148] See, for example, concerns in relation to international law obligations as raised by Lord Hope in *HM Treasury v Ahmed (No 2)* (n 51).

instrumental in shaping the evolution of administrative law jurisprudence as explained in the first subsection of this chapter. Secondly, the consideration of remedial actions or undertakings proposed by responsible parties warrants special attention, as it represents a notable shift from previous practice where this factor was often accorded relatively moderate weight. This enhancement of remedial proposals to a more central position introduces a potential for more context-sensitive outcomes, which are therefore less predictable and less secure for the applicants in particular.

As the foregoing analysis has demonstrated, the JRCA 2022's provisions regarding suspended and prospective-only quashing orders potentially reopen consideration of distinctions between different types of errors of law.[149] By allowing certain unlawful decisions to remain valid temporarily, the Act implicitly challenges the post-Anisminic understanding that all errors of law render decisions void *ab initio*. This raises important questions as to whether certain categories of error might now be treated differently in terms of remedial consequences.

Errors of law that are apparent on the face of the record provide a useful focus for considering this question. Such errors have historically attracted judicial scrutiny, regardless of jurisdictional classification, because of the judiciary's inherent inclination to rectify manifest legal errors readily discernible from an administrative body's official record, rather than relying solely on traditional ultra vires principles that focus on controlling actions beyond legal authority.[150] This suggests that even if the pre-*Anisminic* distinctions were to be revived, errors apparent on the face of the record would likely remain subject to correction. This consideration strengthens the argument that suspended or prospective quashing orders may be less appropriate for clear and manifest errors of law, which traditionally warrant immediate correction under principles of administrative law.

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[149] But see Lewis (n 25) [5-032].

[150] Lewis (n 25) [6-033]: 'The doctrine of error on the face of the record is unique as it is not based on the concept of control of ultra vires action. Rather, the doctrine rests on the courts' inherent willingness to correct patent errors of law where these are readily detectable from the record of the administrative body concerned.'

Alternative distinctions between errors of law (or ‘defects' as it is expressed within the Act) can be drawn. For example, Oliver, in one of her early articles, proposed a distinction that differs from the pre-Anisminic approach by focusing on whether errors are apparent on the face of the matter or not. In the case of errors not apparent on the face of the act, those requiring additional investigation or evidence beyond the official documentation, the power to invalidate an unlawful decision is at the discretion of the court. In this case, both jurisdictional and non-jurisdictional errors of law may be subject to discretionary powers.[151] She grounds her claim on the general judicial discretion to set aside unlawful decisions ‘if the interests of justice so require.’[152] This approach would seem likely to result in more context-sensitive decisions and it may argued that if an error of law is not apparent on the face of the record and significantly harms the parties or disrupts public order, the court may exercise its discretion and choose to suspend or prospectively quash the act. For the errors apparent on the face of the record, such as a decision that explicitly misinterprets statutory provisions, explicitly cites an outdated legal provision, applies an incorrect legal test, or contains internal contradictions in reasoning, on the other hand, it would be more undesirable to issue them.

The relatively recent introduction of statutory suspending and prospective quashing orders has yielded few illustrative cases to date. While no cases of significant controversy have yet arisen regarding the concerns outlined above, one notable instance where a suspended quashing order was issued is the case of *R (Every Child Protected Against Trafficking UK) v Kent County Council and Secretary of State for the Home Department*[153] (‘ECPAT’). In this case, the High Court ruled against a protocol between the Home Secretary and Kent County Council concerning the care of unaccompanied asylum-seeking minors arriving in the UK. The court ruled that both parties had failed to fulfil their statutory obligations as set out in the Children Act 1989. Notwithstanding this ruling, the court granted a suspended quashing order, taking into account the potential adverse effects on unaccompanied minors should the protocol be immediately

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[151] Dawn Oliver, 'Void and Voidable in Administrative Law A Problem of Legal Recognition' (1981) 34 CLP 43.

[152] ibid 54, 59.

[153] *R (Every Child Protected Against Trafficking UK) v Kent CC and Secretary of State for the Home Department* [2023] EWHC 2199 (Admin).

invalidated. This decision permitted the continued relocation of children from hotels to more appropriate accommodation in other local authorities and provided an opportunity for the renegotiation of protocols to ensure compliance with obligations to all unaccompanied minors arriving in Kent. This may serve to illustrate how a case that might otherwise have been resolved through a mere declaration was granted greater force through the issuance of a suspended quashing order. Nevertheless, this single example is insufficient to draw definitive conclusions about whether these new remedies will consistently produce *'desirable'* outcomes for all relevant parties.

7 The Principle of Legality

The principle of legality will likely serve as a crucial interpretive constraint when courts apply the JRCA 2022, particularly those sections that are perceived as limiting judicial review of executive action or restricting access to effective remedies, potentially invoking it to narrowly interpret any provisions that appear to curtail fundamental rights of access to justice or reduce judicial oversight of administrative decision-making. The principle of legality is a multifaceted constitutional tool that shapes statutory interpretation and safeguards fundamental rights.[154] The principle operates as a presumption that Parliament does not intend to override fundamental rights or constitutional norms without explicit statutory language. This requires courts to adopt interpretations that minimise encroachments on rights. For example, in *R v Secretary of State for the Home Department, ex p Leech*,[155] prison rules allowing censorship of legal correspondence were 'extravagantly wide' and thus held to be *ultra vires* by the Court of Appeal as incompatible with the constitutional right of access to justice. Similarly, in *R (UNISON) v Lord Chancellor*,[156] the Supreme Court found the employment tribunal fees unlawful for creating a disproportionate barrier to justice, emphasising that the statutory language which gives rise to such barriers must be 'clear and unambiguous'. The courts invoked the principle of legality

[154] HJ Hooper, 'Historical Origins of the "Principle of Legality" in British Public Law' (UK Constitutional Law Blog, 20 May 2024) <https://ukconstitutionallaw.org/2024/05/20/hayley-hooper-historical-origins-of-the-principle-of-legality-in-british-public-law/> accessed 30 April 2025.

[155] *R v Secretary of State for the Home Department, ex p Leech* [1993] EWCA Civ 12

[156] *R (UNISON) v Lord Chancellor* (n 10).

and circumscribed the scope of the executive's discretionary powers, ensuring statutory schemes aligned with interpretations that upheld fundamental rights and certain common law norms.[157]

In addition to its classic interpretive function, requiring explicit language for certain actions, Varuhas and Young have argued that the principle now has a stronger function. It gives rise to proportionality review, particularly in cases involving access to courts or other fundamental rights, reflecting its evolution into a substantive constitutional check.[158] This evolution can be traced through significant cases over time, beginning with foundational judgments that established its constitutional importance. *R (Daly) v Secretary of State for the Home Department*,[159] exemplifies this shift, with the House of Lords requiring prison policies restricting legal correspondence to demonstrate a 'pressing need' and proportionality to security aims. Subsequent cases, such as *UNISON* in 2017, built on this by applying stricter proportionality tests to secondary legislation under the principle. Thus, even where statutory language permits rights limitations, the courts assess under the principle of legality whether the means adopted are necessary and rationally connected to legitimate aims.

The principle of legality, therefore, operates in two interconnected ways: Firstly, it is assumed that Parliament does not intend to remove fundamental rights unless there is explicit language to that effect. Secondly, the principle functions as a constitutional safeguard, particularly in cases involving access to justice. In such instances, the necessity and proportionality of any restrictions imposed on fundamental rights become relevant and are judicially examined. The relationship between these aspects can be understood as follows: the interpretive presumption provides the mechanism through which courts protect rights (requiring clear words), while the constitutional dimension provides the rationale for applying such rigorous interpretive scrutiny (because fundamental

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[157] Hooper (n 154).

[158] Jason Varuhas, 'The Principle of Legality' (2020) 79(3) CLJ 578, He adds at page 610 that this was done advertently: 'it is notable that the Supreme Court has reinvigorated the PoL, a powerful tool for scrutinising secondary legislation, just as the legal system is, following Brexit, being-flooded with secondary legislation, made pursuant to very broadly-framed statutory powers'; Alison Young, 'Fundamental Common Law Rights and Legislation' in Mark Elliott and Kirsty Hughes (eds), *Common Law Constitutional Rights* (Hart Publishing 2020). 223–250, 236.

[159] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26

rights warrant heightened protection). In essence, the interpretive aspect addresses ‘how’ courts preserve rights (by presuming Parliament does not intend to override them without express language), while the constitutional aspect explains ‘why’ they do so (because certain rights possess special constitutional significance).This constitutional dimension has profound implications for how courts might apply this principle when interpreting legislation that potentially constrains judicial review, including the JRCA 2022.

In applying the above-mentioned statutory factors that guide remedial discretion under JRCA 2022, courts can use this (classic or strengthened) interpretive approach to uphold the protection of fundamental rights and principles. It provides courts, in particular, with a compelling justification for interpreting the Act's remedial provisions in a manner that preserves effective judicial protection. In some cases, the judiciary might interpret the guiding factors in a way that favours immediate quashing orders where fundamental rights or constitutional principles would otherwise be jeopardised. For example, courts could use suspended quashing orders more readily in cases involving technical regulations or complex economic policy decisions, while preferring immediate quashing in cases involving serious rights violations or fundamental constitutional principles.

