UNIVERSITY OF CAMBRIDGE
Faculty of Law

CPL
centre for public law

The Independent Review of Administrative Law

Call for Evidence – Response

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Faculty of Law
Sir David Williams Building
10 West Road
Cambridge CB3 9DZ

Tel: +44 (0)1223 330036
Email: cpl@cam.ac.uk
www.cpl.law.cam.ac.uk

1: Introduction

1. This evidence is provided by the Centre for Public Law, a research group in public law based in the Faculty of Law at the University of Cambridge.

2. The following members of the Faculty of Law at the University of Cambridge have contributed to this document: Professor John Bell; Professor David Feldman; Dr Kirsty Hughes; Dr Stevie Martin; Dr Stephanie Palmer; Dr Sophie Turenne and Professor Alison Young. We were also assisted by Dr Joe McIntyre, University of South Australia.

3. This evidence draws on the knowledge and experience of the contributors based on their role as academics who specialise in aspects of public and comparative law. The contributors regularly teach and conduct research in a variety of fields related to judicial review.

4. The information provided in this submission is based on the law of England and Wales. Where helpful, comparisons have been drawn with other legal systems, particularly those of France, Germany and Australia.

2: Executive Summary

5. First, we would argue that the amenability of public law decisions to judicial review and the grounds of judicial review should not be codified in statute. We are not persuaded that codification of these aspects of public law would provide further clarity. Moreover, we are concerned that codification without other modifications (for example an accompanying statute setting out the precise nature of the powers of the executive) risks undermining the current constitutional settlement in the UK. Where there may be a specific case for codification is as regards administrative procedures or of administrative decision-making, as distinct from codification of the heads of judicial review.

6. Second, we do not believe that there are grounds for the codification of those issues that are justiciable and therefore suitable for adjudication by the courts. Issues of justiciability require

the application of criteria to specific factual circumstances. Codifying these criteria would not provide greater clarity as courts would still need to determine how these criteria would be applied to specific circumstances. In addition, it is important to recognise that even matters that broadly appear political in subject or nature can still raise specific legal issues that are suitable for determination by the courts. Courts have a constitutional duty to uphold the rule of law. This includes ensuring that executive and administrative bodies act lawfully. Codification on subject matter alone, therefore, may risk undermining the protection of the rule of law.

7. Third, we examine different grounds of judicial review to assess whether these are in need of further improvement, or if codification would provide greater clarity and legal certainty. In general, we conclude that courts apply standards of judicial review that aim to balance the protection of the rule of law with the need to ensure good and effective administration. For example: courts are sensitive to the relative institutional and constitutional roles of tribunals and administrative bodies when controlling decisions for errors of law and errors of fact; when protecting legitimate expectations; and when applying controls for rationality and in the limited set of circumstances in which the test of proportionality applies. Whilst it cannot be excluded that there may be some areas of law that may benefit from clarification, in general a lack of clarity tends to arise not because of uncertainty as to how specific types of judicial review are applied but because it is not always clear to what extent these heads of review are conceptually distinct. Yet whilst this may be problematic for academics, it poses less of a practical issue for courts as it enables courts to apply judicial review in a manner that is sensitive to the need to uphold the rule of law and to promote good administration.

8. Fourth, we argue that there are no grounds to modify the rules on standing. Standing has already been codified, the test being found in Part 54 CPR and section 31 Senior Courts Act 1981. Courts have developed principles that guide the interpretation of the 'sufficient interest' test, taking account of the nature of the decision challenged and that of the person bringing the challenge.

9. Fifth, our current legal framework provides for adequate flexibility as regards the remedies available for judicial review.

10. Finally, we conclude that there is insufficient evidence to support the claim that the development of judicial review over the last forty years has given rise to the politicisation of the judiciary.

3: Codification

11. The terms of reference ask: 'whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute'. More specifically, the questionnaire asks: 'whether there is a case for statutory intervention in the judicial review process' and 'whether the amenability of public law decisions to judicial review by the courts and the grounds of public law legality should be codified in statute'.