More importantly for this chapter, the principle of legality could also address the concerns about the potential strengthening of ouster clauses through the re-emergence of the error of law distinction. This distinction, which differentiates between jurisdictional errors (which render decisions void) and non-jurisdictional errors of law (which may leave decisions voidable but not void), was largely eliminated by *Anisminic* but could theoretically be revived if some unlawful decisions are permitted to retain legal effect. If, as suggested here, the Act's remedial provisions implicitly recognise that some unlawful decisions may retain legal effect (and thus revive pre-*Anisminic* distinctions), this could theoretically strengthen arguments that certain non-jurisdictional errors fall within the scope of ouster clauses. Where this jurisdictional/non-jurisdictional error distinction allows for certain administrative acts to be made immune from judicial review, the principle of legality in statutory interpretation provides an important counterbalance to such potential erosion of judicial oversight and can potentially help courts navigate the tension between the Act's practical remedial

flexibility and the deeper constitutional principles, including the rule of law, which are at stake.

7.1 The Emergence and Revival of the Principle of Legality

It is worth exploring the reasoning that underpins the principle of legality to determine what might reasonably be expected from its application. The term 'principle of legality' was first explicitly identified in the House of Lords decision *in R v Secretary of State for the Home Department, ex parte Pierson*.[160] In that judgment, Lord Steyn articulated the fundamental notion underlying the principle of legality: 'Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law'.[161] His recognition of the contextual environment in which legislation is enacted emphasises that statutes must be understood against the background of established constitutional values. In the following year, Lord Hoffmann developed this concept further in *R (Simms) v Secretary of State for the Home Department*,[162] while carefully reaffirming the doctrine of parliamentary sovereignty. His often-quoted passage provides this principle's reasoning: 'The principle of legality means that Parliament must confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.'[163] Again, as Cross observes, '[s]tatutes often go into considerable detail, but even so allowance must be made for the fact that they are not enacted in a vacuum. A great deal inevitably remains unsaid.'[164] It is therefore impossible for Parliament to deal explicitly with every possibility. Instead, Cross notes, '[l]egislators and drafters assume that the courts will continue to act in accordance with well-recognised rules [...] Long-standing principles of constitutional and administrative law are likewise taken

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[160] *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539.

[161] ibid 587.

[162] *R (Simms) v Secretary of State for the Home Department* [2000] 2 AC 115

[163] ibid 131F; Philip Sales, 'A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998' (2009) 125 LQR 598, 604–05.

[164] Rupert Cross (ed), *Statutory Interpretation* (3rd edn, Butterworths 1995) 165

for granted, or assumed by the courts to have been taken for granted, by Parliament.'[165] The principle of legality, therefore, acts as a significant bridge between parliamentary intentions and judicial interpretation, ensuring that legislation is read in accordance with fundamental constitutional values, unless Parliament has expressly stated otherwise. The principle of legality thus preserves parliamentary sovereignty in law while introducing practical political constraints: Parliament can override fundamental rights, but only through explicit language that makes such intentions transparent and democratically accountable. The overriding of rights without compelling justification risks provoking public opposition, thereby incentivising Parliament to act with clarity and restraint.

There is no consensus in the literature regarding the origins of the principle of legality. Whilst some scholars argue it was specifically developed in response to several ECHR judgments against the UK in the late 20th century, others argue that it has deeper historical roots, though it has only recently been given this specific name.[166] It is noteworthy that landmark cases in this context, such as *Simms,*[167] *Pierson,*[168] *Leech,*[169] *and Daly*[170] were all related to prisoners' rights and built on earlier precedents that established crucial legal ground for the principle of legality. *Solosky v the Queen*[171], *R v Board of Visitors of Hull Prison, Ex p St Germain*[172] and *Raymond v Honey*[173] established that imprisonment alone does

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[165] ibid.

[166] Varuhas (n 158); Lord Hoffmann traced the origins of the principle of legality back to the sixteenth century case of Stradling v Morgan (1560) 1 Pl 199. See R (Morgan Grenfell and Co Ltd) v Special Commissioner of Income Tax and another [2002] UKHL 21 at [8].

[167] *R (Simms) v Secretary of State for the Home Department* (n 162)

[168] *R v Secretary of State for the Home Department, ex parte Pierson* (n 160).

[169] *R v Secretary of State for the Home Department, ex p Leech* (n 155).

[170] *R (Daly) v Secretary of State for the Home Department* (n 159).

[171] *Solosky v. the Queen* (1979) 105 D.L.R. (3d) 745, 760 (Dickson J.): '[...] a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law.' (Canadian case).

[172] *R v Board of Visitors of Hull Prison, Ex p St Germain* [1979] QB 425, 455 (Shaw LJ): 'despite the deprivation of his general liberty, a prisoner remains invested with residuary rights appertaining to the nature and conduct of his incarceration […] An essential characteristic of the right of a subject is that it carries with it a right of recourse to the courts unless some statute decrees otherwise.'

[173] *Raymond v Honey* [1983] 1 AC 1, 10: 'under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication.'

not automatically abrogate civil rights more broadly — these rights persist unless explicitly removed by legislation. These cases, therefore, created a framework requiring explicit statutory authority for rights limitations, which became the essence of the principle of legality. In a period just before the ECHR became a source of domestic rights protection, *Simms, Pierson, Leech, and Daly* built on this doctrine and were decided by applying the principle of legality after several judgments against the UK before the Strasbourg Court.[174] Although the principle of legality can be traced back to the 16th century, as Lord Hoffmann argues,[175] its fundamental modern application occurred within this specific period. Because the ECHR was not incorporated until the HRA 1998 came into force in October 2000, and because the ECHR was not a direct source of domestic law, the principle of legality was used as a key judicial tool to address the problems regarding Convention rights in the years leading up to the year 2000. Equally significant, however, is that the principle of legality has been distinctly applied in a wider context even following the enactment of the HRA 1998.

Notably, when the HRA incorporated the Convention into UK law, section 3 of the Act required Convention-compatible interpretation of legislation 'so far as it is possible to do so', which the courts interpreted as allowing such interpretation even when statutory language appears unambiguous.[176] This made the principle of legality, which had previously indirectly protected Convention rights, less essential. And so, for several years after the HRA came into force, the courts seemed to rely less on the principle of legality, potentially because they could apply Convention rights directly and with a clearer democratic basis.[177] However, after this relatively quiet period, the principle underwent a notable revival in the years before Brexit. This revival also coincided with growing political debate about the UK's relationship with other European institutions, including calls for the HRA 1998 to be repealed or substantially

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[174] *Golder v UK* (1979–80) 1 EHRR 524; *Silver v UK* (1983) 5 EHRR 347; *Campbell v UK* (1992) 15 EHRR 137.

[175] *Stradling v Morgan* (1560) 1 Pl 199 cited in *R (Morgan Grenfell and Co Ltd) v Special Commissioner of Income Tax and another* (n 164) [8]; See *R v Morley* (1760) 2 Burr 1040; *National Assistance Board v Wilkinson* [1952] 2 QB 648.

[176] For a detailed analysis, see ch 2.

[177] See *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, *Osborn v Parole Board* [2013] UKSC 61

amended.[178] The courts seemed to be acknowledging that these processes would reduce European legal protection for individual rights, and potentially create gaps in rights protection if the HRA were weakened or repealed. In response, judges began to reinforce the common law principle of legality as a form of protection for fundamental rights that would remain in place regardless of the UK's relationship with European legal frameworks or any changes to the HRA.[179]

7.2 Contemporary Application of the Principle of Legality

One of those *revival* cases is the *R (UNISON) v Lord Chancellor*[180] in 2017. An order imposing fees for employment tribunals, as issued by the Lord Chancellor under the provisions of the Tribunals, Courts and Enforcement Act 2007, was successfully challenged. The fees had led to a dramatic decline in the tribunal claims, and the order was found ultra vires unanimously in the Supreme Court, on the basis that it created a real risk of a complete frustration of the constitutional right of access to justice by making it impossible or futile to apply to the courts particularly for the low-income individuals. The ruling was founded on the principle of legality, namely that the relevant provision of 2007 Act was not sufficiently explicit and clear to authorise such a significant impediment to access to justice.[181]

Moreover, in the controversial case of *R (Evans) v Attorney General*[182] – known as the 'Black Spider Memos' case – the correspondence between King Charles, who was the Prince of Wales at that time, and government departments was held to be disclosable by the Upper Tribunal under the Freedom of Information Act ('FOIA') 2000. The Attorney General had exercised his veto power under section

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[178] Conservative Party, 'Invitation to Join the Government of Britain: The Conservative Manifesto 2010' (2010), Conservative Party, 'Protecting Human Rights in the UK' (2014); Michael Foran, 'Interpretation after the Human Rights Act? The Principle of Legality and the Rule of Law' (UK Constitutional Law Blog, 12 September 2022) <https://ukconstitutionallaw.org/2022/09/12/michael-foran-interpretation-after-the-human-rights-act-the-principle-of-legality-and-the-rule-of-law/ > accessed 30 April 2025

[179] Varuhas (n 156) 608, Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press 2023) 228-229.

[180] *R (UNISON) v Lord Chancellor* (n 10).

[181] ibid [88], [90], [104].

[182] *R (Evans) v Attorney General* [2015] AC 1787.

53[183] of the FOIA 2000 to set aside the Upper Tribunal's decision ordering disclosure. However, by a majority, the Supreme Court found the use of the veto to be unlawful and *ultra vires*. The decision was based on the decision that the relevant statutory provisions (allowing an executive member to overrule judicial decisions merely because of disagreement) must be interpreted narrowly to prevent breach of fundamental components of the rule of law.[184] Lord Neuberger, with whom Lord Kerr and Lord Reed agreed, held that section 53 was not 'crystal clear' in authorising the infringement of the principle that courts' decisions are final and binding between the parties and actions of the executive are reviewable by the court.[185] Similarly, however, from a different perspective, Lord Mance, with whom Lady Hale agreed, held that section 53 requires the Attorney General to have and express reasonable reasons for his disagreement with the Upper Tribunal. Since the assertion of the Attorney General had not been justified on reasonable grounds, it was unlawful.[186] In both cases, the principle of legality played a key role in judicial review, requiring clear and explicit statutory language for any legislation that restricts fundamental constitutional rights and led to unsatisfactory results for the government.

Even more controversially, in *R (Privacy International) v Investigatory Powers Tribunal,*[187] the amenability to judicial review of the Investigatory Powers Tribunal (IPT) was considered in the light of an ouster clause (section 67(8) of the Regulation of Investigatory Powers Act 2000 (RIPA)). Section 67(8) stated that: 'except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal

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[183] Section 53(2) of Freedom of Information Act 2002: 'A decision notice or enforcement notice to which this section applies shall cease to have effect if, not later than the twentieth working day after the day on which the notice is given to the public authority, the accountable person in relation to that authority gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure falling within subsection (1)(b).'

[184] *R (Evans) v Attorney General* (n 182) [52], [145], [154], [160]; Lord Neuberger at [51]: 'A statutory provision which entitles a member of the executive (whether a Government Minister or the Attorney General) to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom. It would cut across two constitutional principles which are also fundamental components of the rule of law.'

[185] ibid [52], [58], [89], [90]; Lord Neuberger at [92]: 'The issue in this case is what the FOIA 2000 means, and it is for the courts to interpret an enactment, and, when doing so, they should bear in mind established constitutional principles.'

[186] ibid [145].

[187] *R (Privacy International) v Investigatory Powers Tribunal* (n 5).

(*including decisions as to whether they have jurisdiction*) shall not be subject to appeal or be liable to be questioned in any court.'[188] By a majority of four to three, the Supreme Court, however, reaffirmed the *Anisminic* principle that errors of law render administrative decisions invalid and thus unprotected by ouster clauses. The central question of the case was whether the IPT's extensive interpretation of 'thematic warrants' as set out in section 5 of the Intelligence Services Act 1994 could withstand judicial review, given the broad exclusions under section 67 of the RIPA 2000. The majority held that section 67(8) lacked the clear and explicit language required to oust the High Court's supervisory jurisdiction, by emphasising the constitutional significance of maintaining judicial review to uphold the rule of law.[189] More radically, some of the judges suggested that no ouster clause could ever be sufficiently explicit to exclude judicial review entirely, effectively rendering such clauses constitutionally impermissible.[190]

According to these authorities, and several others,[191] the principle of legality requires exceptionally clear parliamentary intention to infringe certain fundamental rights and constitution principles, or to delegate powers for such infringement. Nevertheless, the doctrine lacks clarity regarding which rights and principles qualify for this protection.[192] The lack of an objective framework for determining the relative importance of different rights generates significant judicial discretion in the application of this interpretive approach.[193] Case law

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[188] Italics added.

[189] *R (Privacy International) v Investigatory Powers Tribunal* (n 5) [107]: 'if the IPT's decision in the present case were found to have been reached on an erroneous interpretation of section 5 of the Intelligence Services Act 1994, those words would not save it from intervention by the courts.'

[190] ibid [122] (Lord Carnwath (with whom Lady Hale and Lord Kerr agree)).

[191] See *R (Ingenious Media Holdings plc) v Revenue and Customs Comrs* [2016] UKSC 54.

[192] *Moohan v Lord Advocate* [2014] UKSC 67. The court rejected the argument that the general statutory provision should be narrowly interpreted in order to preserve the right to vote, because the right itself was a creation of statute rather than a pre-existing common law right that required protection from legislative interference.; *R (The Spitalfields Historic Building Trust) v London Borough of Tower Hamlets* [2025] UKSC 11; But see *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10 where the principle of legality applied not on a common law restriction on facilitating the death penalty, but rather the Data Protection Act 2018 that made such international data transfers facilitating the death penalty (Lord Kerr dissenting).

[193] Sales (n 163) 5; John Laws in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin): 'We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen

shows that courts have recognised various triggers for applying the principle of legality including access to a court; access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege,[194] freedom of speech,[195]certain principles such as non-aggravation of penalties[196], bindingness of court decisions[197], and preservation of the High Court's supervisory jurisdiction;[198] but, for instance, not the right to life.[199] Nevertheless, it is evident that in the context of ouster clauses the courts demonstrate the least tolerance for intrusion.[200] Indeed, an ouster clause that leaves the executive without legal supervision and the individuals without legal protections is contrary to the *raison d'être* of the Courts, as Lord Reed, in *Unison* explains as follows:

> 'Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be

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and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. […] The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the HRA, the Scotland Act 1998 and the Government of Wales Act 1998."; Independent Review of Administrative Law Panel Report [3.31] : '[W[e note that at the moment there exists little clarity around the question of what amounts to a 'constitutional right, value or principle'. There is not even any agreement as to how one might determine whether a particular right, value or principle is recognised as being "constitutional" under the common law, with some preferring an approach that simply looks at the state of the precedents and others preferring an approach that turns on arguments of political principle.'

[194] *R (Daly) v Secretary of State for the Home Department* (n 159); *R v Lord Chancellor Ex p. Witham*, [1998] Q.B. 575; *R (UNISON) v Lord Chancellor* (n 10).

[195] *R (Simms) v Secretary of State for the Home Department* (n 162).

[196] *R v Secretary of State for the Home Department, ex parte Pierson* (n 160).

[197] *R (on the application of Evans) v Attorney General* [2014] EWCA Civ 254.

[198] *R. (Privacy International) v Investigatory Powers Tribunal* (n 5).

[199] *Elgizouli v Secretary of State for the Home Department* (n 192).

[200] Young (n 158) 237: 'Courts are also more willing to protect fundamental rights of the common law that directly protect the rule of law or democracy, particularly the protection of the role of courts in judicial review and access to courts more generally.'; R (Privacy International) v Investigatory Powers Tribunal (n 5) [107] (Lord Carnwath): 'The main flaw in this argument, in my view, is that it treats the exercise as one of ordinary statutory interpretation, designed simply to discern "the policy intention" of Parliament, so downgrading the critical importance of the common law presumption against ouster.'; See *Anisminic* (n 3).

> rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade.'[201]

Yet, the case law to be examined here is not limited to the cases where the principle of legality is successfully applied. There are cases where the principle did not successfully apply, either because the principle or right at stake was not deemed to be one of the triggers of the principle,[202] or, more importantly, because the clear intention to interfere with the principle, and accept the political cost of doing so, was held present.[203]

In the 2021 case of *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others,*[204] the Supreme Court upheld the two-child limit on child tax credits and rejected claims that the policy breached Article 8 ECHR. The Court emphasised that the welfare reform aims — reducing public expenditure — were 'squarely confronted' during parliamentary debate.[205] Lord Hodge's reasoning echoed earlier precedents by stressing that courts should not undermine democratic outcomes on questions of moral and political judgement where Parliament has clearly expressed its intentions.[206] The expectation that the principle of legality would successfully apply in this case arose from two key factors. First, the policy's direct impact on vulnerable families' living standards engaged fundamental rights under Article 8 ECHR (right to family life). Second, judicial precedent – specifically *UNISON* – suggested that courts closely scrutinise policies that disproportionately affect disadvantaged groups. However, the Supreme Court distinguished this case by emphasising Parliament's explicit deliberation of the two-child limit's social consequences during legislative debates. Lord Reed's judgment stressed that courts cannot override considered economic and social policy choices where Parliament has squarely confronted the human rights implications.[207] This reasoning illustrates a

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[201] *R (UNISON) v Lord Chancellor* (n 10) [68].

[202] *Moohan v Lord Advocate* (n 192); R (The Spitalfields Historic Building Trust) v London Borough of Tower Hamlets (n 192).

[203] For the statistics see Paul Craig, 'Judicial Review, Methodology and Reform' [2022] PL 19.

[204] *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others* [2021] UKSC 26.

[205] ibid [41], [58], [162]-[180], [202], [209] (Lord Reed).

[206] ibid [179], [193].

[207] ibid [45].

crucial distinction within the principle of legality's application: the presumption operates with less force when Parliament has demonstrably considered and accepted the political cost of rights interference, as evidenced by explicit parliamentary debate about the human rights consequences, rather than in cases where such implications may have been overlooked or inadequately considered.

Similarly, in *R (Coughlan) v Minister for the Cabinet Office*,[208] the claimant argued that the voter identification pilot schemes unlawfully restricted the right to vote, a fundamental constitutional right, and under the principle of legality, such restrictions require express statutory authority. It was argued that the schemes fell outside the scope of the Secretary of State's power under Section 10 of the Representation of the People Act 2000 to make subordinate legislation for implementing pilot schemes, which is specifically limited to schemes concerning 'how voting at the elections is to take place.' The Supreme Court, however, unanimously held that Parliament had authorised such measures through sufficiently broad statutory language in this context.

The principle of legality was not held to be applicable mainly because Parliament, through section 10, had explicitly authorised temporary pilot schemes, thereby accepting their potential incidental effects on rights as inherent to experimentation. The Supreme Court underscored Parliament's deliberate intent to test electoral reforms,[209] noting that 'Parliament squarely confronted what it was doing' when creating this power. The court's broad interpretation of 'how voting is to take place' encompassed voter identification processes, confirming that these requirements fall within Parliament's intended framework.[210] Applying the principle of legality would have rendered the piloting power meaningless, as virtually all electoral pilots will inevitably impact some voters' exercise of their rights. Recently, in *R (The Spitalfields Historic Building Trust) v London Borough of Tower Hamlets*[211] the Supreme Court held that councillors' voting entitlements do not constitute a constitutional right of sufficient fundamentality for the principle of legality. In contrast to the voting

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[208] *R (Coughlan) v Minister for the Cabinet Office* [2022] UKSC 11.

[209] ibid [53]-[55].

[210] ibid [57].