12. It is our opinion that codification would not provide further clarity. On the contrary it may create further uncertainty and could upset the delicate constitutional balance underpinning the principles of judicial review in English law. If there is a need for codification it is in the context of administrative procedures and rulemaking, rather than as regards the heads of judicial review, or the scope of justiciable matters that should be the subject of judicial review.

13. As explained by Professor Mark Elliott, 'codification' may take one of three forms: 'window-dressing'; 'all-encompassing' and 'restrictive'.[1] A 'window-dressing' approach would replicate the general approach to standards of review found in current case law – for example the account of Lord Diplock listing 'illegality, irrationality and procedural impropriety'.[2] Such an approach would not aid clarification. Moreover, it may prompt further uncertainty given that case law interpreting these provisions prior to clarification may be distinguished from case law interpreting these heads of judicial review after codification. This, in turn, may encourage

[1] M Elliott, 'Codifying Judicial Review: Clarification or Evisceration?' https://publiclawforeveryone.com/2020/08/10/the-judicial-review-review-ii-codifying-judicial-review-clarification-or-evisceration/ .

[2] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 410-411.

litigation to clarify how the codified heads of judicial review should be interpreted, undermining a potential aim of the review to streamline the judicial review process.

14. An 'all-encompassing' model would require legislation that is capable of providing a detailed account of the possible heads of judicial review and the range of criteria establishing their specific application to a range of administrative actions and decisions. This is likely to require a long and complex statute that would run the risk of undermining legal clarity. In addition, even a detailed piece of legislation would still require interpretation of its provisions, again leading to future case law and the potential encouragement of litigation.

15. A 'restrictive model' would focus on reducing the current provisions relating to judicial review. This may be achieved through legislation that specifically excludes areas from judicial review as non-justiciable, through providing an exclusive list of heads of review, or through providing ouster clauses designed to remove the jurisdiction of the courts. Regardless of the desirability of this direction of travel, codification in this manner would modify the UK's current constitutional settlement. Principles of judicial review are developed through the common law. These common law provisions provide a constitutional backdrop against which legislation is enacted. Legislation is interpreted in line with these background principles in order to provide a means through which the UK constitution upholds the rule of law. The UK constitution has developed in this manner because it is uncodified. It is difficult to envisage how a restrictive or an all-encompassing model of codification could achieve its objectives without also requiring a clearer codification of the precise powers of the executive. This would also require specification of the conditions under which these statutory powers are to be exercised. A general and complete codification of the principles of judicial review, without an accompanying detailed and precise account of specific executive powers, runs the risk of undermining the protection of the rule of law in the UK.

16. These arguments are reinforced by an analysis of how European national legal systems have approached codification of judicial review. It is necessary to distinguish at least three distinct

issues: codes of general administrative court procedure, codes of general administrative procedure, and codes of the general principles of administrative law.

17. It is quite common in Europe for the rules of administrative court procedure to have been consolidated into a codified form.[3] In England, these are consolidated within the Civil Procedure Rules.

18. A number of countries have codified the principles and procedures which the administration must follow. These cover preparing impact assessments of policies, consulting with stakeholders, giving reasons for decisions and taking adequate account of vested interests. The comprehensive US Administrative Law Procedure Act of 1946 has long been admired in the UK. Compliance with procedural safeguards in administrative rulemaking and in administrative adjudication was meant to protect individual freedoms against bureaucracy.[4] The German Verwaltungsverfahrensgesetz of 1976 had a similar ambition to achieve a comprehensive codification and was the first time in a European country that major general principles of administrative law were put into legislative form.[5] Beyond differences in their administrative law traditions, the US, French and German codifications counterbalance the administrative procedural requirements by restricting the consequences of 'irrelevant' procedural irregularities on the outcome and by accepting, to some extent, corrections of procedural mistakes during judicial review proceedings.[6] Next to codification, many European countries have also developed an expeditious procedure to appeal an administrative decision, with the distinct (and successful) aim to reduce the significant caseload for judicial review in specific areas such as asylum and immigration cases.

[3] In France the code de justice administrative dates from 2000, the German Verwaltungsgerichtsordnung dates from 1960, and the Codice del processo amministrativo in Italy dates from 2010; see J.-B. Auby & G. Bermann, *Codification of Administrative Procedure*, Bruxelles 2013.

[4] D. M. Custos, 'Droits administratifs américain et français : sources et procédure', 2 (2007) *Revue Internationale de Droit Comparé* 285, p 297

[5] See H. Maurer, *Allgemeines Verwaltungsrecht*, 18th edn, Munich 2011, p 39.

[6] H. Punder, 'German administrative procedure in a comparative perspective: Observations on the path to a transnational ius commune proceduralis in administrative law', ICON 2013, 953-53, 958

19. In no European country is there a code or legislative provision which sets out the principles on which judicial review of administrative action and state liability are based. In all countries, there are broad categories of incompetence (lack of jurisdiction), procedural irregularity (breach of statutory procedure or principles of natural justice), unlawfulness and abuse of administrative discretion. But the meaning of these ideas is articulated only in scholarly writing and in judicial decisions, both often dating back to the nineteenth century. These days, the multiple sources of administrative law (constitution, international and supra-national obligations, soft law, etc.) make it difficult to state very broad principles in advance with precision and it is left to judicial articulation to produce the appropriate integration.[7]

20. Almost all European national legal systems have a large number of very specific 'codes' which regulate much of the activity of the administration. But these are 'special codes', ones which regulate a specific area of activity, e.g. local government, immigration or tax imposition and enforcement.[8] The equivalent in the countries of the United Kingdom are such statutes and delegated legislation which offer a structured code of rules which apply in a specific area – for example the regulation of immigration through a series of Immigration Acts and Immigration Rules, delegated legislation which supplements the Immigration Acts . These are collections of legal rules applicable to major areas of administrative activity. Important material may also have to be sought in subordinate legislation, administrative rules and directions, guidance and other forms of soft law. This may make it difficult for codification to provide clarity and certainty, particularly in those areas where the law needs to change frequently if it is to facilitate the public good.

21. A different approach is to couch the principles of good administration in the form of soft law guidelines. This is the approach of SIGMA, a joint initiative between the OECD and the EU: http://www.sigmaweb.org/publications/principles-public-administration.htm. In either case,

[7] Maurer, pp 67ff; M. Guyomar & B. Seiller, *Contentieux administratif,* 5th ed., Paris 2019, ch 10.
[8] See, for example in France, the code général des collectivités territoriales, the code de l'entrée et du séjour des étrangers et du droit de l'asile, and the code général des impôts.

the official articulation of principles of good administration (chiefly procedural)[9] provides a reference point for the courts in judicial review of administrative decisions and restricts the need for judicial creativity. There is a lot to be said for articulating the principles by which the administration should behave in a single, overarching text. However, this is different from codifying principles of judicial review. Rather, it focuses on providing a detailed account of how administrative bodies should exercise their powers, improving standards of good administration with the aim of administrative behaviour being less likely to produce outcomes that trigger actions for judicial review. Judicial review would still be needed as a safeguard to uphold the rule of law.

22. Similarly, in Australia, even with a statutory regime there is still a strong blend of codified and common law principles. There are three main pathways to judicial review at the Federal level in Australia: the constitutional protection of judicial review vested in the High Court (found in section 75(v) of the Australian Constitution); legislation vesting the jurisdiction of the High Court to the Federal Courts under section 39B of the Judiciary Act 1903 and the purely statutory regime of judicial review of the Federal Courts under the Administrative Decisions (Judicial Review) Act 1977 (ADJR).

23. The ADJR largely replicates the common law grounds of judicial review. In addition to providing a specific list of these provisions of judicial review, the ADJR specifically refers to the ability to bring an action for judicial review where 'the decision was otherwise contrary to the law', providing a means of preserving judicial review on common law grounds other than those specifically listed in the Act.[10] The existence of the constitutional protected mechanism of judicial review ensures that judicial review cannot be excluded for jurisdictional errors. This would also support our conclusion that codification may do little to clarify the general heads

[9] Recent codifications of administrative procedure in Europe sometimes include underlying principles in addition to procedural rules, and they can also extend to matters of substance which are deemed to inform procedural matters (e.g. qualitative standards of administrative behaviour), see J.-B. Auby & G. Bermann, *Codification of Administrative Procedure*, Bruxelles 2013, ch 1.