[211] *R (The Spitalfields Historic Building Trust) v London Borough of Tower Hamlets* (n 192).

rights of individual citizens, which may be subject to greater protection, the voting rights of councillors derive from statutory provisions which do not justify the application of the principle of legality in the sense that Parliament would not intend to abrogate them without express words.

The 2021 case of *Begum v Home Secretary*[212] provides another significant example of the courts' contextual application of the principle of legality. This case concerned Shamima Begum, who at age 15 travelled to Syria and aligned herself with DEASH (also known as ISIS or ISIL). The Home Secretary deprived her of British citizenship under section 40(2) of the British Nationality Act 1981 on national security grounds. Ms Begum challenged this decision, arguing that her inability to effectively participate in her appeal from a Syrian detention camp violated her right to a fair hearing. Applying the principle of legality, she contended that Parliament must have intended the statutory right of appeal to be effective, which therefore required her to be returned to the UK.

The Supreme Court rejected this argument, holding that Begum's inability to present her appeal did not necessarily render the process unfair or require overriding national security concerns. What distinguishes Begum from cases where the principle of legality has been robustly applied is twofold: first, both citizenship decisions and national security assessments fall squarely within the executive's institutional expertise;[213] second, the Court determined that being unable to personally participate in an appeal does not inherently constitute unfairness.

Collectively, these cases illustrate that when Parliament has explicitly deliberated on potential rights interferences, particularly in policy domains traditionally within legislative competence such as welfare distribution, electoral administration, or national security, courts demonstrate a greater reluctance to apply the principle of legality. In contrast, cases where the principle of legality has been more forcefully applied typically involve rights that underpin democracy itself — such as access to courts, freedom of expression, and constitutional principles like non-retroactivity of penalties or preservation of

[212] Begum v Home Secretary [2021] UKSC 7.

[213] For a detailed analysis see ch 1.

the High Court's supervisory jurisdiction. These rights generally relate to the courts' own institutional position within the constitutional framework, areas where judges themselves are particularly well-placed to defend fundamental values.

The principle of legality, therefore, has been applied with varying intensity in UK constitutional jurisprudence. The key distinction between the cases where the principle was rigorously applied (*UNISON*, *Evans*, *Privacy International*) and those where it was not (*SC, CB and others; Coughlan* and *Begum*) reflects several interconnected factors. While the 'squarely confronted' emphasis in *SC* and *Coughlan* is significant, it is equally important to acknowledge the constitutional nature of the rights involved. In *UNISON*, *Evans* and *Privacy International*, the courts were protecting rights that are foundational to the constitutional order itself – access to justice, the courts' ultimate authority to interpret the law and the jurisdiction of courts to review executive action. These rights hold a special position, given that they maintain the separation of powers and ensure the rule of law. In contrast, in the cases of *SC*, *Coughlan*, and *Begum*, the rights in question (welfare benefits under Article 8 ECHR, certain aspects of voting procedures, and citizenship deprivation) were more closely aligned with Parliament's legitimate policy-making authority concerning resource allocation, administrative arrangements, and national security considerations.

Furthermore, ouster clauses, as seen notably in *Privacy International*, trigger particularly intense judicial scrutiny because they directly challenge the constitutional role of courts. Despite the clear language in the statutes attempting to exclude judicial review, the courts have traditionally been reluctant to interpret such provisions as successful ousters without the most unambiguous wording. While courts theoretically accept that sufficiently explicit language might oust judicial review in some contexts, they set an extremely high threshold, and some judges have suggested that no ouster clause could ever be clear enough when fundamental constitutional principles are at stake.[214] Indeed, in *UNISON*, the court held that access to justice represents a constitutional imperative inherent to the rule of law.

[214] *R (Privacy International) v Investigatory Powers Tribunal* (n 5) [122].

How clearly Parliament must express itself seems to depend on which constitutional rights are at stake. In *Privacy International*, despite the seemingly clear statutory language excluding review of the Tribunal's decisions, it was deemed insufficient given the constitutional significance of maintaining judicial oversight of executive action. In contrast, in the cases of *SC* and *Coughlan*, although arguably fundamental rights were engaged, Parliament had explicitly debated the specific rights implications during the legislative process and made deliberate policy choices with those implications in mind. The courts acknowledged that, in contexts of social, economic, electoral and national security policy, Parliament's democratic legitimacy holds particular significance when it has effectively engaged with rights considerations.

This varied application of the principle of legality, therefore, reveals a complex and detailed judicial approach to the tension between parliamentary sovereignty and constitutional rights protection. In cases where rights are considered fundamental to the constitutional structure itself (particularly those concerning access to justice, therefore the rule of law), the courts adopt a particularly rigorous approach, requiring language of the greatest clarity before accepting any abrogation of these rights. However, in cases where rights relate to contested policy areas and Parliament has carried out detailed debates on specific interferences during the legislative process, courts demonstrate a greater degree of deference. This enables the courts to protect fundamental constitutional principles while acknowledging Parliament's (concomitantly executive's) primary function in addressing complex policy issues.

Furthermore, it is conceivable that the political context may have influenced the judicial approach to these cases. The *Miller* cases, *Ahmed (No 2), Unison* and *Evans*, gave rise to a substantial degree of political criticism directed at the courts. Subsequent to these cases, the government proposed legislation with a view to restricting judicial review powers. This tension in the constitutional atmosphere arguably encouraged greater judicial caution. However, the Judicial Review and Courts Act 2022 introduced smaller (although substantial) modifications to judicial review. The reforms of the Act may further contextualise the principle's application. By enabling prospective-only quashing orders, the Act permits courts to uphold the past effects of unlawful decisions, potentially diluting the *Anisminic* nullity doctrine. This risks undermining the

rule of law by effectively countenancing temporary violations of rights, as remedies would only apply prospectively.

The JRCA 2022 signifies a more extensive transition towards emphasising administrative efficiency over individual redress, by addressing concerns that judicial review is become susceptible to use as a means for advancing political agendas. Notwithstanding the effect of the Act upon judicial review, the principle of legality remains a crucial safeguard against the exploitation of statutory ambiguity, ensuring that fundamental constitutional norms are not eroded without clear (and sometimes clearest) legislative intent. Nevertheless, the efficacy of the principle of legality depends on how judges apply it in practice. The principle of legality, while resilient, reveals the boundaries of its operation when Parliament explicitly chooses to restrict rights in favour of governmental efficiency, particularly in areas traditionally within the purview of the executive. It has been contended that the principle of legality will likely play a significant role in cases involving the implementation of the JRCA 2022. However, the extent to which reforms impact constitutional safeguards is dependent on the judiciary's willingness to engage in rigorous analysis of new remedial powers against the principles of the rule of law.

When applying the principle of legality to the JRCA's remedial provisions, it is likely that courts will need to distinguish between different types of illegality. Where fundamental rights, particularly such as access to justice, are at stake, judges may interpret the Act narrowly to preserve immediate remedies. Consideration of 'good administration', for instance, when determining remedies, will be particularly revealing. The statutory language calls for judicial evaluation of administrative convenience alongside individual rights, constituting a balancing exercise that potentially risks dilution of rights protection. Through the lens of the principle of legality, however, courts could interpret 'good administration' as necessarily encompassing respect for fundamental rights and principles, thereby ensuring that efficiency concerns do not systematically override constitutional protections.

Furthermore, the Act creates potential for a form of dialogue between Parliament and the courts. If judges consistently interpret the JRCA's provisions narrowly to preserve fundamental rights through the application of the principle

of legality, Parliament may respond with increasingly explicit language to achieve its aims as regards efficiency. This may ultimately result in a more transparent democratic debate about which rights warrant absolute protection and which may be qualified in the interests of administrative efficiency. In this way, the principle of legality performs a dual function as both a judicial tool and a constitutional mechanism that serves to enhance democratic accountability by requiring Parliament to 'squarely confront' the consequences of rights limitations.

7.3 Conclusion

This chapter demonstrates, through the lens of judicial review — not merely a mechanism for rights protection but a systemic practice that continuously renegotiates the boundaries of institutional authority at both the doctrinal and case level — that the relatively modest changes introduced by the JRCA 2022 carry constitutional significance that belies their apparent modesty, representing the most recent episode in that ongoing negotiation. The potential impact of JRCA 2022 on the balancing of considerations in judicial review cases remains largely uncertain due to the lack of empirical evidence. Nevertheless, it is argued here that the use of remedies under the JRCA 2022 may result in a resurgence of distinctions between different types of errors of law, potentially reviving the pre-*Anisminic* categorisation of jurisdictional and non-jurisdictional errors. This development, accompanied by practical evidence that challenges the orthodox theory, necessitates a reconsideration of the traditional *ultra vires* doctrine, as the Act implicitly acknowledges that decisions containing errors of law can retain legal effect for specified periods. While the principle of legality represents a potentially significant constitutional counterweight to the concerns arising from the use of the remedies under JRCA 2022, its application remains inherently contextual and its potential will be realised depending on how courts approach the statutory factors in concrete cases.

The JRCA 2022 has legislatively legitimised remedies that courts had historically treated with considerable caution, restrained by their grounding in the orthodox ultra vires theory treating unlawful acts as null and void ab initio. One potential important concern arising from these changes is the increased efficacy of ouster clauses. If the JRCA 2022 implicitly revives distinctions between different types

of errors of law (by allowing some unlawful decisions to retain validity temporarily), this could strengthen arguments that certain ‘non-jurisdictional’ errors fall within the scope of ouster clauses. Historically, courts have narrowly construed ouster clauses to preserve review for jurisdictional errors while potentially allowing them to exclude review of non-jurisdictional errors. A return to such distinctions could therefore see certain administrative acts rendered immune from judicial scrutiny, potentially undermining the rule of law principle. Conversely, the availability of statutory remedies, namely suspended and prospective quashing orders, provides courts with more flexible options to address unlawful administrative acts, potentially encouraging judicial intervention while minimising disruptive consequences. This nuanced approach may result in a more frequent remedying of unlawfulness in judicial review, where courts are more inclined to quash unlawful acts (either retrospectively or prospectively) rather than resorting to mere declarations.

Conclusion

This thesis has examined whether the significant expansion in the scope of judicial review in the UK — focusing predominantly on the English jurisdiction — represents a constitutionally legitimate development: that is, whether it has proceeded in a manner that is anchored to constitutional boundaries, and consistent with the preservation of parliamentary sovereignty and the rule of law, rather than constituting an unwarranted judicial encroachment upon democratic authority. While tracing the roots of this evolution across fifty years, the research concentrates on the era since the turn of the millennium to analyse how this evolution has reshaped the relationship between parliamentary sovereignty and the rule of law. The analysis, conducted across three chapters and through a holistic judicial review lens (rather than often deployed rights-protection lens), has demonstrated that the expansion of judicial review has been principled, incremental, context-sensitive and constitutionally grounded — driven not by institutional preference. Parliamentary sovereignty has not been displaced by this evolution; it has been recalibrated in its practical operation rather than diminished in its legal force — courts exercise greater oversight, but within a framework that Parliament authorised, and subject to limits that Parliament retains the power to redefine and over which Parliament retains the final word.

Across the domains examined, judicial oversight of executive action and, under the HRA 1998, parliamentary legislation in specific contexts has expanded or deepened while consistently anchoring that expansion to constitutional and institutional principles, preserving the distinction between lawfulness review and merits review on appeal, and deferring to democratic authority where institutional competence and constitutional principle so require. The developments traced across three chapters form a constellation of advances and recalibrations rather than a single linear expansion: standing and third-party interventions liberalised but recently recalibrated; non-justiciability narrowed but substantial deference maintained in practice in sensitive domains such as national security and foreign policy; proportionality deepened but remained bounded by institutional competence, and the JRCA 2022 introduced remedial flexibility. What unifies these developments throughout the evolution of judicial review is not their direction but their method — in each domain, the courts have

proceeded by reference to constitutional principle rather than institutional preference — and it is this that has simultaneously strengthened the rule of law and preserved parliamentary sovereignty, rendering the overall evolution constitutionally legitimate, notwithstanding that the full constitutional implications of the JRCA 2022 remain, at this stage, to be determined.

The thesis has further demonstrated that parliamentary sovereignty and the rule of law are not in fundamental opposition: they coexist in a mutually reinforcing relationship — the rule of law has been strengthened through expanded judicial review, while parliamentary sovereignty has been preserved in its constitutional primacy throughout. What redeems the inevitable variability and occasional inconsistency in this evolution is not its uniformity but its justification — in each domain examined, the judicial decisions have been grounded in articulable principles. Examined through a holistic judicial review lens, the evolution of judicial review emerges not as a contest for supremacy between courts and Parliament, but as a dynamic, continuously negotiated, and constitutionally legitimate recalibration of institutional relationships — one that has strengthened the rule of law without displacing parliamentary sovereignty's prominence.

The analysis in the first section of the first chapter has traced the evolution of justiciability in the context of prerogative powers across three interconnected developments. *GCHQ*[1] established the foundational shift: justiciability is determined not by the source of a power but by its subject matter. The cases that followed — *Everett*,[2] *Bentley*,[3] *Bancoult*,[4] and *Miller*[5] — demonstrated that this shift was neither abrupt nor unprincipled; it was constitutionally grounded and sensitive to the institutional limits of judicial competence. *Miller/Cherry*,[6] however, was particularly criticised as signalling a departure from this trajectory — not because it expanded judicial review, but because of the methodological

[1] *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374.

[2] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] QB 811.

[3] *R v Secretary of State for the Home Department ex p Bentley* [1994] QB 349.

[4] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2008] UKHL 61.

[5] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[6] *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41.

vehicle through which it did so. By recasting what was essentially a question about the manner of exercise of a high-level prerogative power as one of existence and scope, the Court bypassed the justiciability analysis that the *GCHQ* framework established, collapsing the very distinction that had made the preceding evolution principled. That the decision was unanimous, delivered by eleven justices, lends it considerable institutional weight — albeit the strength of the criticisms levelled against it. While significant criticisms towards the case and contextually unique nature of the case makes it unlikely that courts will readily apply its reasoning in the near future, a unanimous Supreme Court precedent of this kind cannot be regarded as constitutionally inert. However, at some point, it will bear upon the development of the law — and it was for that reason, rather than its immediate practical consequences, that its methodological implications have merited careful scrutiny.

Addressing the expansion of justiciability through two distinct categories — administrative-type prerogative decisions on the one hand, and higher-order constitutional challenges on the other — has revealed that each line of development reflects a different institutional logic. In the former — exemplified cases such as *Everett*[7] and *Bentley*[8] — courts applied established public law principles to protect individual rights and procedural fairness, filling a genuine accountability gap without displacing political judgment. In the latter — exemplified by *Bancoult*[9] and *Miller*[10] — judicial intervention was grounded in fundamental constitutional doctrines, most notably parliamentary sovereignty, and required a more careful calibration of institutional roles. These two lines of development are not merely categorically distinct; they reveal how the courts have progressively expanded the reach of review while modulating its intensity according to the constitutional sensitivity of the subject matter — a pattern that, as subsequent chapters demonstrate, extends beyond the prerogative context.

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[7] *Everett* (n 2).

[8] *Bentley* (n 3)

[9] *Bancoult* (n 4).

[10] *Miller* (n 5).

Taken together, these developments illustrate a refining constitutional trajectory. The expansion of judicial review is not an abrupt disruption but a principled refinement of the institutional boundaries. This trajectory suggests the broader scope of judicial review does nor operate in tension with parliamentary sovereignty, but rather as its necessary corollary in a modern rule of law state. By anchoring its intervention to established principles, the judiciary ensures that its oversight remains a mechanism for institutional equilibrium rather than encroachment. The danger identified in *Miller/Cherry*[11] lies precisely here: by blurring the doctrinal lines of justiciability, it risks destabilising the very transparency that grants judicial intervention its constitutional legitimacy.

The first section of the first chapter also illustrates a broader methodological point that this thesis advances. The prevailing scholarship on constitutional balance — represented by the work of Gardbaum,[12] Young,[13] and Kavanagh[14] — engages with questions of institutional interaction predominantly through a rights-protection lens, one that necessarily presupposes individual rights at stake and frames the central question as one of institutional competence to resolve rights-based disputes. The cases examined here, however, operate largely outside that framework. The subject matter of *Bancoult*,[15] *Miller*,[16] and *Miller/Cherry*[17] is primarily the structural relationship between executive power, parliamentary authority, and judicial oversight. Examined through a holistic judicial review lens — one attentive to the full spectrum of judicial review rather than its rights-protective dimension alone — these cases reveal how constitutional balance is negotiated, and disrupted potentially in certain circumstances, in the absence of the normative anchor that rights protection provides. It is this dimension of constitutional calibration, visible only when one

[11] *Miller/Cherry* (n 6).

[12] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (CUP 2013).

[13] Alison Young, *Democratic Dialogue and the Constitution* (OUP 2017).

[14] Aileen Kavanagh, *The Collaborative Constitution* (CUP 2023).

[15] *Bancoult* (n 4).

[16] *Miller* (n 5).

[17] *Miller/Cherry* (n 6).

looks beyond the rights-centred debate, that this thesis's analytical framework is designed to illuminate.

The analysis in the second section of the first chapter has traced the judicial approach to executive decision-making in national security and foreign policy contexts, revealing a pattern that stands in contrast to the broader expansion of judicial review examined in the other chapters of this thesis. The foundational shift established in *GCHQ*[18] — from a priori non-justiciability to theoretical reviewability — was confirmed and refined through prominent cases such as *Rehman*,[19] *Abbasi*,[20] *CND*,[21] *Al-Haq*,[22] *Gentle*,[23] *Corner House Research*,[24] *Carlile*,[25] and *Begum*[26]. Yet across this line of authority, the practical outcome has remained substantially consistent: courts have affirmed their jurisdiction in principle while exercising it with a degree of restraint that renders the scope of review in these domains considerably narrower than in other areas of public law. The erosion of categorical immunity has not translated into substantial judicial intervention to executive action in national security and foreign policy; it has instead produced a framework of high deference, justified by reference to institutional competence, democratic accountability, and the polycentric character of executive decision-making in these sensitive domains. This development has proceeded case by case, step by step, with careful attention to both constitutional and institutional boundaries — rather than through any wholesale reconfiguration of the relationship between courts and the executive. Across this line of authority, a consistent pattern emerges: from *Rehman*'s transformation of immunity into high deference, through *Abbasi*'s procedural/merits distinction, to *Belmarsh*'s[27] contextually specific intervention

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[18] *GCHQ* (n 1).

[19] *Secretary of State for The Home Department v Rehman* [2001] UKHL 47.

[20] *R (Abbasi) v Foreign Secretary* [2002] EWCA Civ 1598.

[21] *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin).

[22] *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin).

[23] *R (Gentle) v Prime Minister* [2008] UKHL 20.

[24] *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60.

[25] *R (Lord Carlile) v Home Secretary* [2014] UKSC 60.

[26] *Begum v Home Secretary* [2021] UKSC 7.

[27] *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

and its subsequent narrowing in *Carlile*, *Corner House Research*, and *Begum*, each case has reinforced rather than departed from the fundamental proposition that national security and foreign policy remain domains of executive primacy.