[10] Section 5(1)(j). This protection has been extended to the review jurisdictions of State Supreme Courts in *Kirk v Industrial Court of NSW* (2010) 239 CLR 531.

of judicial review. In a system which has a constitutional protection of judicial review, or which recognises the constitutional role of the courts to develop principles of judicial review, codification would continue to be supplemented by common law standards of judicial review.

24. It also indicates a further problem for codification in the UK constitution. The English courts are courts of inherent jurisdiction, having the power to develop the common law, including principles of judicial review.[11] However, the UK constitution also recognises the principle of parliamentary sovereignty, which, understood in its orthodox interpretation, prohibits a constitutional protection of the courts to uphold judicial review and the rule of law. Although there is dicta suggesting both that, were Parliament to completely remove judicial review,[12] or to oust the jurisdiction of the court to check that administrative bodies had not acted beyond or abused their jurisdiction, or had acted unlawfully when exercising their powers.[13] As such, codification of judicial review runs the risk of upsetting the delicate constitutional balance underpinning the UK constitution.

25. Nevertheless, the experience of codification in Australia may support the codification of some procedural requirements. For example, there is a general right to reasons in the ADJR. This is not currently the case in English administrative law.

4: Justiciability

26. In the call for evidence, the panel asks, 'whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability of the exercise of a public law power and/or function could be considered by the Government'.

27. In responding to this question, it is important to recognise that the legal concept of justiciability is not a doctrine solely related to the judicial review process. It is also a general doctrine of

[11] *Michalak v General Medical Council* [2017] UKSC 71, [2018] 1 All ER 463.
[12] *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.
[13] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491.

domestic law. It is used primarily to determine whether there are some issues which courts cannot or should not determine on the ground that they are non-justiciable.[14]

28. We argue that the distinction between justiciability and non-justiciability does not require clarification. As a general doctrine of domestic law, the legal position is straightforward. There are a very limited number of issues which are considered inherently unsuitable for adjudication by reason of their subject matter/areas.

29. The concept of non-justiciability is used to refer to different types of situations. The first way in which the concept of non-justiciability is used is in relation to the acts of a foreign state whose validity is called into question in a UK domestic court. The rules on international law and comity will lead a domestic court not to adjudicate on such legal questions.[15] Even in this context, there is no absolute doctrine of non-justiciability but rather a doctrine of 'judicial restraint'.[16] Courts do not normally adjudicate on acts of a foreign state on the ground that no legal right of an individual, in either public or private law, is engaged.[17] Nevertheless, they may still intervene if a resolution is necessary in order to decide some other issue which is justiciable.[18] There are also occasions when as an issue of 'public policy' the domestic courts will decline to apply a foreign law.[19] Although a foreign state may be able to claim state immunity for itself and its officials in cases brought in an English court.[20]

30. The concept of non-justiciability is also used in domestic case law in relation to treaties which have been ratified but not incorporated into domestic law. The rationale for this rule is that

[14] *Graham Nassau Gordon Senior-Milne v Advocate General for Scotland* [2020] CSIH 39; '[W]e are of opinion that the decision of the Queen to grant or withhold an honour cannot be the subject of judicial review, in view of its fundamentally discretionary nature.',[20]

[15] *Belhaj v Straw* [2017] UKSC 3 at [121]-[123] (Lord Neuberger set out the rules to which a court will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign states). *Deutsche Bank AG London Branch v Central Bank of Venezuela* [2020] EWHC 1721 (Comm), at [93].

[16] *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888 at 931-934 (per Lord Wilberforce); *Kuwait Airways v Iraqi Airways (Nos 4 & 5)* [2002] UKHL 19 at [140]. Lord Hope stated: 'restraint is what is needed, not abstention.'

[17] *Khaira v Shargill* [2014] UKSC 33, at [43].