These developments support the thesis' central argument that expansion of judicial review in the UK has been a process of careful incremental development — and the relative narrowness of that expansion in national security and foreign policy contexts is not a failure of that evolution but a constitutionally principled feature of it. Courts have recognised that the institutional competence, democratic legitimacy, and information asymmetries that characterise executive decision-making in these domains provide compelling grounds for restraint. The coexistence of theoretical reviewability and substantial practical deference is not a contradiction; it reflects the context-sensitive understanding of the judicial role that is consistent with, rather than in tension with, both the rule of law and the democratic accountability that parliamentary sovereignty embodies. Judicial review, which serves to uphold the rule of law by ensuring that executive power remains grounded in legal authority and subject to judicial oversight, does not require courts to intervene wherever they have jurisdiction — it requires that the boundaries of institutional authority be respected and that intervention, when it occurs, be proportionate to the constitutional stakes involved. In national security and foreign policy contexts, substantial deference achieves precisely this — preserving legal accountability without displacing the executive's constitutionally primary role.

The second section of the first chapter also illustrates a broader methodological point. Several of the cases examined here — notably *Belmarsh*,[28] *Gentle*,[29] *Carlile*,[30] and *Begum*[31] — raised human rights considerations, yet the analysis has shown that their proximity to high policy considerations consistently drew them into a different constitutional dimension, shaping both the analytical framework applied and the outcomes reached. *Corner House Research*[32] is particularly

[28] ibid.

[29] *Gentle* (n 23).

[30] *Carlile* (n 25).

[31] *Begum* (n 26).

[32] *Corner House Research* (n 24).

instructive in this respect: falling outside the human rights protection framework, it demonstrates that the dynamics of institutional deference in national security contexts operate independently of rights-based considerations — and it is precisely this kind of case that a rights-centred lens would struggle to fully account for. By focusing on the evolution of the scope of judicial review rather than on rights protection as such, this section has been able to examine how institutional and constitutional boundaries have developed, and on what grounds courts have calibrated their restraint, beyond what a rights-centred account would capture. Read alongside the first section's examination of prerogative powers, this analysis demonstrates that the same holistic framework yields meaningfully different findings across different constitutional domains — revealing not a uniform expansion of judicial authority, but a context-sensitive recalibration of institutional boundaries. Without this broader lens, the persistence of substantial deference in national security and foreign policy contexts would remain obscured behind a rights-protection debate that these cases ultimately transcend — and with it, the insight that constitutional balance in these domains is maintained not primarily through the vindication of individual rights, but through a principled allocation of institutional authority.

The third section of this chapter has examined three interrelated mechanisms through which access to judicial review has been reshaped: the 'sufficient interest' test governing standing and public interest standing, third-party intervention rules, and the emerging phenomenon of crowdfunding. Taken together, these developments reveal a transformation in who may bring and participate in judicial review proceedings — and, consequently, in the constitutional role that judicial review has come to play. The shift is not merely procedural: as standing and intervention rules have liberalised, the range of legal arguments, factual perspectives, and constitutional framings available to courts has expanded correspondingly, producing outcomes that reach well beyond the immediate parties to the proceedings.

The trajectory of standing doctrine illustrates this most clearly. R v Inland Revenue Commissioners, ex parte National Federation for the Self-Employed and

Small Businesses Ltd[33] ('Fleet Street Casuals') established foundational principles that would transform the doctrine of standing, holding that sufficient interest test must be assessed within its complete legal and factual context — encompassing the gravity of the alleged unlawfulness, the significance of the issues raised, and the availability of other challengers — rather than by reference to direct personal interest alone. Although the Federation ultimately failed to obtain standing, and the more expansive public interest approach represented the minority view at the time, the case marked a decisive shift away from the private law paradigm that had previously confined judicial review to those with direct personal interest. *Child Poverty Action Group*[34] extended this logic to representative organisations, recognising that in matters of sufficient public importance that individual claimants could not be expected to raise, organisations with relevant expertise and representative capacity could have sufficient interest to seek judicial review. Rather than requiring the organisation itself to be directly affected, the court granted standing to bodies such as Child Poverty Action Group and the National Association of Citizens Advice Bureaux on the basis of their expertise, their advisory role in relation to affected individuals, and the significance of the issues raised — a step beyond *Fleet Street Casuals*, which had left such representative standing open but unresolved.

Greenpeace[35] then confirmed that public interest standing was available to established organisations, but did so cautiously: standing was justified by reference to the organisation's expertise, established reputation, the practical difficulty of individual challenges and its local presence — maintaining a residual connection to the traditional interest-based framework even while extending it. *WDM*[36] went considerably further, grounding standing primarily in the constitutional significance of the issue and the absence of any other challenger capable of bringing the claim — a step that remains controversial because it came closest to recognising standing based on constitutional significance alone,

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[33] *R v Inland Revenue Commissioners, ex parte National Federation for the Self-Employed and Small Businesses Ltd* [1982] AC 617.

[34] R v Secretary of State for Social Services, ex p Child Poverty Action Group [1990] 2 QB 540.

[35] *R v Inspectorate of Pollution, ex p Greenpeace (No 2)* [1994] 4 All ER 329.

[36] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p The World Development Movement Ltd* [1995] 1 WLR 386.

without requiring any personal or organisational connection to the issue. *Evans*[37] extended this further, granting standing to a peace activist to challenge UK military policy despite the absence of direct personal interest, and notably holding that the claimant's broader political motivations were irrelevant where the public interest nature of the claim was sufficient to override any such concerns — a development that expanded standing to individuals, not merely organisations, on public interest grounds. The *R (Good Law Project Ltd) v Secretary of State for Health and Social Care*[38] decision reinforced this trajectory in the specific context of procurement, by recognising that a public interest organisation could have standing to challenge systemic failures of transparency in procurement where no economic operator could realistically be relied upon to bring such a transparency challenge, even without direct financial interest. *AXA*[39] and *Walton*[40] brought Scottish administrative law into alignment with this trajectory, with Lord Reed's judgment in *Walton* providing the clearest articulation of what the English cases had cumulatively implied: that the rule of law itself may require judicial access even where no individual suffers greater harm than any other citizen. Yet this liberalisation has not been unidirectional.

Rose Theatre[41] demonstrated the judiciary's early reluctance to extend standing to groups formed specifically to challenge a single decision, and the recent Good Law Project decisions — *R (Good Law Project and Runnymede Trust) v The Prime Minister ('Runnymede')*[42], and *R (Good Law Project) v Secretary of State for Health and Social Care ('Abingdon')*[43] — mark a discernible recalibration: *Runnymede* insisting that broad organisational objectives and public interest credentials alone are insufficient where better-placed challengers exist and *Abingdon* imposing the further requirements that the claimants demonstrate tangible impact from the challenged decision and that the alleged breach reach a threshold of sufficient gravity — together signalling that public interest

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[37] *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin).

[38] *R (Good Law Project Ltd) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin).

[39] *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46.

[40] *Walton v Scottish Ministers* [2012] UKSC 44.

[41] *R v Secretary of State for the Environment, ex parte Rose Theatre Trust Co* [1990] 1 QB 504.

[42] *R (Good Law Project and Runnymede Trust) v The Prime Minister* [2022] EWHC 298 (Admin).

[43] *R (Good Law Project) v Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC).

credentials and expertise, absent tangible impact or exceptional circumstances, cannot automatically confer standing.

The intervention doctrine traces a parallel arc: from the restrictive approach of *Gillick*[44], which refused permission to intervene to organisations with directly relevant expertise, through *Khan*[45]*'s* recognition that domestic NGOs could contribute meaningfully to proceedings raising broad Convention questions, to the functional threshold of the case of *R (British American Tobacco UK Ltd) v Secretary of State for Health*[46] which established that intervention must offer a distinctive contribution rather than merely reinforce existing arguments. Cases such as *EM (Eritrea)*[47] and *Kiarie*[48] demonstrate what this expanded participation has produced in practice: factual evidence and legal frameworks that courts could not have constructed from the parties' submissions alone, with consequences for legal doctrine that extend far beyond the individual cases decided.

These developments support the thesis's central argument. The expansion of standing doctrine and intervention rules has strengthened judicial review's capacity to uphold the rule of law — ensuring that unlawful executive action does not go unchallenged merely because no individual claimant has suffered direct harm — thereby reshaping how constitutional balance is struck between judicial oversight, executive authority, and democratic accountability — without displacing parliamentary sovereignty or undermining the institutional framework within which that balance is maintained. Parliament's deliberate choice of an open-textured standard — 'sufficient interest' — was itself a constitutional choice, one that consciously left the boundaries of standing to judicial elaboration rather than legislative prescription. The courts have operated within that choice, interpreting rather than rewriting the framework Parliament established. A parallel restraint is evident in the legislature's response to third-party intervention: despite IRAL's recommendations for formal standards, the

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[44] *Gillick v W Norfolk & Wisbech Area Health Authority* [1985] 1 All ER 533

[45] *R v Khan* [1997] AC 558.

[46] *R (British American Tobacco UK Ltd) v Secretary of State for Health* [2014] EWHC 3515 (Admin).

[47] *EM (Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12.

[48] *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42.

JRCA 2022 left the intervention framework intact — a further indication that Parliament has endorsed rather than sought to reverse the constitutional equilibrium that judicial practice has produced in this domain. That broader access and preserved institutional balance coexist is itself revealing, it demonstrates that the expansion of both standing and intervention has been accommodated within, rather than disruptive of, the constitutional framework that parliamentary sovereignty and democratic accountability sustain. Crowdfunding, however, occupies a more uncertain position within this trajectory: unlike the evolution of standing and intervention rules, its implications remain to be determined.

The third section of the first chapter also advanced the thesis's broader methodological contribution. Rights-centred account of judicial review would necessarily frame the central question as one of right violation or rights protection, whether under the HRA, the Convention, or common law. Where executive action engages no identifiable right directly and affects no more than any other citizen, such accounts provide limited analytical traction. The evolution of the sufficient interest test, by contrast, operates across the full spectrum of judicial review — encompassing challenges to executive action that engage no Convention rights and affect no identifiable individual more than any other citizen. The evolution of third-party intervention further deepens this picture: the procedural and substantive changes brought by expanded intervention have produced consequences that extend well beyond the immediate parties — shaping constitutional framing, supplying factual evidence, and establishing legal tests of broad application, as the cases of *EM (Eritrea),*[49] *Kiarie,*[50] *and Miller/Cherry*[51] demonstrate. Examined through a holistic judicial review lens, this distinction revealed a dimension of constitutional calibration that a rights-centred account cannot fully capture: the courts' ongoing negotiation of when public interest, rather than private right, provides an adequate constitutional basis for access and participation in judicial review proceedings. It is this dimension — visible only when one looks beyond the rights-

[49] *EM (Eritrea)* (n 47).

[50] *Kiarie and Byndloss* (n 48).

[51] *Miller/Cherry* (n 6).

protection debate — that the analytical framework of this thesis is designed to illuminate.

Together, the three sections of this chapter revealed a constitutional landscape in which judicial review has expanded its reach across multiple dimensions simultaneously — the boundaries of justiciable subject matter, the identity of those who may challenge executive action, and the range of voices that may participate in proceedings — while remaining anchored, in each domain, to the institutional and constitutional boundaries that principled oversight requires. The expansion has been neither uniform nor uncontested, but it has been, with the partial uncertainty introduced by crowdfunding, accommodated within rather than disruptive of the constitutional framework. Indeed, the analysis of national security and foreign policy contexts in the second section of this chapter demonstrates that where the scope of judicial review has remained narrow, this too reflects the same principled calibration — restraint exercised not through institutional abdication but through conscious deference to the constitutional boundaries that democratic accountability and institutional competence require. Parliamentary sovereignty and the rule of law have not been placed in opposition by these developments; they have been mutually reinforced by a judicial review that has grown more robust without growing less principled.

The analysis in the second chapter has traced the impact of the Human Rights Act 1998 on the scope of judicial review across two distinct but interconnected constitutional relationships: on the relationship between courts and Parliament — and, through that relationship, on the constitutional principle of parliamentary sovereignty — across two interconnected dimensions: the interpretive duty under section 3 and the declaratory power under section 4; and the relationship between courts and the executive, examined through the proportionality framework introduced by section 6 and its context-sensitive application across different institutional domains. Taken together, these two dimensions reveal a constitutional order that has been fundamentally reshaped by the HRA without being destabilised — one in which judicial oversight has deepened, executive accountability has been strengthened, and the protection of Convention rights has been embedded within domestic law, while the

institutional boundaries that define each branch's constitutional role have been preserved rather than displaced.

The first dimension — the courts' relationship with Parliament — is traced through the evolution of application of the sections 3 and 4. *R v A (No 2)*[52] marked the high-water mark of section 3's application in 2001, widely regarded as pushed against the proper limits of statutory interpretation by contradicting Parliament's clear legislative intent. *Bellinger*[53] and *Ghaidan*[54] subsequently recalibrated the boundaries: the former establishing that section 3 cannot be used where interpretation would amount to *de facto* legislative power; the latter confirming that the interpretive duty, however strong, must go with the grain of the legislation rather than against it — a standard that has set the law since 2004. *Mercer*[55] refined these limits further, identifying two specific factors that weigh against the use of section 3: where no clear or sole legislative solution exists that ensures ECHR compliance whilst balancing competing rights, and where Parliament's intentions remain uncertain. Yet *Ziegler*[56] was criticised in that the court's incorporation of a proportionality requirement into the statutory 'lawful excuse' defence of an offence pushed against the boundaries *Ghaidan* had established by demonstrating these limits are not self-enforcing — though the subsequent clarification in the *Safe Access Zones Reference*[57] signals the constitutional system's continuing commitment to principled evolution rather than arbitrary and unconstrained expansion.

Examination of section 4 of the HRA showed closely the contrasting approaches in *Nicklinson*[58] and the Northern Ireland abortion case[59] revealing that even declarations of incompatibility — which carry no legally binding force and leave the final determination with Parliament — have not been treated as an

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[52] *R v A (No 2)* [2001] UKHL 25.

[53] *Bellinger v Bellinger* [2003] UKHL 21.

[54] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

[55] *Secretary of State for Business and Trade v Mercer* [2024] UKSC 12.

[56] *Director of Public Prosecutions v Ziegler* [2021] UKSC 23.

[57] *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32.

[58] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.

[59] *Re an application by the NIHRC for Judicial Review (NI)* [2018] UKSC 27.

unconstrained tool. In *Nicklinson*, the majority declined to issue a declaration despite acknowledging the incompatibility with the Convention rights, grounding that restraint in the exceptional moral complexity of assisted suicide, Parliament's active engagement with the issue, and the radical departure from existing law that any declaration would have required. In the Northern Ireland abortion case[60], by contrast, a majority found it institutionally appropriate to issue a declaration to signal incompatibility where legislative gridlock had foreclosed democratic resolution and a relatively straightforward amendment could cure the incompatibility — though the case were dismissed because of lack of standing. The difference between these two cases exposed an asymmetry in how institutional competency factors are weighted that cannot be entirely explained by the factual differences between them — a legitimate criticism in the current framework, accepted in this thesis. Nevertheless, what redeems this variability is not its consistency but its justification: in each case, the courts grounded their decisions in articulable constitutional and institutional principles rather than unexplained preference, calibrating the scope of review case by case, sensitive to context and anchored to principle.

The second dimension — the courts' relationship with the executive — traces an equally significant transformation. Prior to the HRA, the structural inadequacy of the Wednesbury[61] standard — exposed through the incremental but ultimately insufficient evolution of anxious scrutiny in *Bugdaycay*,[62] *Brind*,[63] and *Smith and Grady*,[64] and confirmed by the Strasbourg Court's finding that domestic courts' application of the Wednesbury standard had precluded any meaningful evaluation of proportionality in *Smith and Grady v United Kingdom*[65] — left courts unable to address the core questions that Convention rights analysis requires. The HRA resolved this by introducing proportionality as a statutory ground of review, and *Daly*[66] confirmed that this new standard goes further than anxious scrutiny in three distinct respects: courts must now assess the balance

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[60] ibid.

[61] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

[62] *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514.

[63] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.

[64] *R v Ministry of Defence, ex p Smith* [1996] QB 517

[65] *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.

[66] *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26.

struck by decision-makers, must examine the relative weight given to competing interests, and must determine whether interference is excessive in a democratic society. Yet the subsequent case law demonstrates that proportionality is neither uniform nor unconstrained in its application. *Bank Mellat*,[67] *Denbigh*,[68] and *Carlile*[69] reveal that the intensity of review varies significantly according to the institutional competence of the decision-maker, the nature of the right at stake, the quality of the decision-making process, and the degree of democratic accountability involved. In *Denbigh*,[70] the school's comprehensive consultation process and educational expertise resulted in substantial deference; in *Carlile*,[71] the executive's institutional competence, particularly with regard to matters of national security involving complex predictions, and the executive's accountability through political processes justified a similarly deferential approach; *Bank Mellat*,[72] by contrast, demonstrated that even in a national security context, unjustified distinctions between similarly situated parties will not survive proportionality scrutiny. Two principles emerge from this analysis with particular significance. First, proportionality assessment is not an exclusively judicial exercise: courts give variable weight to executive assessments based on contextual factors, and this contextual weighting serves a vital constitutional function — maintaining the distinction between substantive review and impermissible merits review on appeal. Second, the court's role is to evaluate whether the institution's balancing exercise was reasonable and Convention-compliant, not to substitute its own policy preferences.

The trajectory of common law proportionality — from *Kennedy*[73] through *Pham*[74] to *Keyu*[75] and *Youssef*[76] — added a further dimension: the courts have

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[67] *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39.

[68] *R (Begum) v Denbigh High School Governors* [2006] UKHL 15.

[69] *Carlile* (n 25).

[70] *Denbigh* (n 68).

[71] *Carlile* (n 25).

[72] *Bank Mellat* (n 67).

[73] *Kennedy v Charity Commission* [2014] UKSC 20.

[74] *Pham v Secretary of State for the Home Department* [2015] UKSC 19.

[75] *R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69.

[76] *R (on the application of Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3.

acknowledged the possibility of convergence between reasonableness and proportionality while declining to effect it through judicial initiative alone, signalling that formal recognition would require parliamentary engagement. Furthermore, where absolute rights are engaged, as *Chahal*[77] and the Rwanda litigation[78] demonstrate, courts neither apply deference nor conduct a balancing exercise, and the executive's policy justifications — however compelling in democratic terms — are constitutionally irrelevant. However, the Rwanda litigation and the Safety of Rwanda Act 2024 illustrate the resilience of parliamentary sovereignty despite judicial findings grounded in HRA protection of absolute rights. Following the court's ruling that the Rwanda policy to remove asylum seekers to Rwanda was unlawful, Parliament enacted the Safety of Rwanda Acts 2024, requiring judges to treat Rwanda as safe regardless of contrary evidence and permitting ministers to disregard interim measures. This was a formally valid exercise of parliamentary sovereignty: the courts could not strike the Act down. Yet it carried substantial constitutional and political costs. The constitutional balance ultimately absorbed these tensions through the mechanisms that parliamentary sovereignty and democratic accountability provide — electoral accountability, governmental change, and legislative repeal through the Border Security, Asylum and Immigration Act 2025.