[18] *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UK (justiciable legitimate expectation)

[19] See e.g. *Oppenheimer v Cattermole* [1976] AC 249.

[20] But see *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62.

the Crown, which alone has the power to ratify treaties in the UK constitutional structure, has no power to alter domestic law without the consent of Parliament.[21] This dualist system protects Parliament, a necessary corollary of parliamentary sovereignty. Its rationale is to protect the democratic body, Parliament, and not the Executive.[22]

31. A third way in which the concept of non-justiciability comes into play is by public authorities exercising prerogative power. These powers were once considered inherently unsuitable for judicial determination. Although the courts could and did determine the existence, scope or extent of a prerogative power, it was thought that they could not review its lawful exercise. However, it is now well-established that it is not the source of the power but rather the **nature of the issue** to be determined that is the critical factor. In the *GCHQ* case, judicial review was placed on a broader basis and extended to the exercise of justiciable public powers, including those which have no statutory basis. The exercise of prerogative power is a form of executive power and there is no inherent reason in our constitutional structure to exclude judicial review.[23]

32. There is no doctrine of non-justiciability under the Human Rights Act 1998.[24] If a Convention right is squarely raised under the Human Rights Act, the courts cannot decline to answer the question.

33. If difficulties arise, it is in the application of these principles to particular circumstances. These difficulties would arise in the same manner were the general principles of justiciability to be codified. Court decisions would still be required to apply these principles to particular situations.

[21] *Rayner (JH) (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (The Treaty is regarded by domestic courts as *res inter alios acta* (Something done as between others)).
[22] *Secretary of State for Exiting the European Union v R (Miller)* [2017] UKSC 5, at [57].
[23] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
[24] See, however, the Overseas Operations (Service Personnel and Veterans) Bill 2020.

34. In addition, we would argue that courts apply the distinction between justiciable and non-justiciable issues in a manner that is sensitive both to the need to uphold the rule of law and the separation of powers. They do so in a manner that respects the relative constitutional and institutional roles of the executive and the judiciary.

35. Lord Roskill, for example, provided a long list of areas of prerogative power which would still be non-justiciable because of their subject matter.[25] Later legal advances have refined these broad exceptions, looking more specifically at the particular subject matter (delineating, for example, between matters of high policy and executive actions), whether the prerogative power harms individual rights and the nature of the legal challenge.[26]

36. Courts also recognise the need to exercise caution when determining issues of justiciability. The judiciary has recognised constitutional limitations on its role. On the basis of the separation of powers the courts should not interfere with policy preferences including matters of social and economic policy. This is the role for the executive and the legislature.

37. The courts have exercised 'judicial restraint' concerning the decision to deploy the armed forces and other high policy decisions.[27] For example, the courts have declined to assess whether the British invasion of Iraq in 2003 was compliant with international law.[28] Lord Bingham observed that there exist 'issues which judicial tribunals have traditionally been very reluctant to entertain because they recognise their limitations as suitable bodies to resolve them. This is not to say that if the claimants have a legal right the courts cannot decide it.'[29]

38. However, it is important to recognise that courts are still under a constitutional duty to ensure that even 'high policy' decisions fall within the scope of the relevant law and are procedurally

[25] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 418.
[26] *Lewis v Attorney General of Jamaica* [2001] 2 AC 50.
[27] *R (Gentle) v Prime Minister* [2008] A.C. 1356. The issue of justiciability was more fully dealt with by the Court of Appeal [2007] QB 689, at [26]-[34].
[28] *R (Gentle) v Prime Minister* [2008] A.C. 1356 at [8].
[29] *R (Gentle) v Prime Minister* [2008] A.C. 1356.

fair.[30] This does not transgress the proper constitutional role of the court as it does not directly intrude upon or impede the executive's policy choices.

39. As well as constitutional limitations on the courts, there are also institutional factors which limit the competence of the courts, such as whether the matter is capable of being determined through adjudication. These include decisions which cannot be assessed on any objective standard, such as political preferences. The more purely political the question is, the greater the judicial restraint: these issues are considered appropriate for political rather than legal resolution.[31] Under the UK constitutional system it is the function of the political bodies rather than the judiciary to resolve political questions.[32] The courts exercise considerable 'self-restraint'. This provides an effective means through which to ensure that courts provide a legal check when required, without taking 'political' decisions or intruding too greatly on the policy choices of the executive.