Across both dimensions, these developments support the thesis's central argument. The HRA preserves parliamentary sovereignty in law but modifies its practical operation: courts may now depart significantly from legislative intent through statutory interpretation, and may more readily quash executive decisions on grounds of incompatibility with Convention rights — yet Parliament retains the final word, the courts' mandate derives explicitly from parliamentary will, and the framework within which they operate is one that Parliament designed and retains the power to modify. The rule of law has been strengthened — Convention rights are now directly enforceable, proportionality review has deepened, and unlawful executive action is subject to more intensive scrutiny — yet none of this has come at the expense of parliamentary sovereignty, which remains intact in its legal supremacy and its formal constitutional primacy. That robust judicial review and the preservation of

[77] *Chahal v United Kingdom* [GC] App no 22414/93 (ECtHR, 15 November 1996).

[78] *R (AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42.

parliamentary sovereignty coexist throughout the HRA's operation is not coincidental: it reflects the fact that role of the courts have been calibrated with reference to constitutional principles rather than institutional preference.

The second chapter also advances the thesis' broader methodological contribution. The prevailing scholarship of Gardbaum, Young, and Kavanagh shares with this thesis a concern for constitutional balance, but their frameworks are ultimately organised around a different question: how Convention rights are most legitimately and effectively protected through institutional design and interaction. This thesis does not dispute the value of that question, it asks a different but complementary one. Rather than normatively prescribing how rights should be protected, it examined how constitutional balance between courts, Parliament, and the executive has actually been struck across the evolving scope of judicial review — across the specific decisions courts have made about the reach of sections 3, 4, and 6 — and whether the resulting development is constitutionally sound.

It is this reorientation — from prescribing how rights should be protected to examining how constitutional balance has in practice been legitimately maintained — that constitutes the novel contribution of this thesis to the existing literature. The cases analysed in this chapter reveal that robust judicial review and the preservation of parliamentary sovereignty are not mutually exclusive outcomes. They coexist, and have coexisted throughout the HRA's operation, because the courts have approached their expanded role with a principled sensitivity to constitutional and institutional boundaries — as a dynamic, continuously negotiated, and constitutionally grounded recalibration of institutional relationships that has strengthened the rule of law without displacing the democratic accountability that parliamentary sovereignty requires.

The analysis in the third chapter has examined the legal status of unlawful administrative acts and the constitutional implications of the Judicial Review and Courts Act 2022 across three interconnected dimensions: the theoretical framework governing the legal status of unlawful acts, from the pre-*Anisminic*[79]

[79] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

distinction between jurisdictional and non-jurisdictional errors to the competing orthodox and alternative theories; the JRCA 2022's statutory introduction of suspended and prospective-only quashing orders and the constitutional tensions those remedies generate; and the principle of legality as a potential constitutional counterweight to the risks that those remedies introduce. Unlike preceding chapters, which trace evolutions that have already occurred over many years and are reflected in a developed body of case law, this chapter also offers a prospective analysis by examining the constitutional implications, including its consequences for the relationship between the rule of law and Parliamentary sovereignty, whose full consequences remain to be determined by future litigation. Taken together, the three interconnected dimensions reveal a constitutional landscape that is more significant than the relatively modest legislative changes of the JRCA 2022 might initially suggest — one in which the theories governing the legal status of unlawful acts are being actively contested, and in which the relationship between parliamentary sovereignty and the rule of law is being negotiated in a distinct doctrinal level than in the domains examined in the preceding chapters.

The third chapter argued that the theoretical analysis of the legal status of unlawful acts demonstrated that the post-*Anisminic* single-category position — that *all* errors of law render decisions null and void *ab initio* — was always more unstable than its apparent doctrinal clarity suggested. The practical divergence between declarations and quashing orders, illustrated in cases such as *Hurley and Moore*,[80] and *Blackburn*,[81] revealed that courts have consistently treated these remedies as carrying distinct legal consequences, contradicting the orthodox theory's necessary conclusion that both merely articulate an existing legal reality. Neither Forsyth's reconciliation through the relativity of nullity nor Nadhamuni's recharacterisation of remedial discretion as a nuanced application of the rule of law fully resolves this tension without implicitly acknowledging a category of errors that are voidable rather than void — a concession that sits uneasily with the single-category position. The alternative theories advanced by Adams and Feldman — grounded in the legal rather than merely factual effects

[80] *R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin).

[81] *R v Greater London Council Ex p Blackburn* [1976] 1 WLR 550.

of unlawful acts and illustrated most powerfully by the *Ridge v Baldwin*[82] analysis — provided a doctrinal foundation for this implicit acknowledgement, one that the JRCA 2022 has now formalised through statutory intervention. Section 29A(5) of the Senior Courts Act 1981, as amended by the JRCA 2022, provides that acts upheld by suspended or prospective orders are to be treated as if their validity had never been impaired — a provision that aligns directly with an alternative voidable theory and that represents a departure from the orthodox position.

The analysis of the JRCA 2022's remedial provisions demonstrated that this statutory intervention carries constitutional implications that extend well beyond its immediate remedial context. By statutorily legitimising remedies that courts had historically treated with considerable caution — restrained, in part, by their grounding in the orthodox ultra vires theory — Parliament has potentially amplified the constitutional risks that those remedies carry. The JRCA 2022 implicitly requires the recognition of voidable unlawfulness, a development that as the chapter argued, crystallises the latent doctrinal tensions and that risks reviving pre-*Anisminic* distinctions between jurisdictional and non-jurisdictional errors in ways that could strengthen ouster clauses and narrow the scope of judicial review. Conversely, however, the availability of more flexible remedies may encourage more frequent judicial intervention, as courts are no longer constrained to choose between immediate quashing and mere declarations. This tension between potential of narrower reviewability and increased judicial willingness to intervene creates a complex and somewhat paradoxical framework.

The principle of legality, examined in the final section of this chapter, represents a potentially significant constitutional counterweight to the risks identified herein regarding the JRCA 2022. Its recent revival — coinciding with political pressure to repeal the HRA and restrict judicial review, and Brexit process — suggests that courts have been reinforcing common law protections in anticipation of legislative encroachment on fundamental rights. Where the JRCA 2022's remedial provisions risks undermining access to effective remedies, the principle equips courts with an interpretive basis for construing those provisions narrowly in certain circumstances. Whether its potential will be realised remains

[82] *Ridge v Baldwin* [1964] AC 40.

uncertain: the principle of legality is neither self-executing nor uniformly applied, and its deployment in concrete cases will depend on several factors including the fundamental status of the rights, the broader context in which statutory factors fall to be assessed.

The third chapter supports the thesis's central argument in a distinctive way. The preceding chapters demonstrated that the scope of judicial review has expanded in a principled manner through the subject-matter approach to justiciability, the public standing and third-party interventions, the contextual application of proportionality review, and the calibrated use of sections 3 and 4 of the HRA. This chapter reveals a different dimension of that evolutionary trajectory: not a further development of judicial oversight itself, but rather a statutory reconfiguration of its theoretical foundations which may in certain respects expand and in certain respects constrain that scope. The JRCA 2022 does not simply modify the remedies available in judicial review proceedings; it implicitly challenges the post-*Anisminic* understanding of what unlawfulness means and what consequences follow from it. In doing so, it creates a new axis of constitutional tension — one that operates not through the familiar dynamics of rights adjudication or justiciability but through the doctrinal architecture of administrative law itself. Parliamentary sovereignty and the rule of law, which the preceding chapters showed to be mutually reinforcing within a carefully calibrated constitutional framework, are here newly placed in an unresolved tension: Parliament has authorised a framework that permits unlawful acts to retain legal effect, yet the rule of law requires that the executive action remain within its lawful boundaries and should not be able to breach them.

Yet this tension does not undermine the thesis' central argument, rather it defines its outer boundary. The principled and constitutionally grounded evolution traced across the preceding chapters remains intact — what chapter three reveals is that Parliament itself may introduce new axes of constitutional strain that the courts, through the principle of legality and careful remedial discretion, will be called upon to navigate. Whether the principle of legality and judicial restraint will prove sufficient to preserve the mutually reinforcing relationship between parliamentary sovereignty and the rule of law that this thesis has traced remains, at this prospective stage, an open question.

The third chapter also advances the thesis's broader methodological contribution. Attending to the full spectrum of judicial review rather than its rights-protective dimension alone, the JRCA 2022 emerges as constitutionally significant in ways that a rights-centred account would struggle to fully capture. The issues examined in this chapter including the orthodox and alternative theories of the legal status of unlawful acts and the revival of jurisdictional distinctions are not primarily about how rights are best protected; they concern how the doctrinal architecture of judicial review itself shapes and constraints the constitutional balance between courts, Parliament, and the executive. It is this dimension, how constitutional balance has actually been struck at the doctrinal level, and whether the pattern of development is constitutionally sound, that the holistic judicial review lens of this thesis designed to illuminate. The JRCA 2022, for all its apparent modesty, represents a significant development in that ongoing process of constitutional negotiation.

Viewed as a whole, the evolution examined in this thesis presents neither a story of judicial supremacy nor one of parliamentary retreat, but a principled, incremental, context-sensitive and constitutionally grounded recalibration of the constitutional balance. This constellation of advances and recalibrations, each with its own constitutional logic, reveals a coherent and constitutionally legitimate trajectory in which parliamentary sovereignty and the rule of law are mutually reinforced rather than placed in fundamental opposition. While the JRCA 2022 introduces a yet uncertain dimension to this trajectory, this uncertainty itself confirms the thesis' central finding: the UK's constitutional framework is one that continuously calibrates, rather than finally resolves, the balance between legal accountability and democratic authority. It is precisely this principled, ongoing calibration —rather than any final resolution — that renders the overall development constitutionally legitimate.

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