40. A further limitation on the court's institutional capacity occurs when courts are asked to review a matter which is 'polycentric', 'where the decision-maker has broad discretion involving policy and public interest considerations'.[33]

41. After the decision of the Supreme Court in the *Miller*[34] and *Cherry; Miller*[35] cases, it may appear that the boundary between judicial and political decision making is porous. In *R (Miller) v Prime Minister and Cherry v Advocate General for Scotland*,[36] the Supreme Court distinguished

[30] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61.
[31] *A v Secretary of State for the Home Department* [2004] UKHL 56
[32] See *Secretary of State for Exiting the European Union v (Miller*) [2017] UKSC 5. (The court was asked whether the consent of the devolved nations should be sought before art 50 TEU could be triggered but the Supreme Court refused to adjudicate on political conventions). *R (on the application of Shaw) v Secretary of State for Education* [2020] EWHC 2216 (Admin) (Courts will not dictate when the Secretary of State could, or could not, lay regulations before Parliament. This is a matter for Parliament).
[33] Harry Woolf, Jeffrey Jowell, Catherine Donnelly and Ivan Hare, *De Smith's Judicial Review of Administrative Action* 8th edn (London: Sweet & Maxwell, 2018), para. 1-044.
[34] *R (on the application of Miller) v Secretary of State for Exiting the European Union (Birnie intervening)* [2017] UKSC 5.
[35] *R (on the application of Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41, [2020] AC 373.
[36] [2020] AC 373, at [31].

between political and legal questions in relation to its exercise of its supervisory jurisdiction over the executive. The Supreme Court held that the power to prorogue Parliament was not unlimited and that it impeded the effectiveness of other constitutional principles. It determined the scope of the prerogative and thus the legal limits of the prorogation power and concluded that the Prime Minister had exceeded those limits.

42. Unlike the High Court, the Supreme Court did not examine whether the prerogative power of prorogation had been used for an improper purpose. The Supreme Court focused on determining the scope of the prerogative power by reference to its effect on constitutional principles. Consequently, the Supreme Court's decision in *Miller; Cherry* does not provide evidence of a rejection of the doctrine of justiciability when applied to the review of the exercise of a prerogative power.

43. In addition, it is important to recognise that, although these two cases arose in highly political contexts, in each of these cases, there remained important questions of law for the courts to decide. In both decisions, the Supreme Court had to address where power lies in the British constitutional system: a quintessentially legal, as well as political, question. Moreover, these two high profile decisions arose in extraordinary times and do not reflect the usual pattern of cases that the courts are asked to decide.

44. Uncertainties can arise in any constitution and no code of judicial review could provide an answer for every possibility (especially evident in the extraordinary circumstances of Brexit).[37] It is the role of the court to articulate the legal position even within a highly charged political context. This is a duty of the judiciary in a rule of law state and an essential feature of a modern democratic state. The courts have the responsibility of adjudicating on the values and principles inherent within our constitutional structure.

[37] See, for example, *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP); 2017 (1) SACR 623 (GP) (22 February 2017), in which the Constitutional Court of South Africa had to adjudicate on whether the Government had the power to withdraw from an international Treaty or whether legislation was needed, the Constitution being silent on this issue.

45. Excluding the review of the courts on the basis of 'subjects or areas' is objectionable on the basis of the separation of powers. It would be constitutionally suspect and an effort to turn the clock back to before the *Council of Civil Service* judgment.[38] It is the role of the courts to ensure that public authorities act within the boundaries of their lawful powers. Moreover, this is unnecessary as the courts have exercised self-restraint and decided that some decisions are not amenable to the judicial process especially when, for example, matters of 'high policy' are raised.

46. If, contrary to our view, it was considered necessary to make some matters non-justiciable, particularly perhaps in relation to prerogative powers, this could be achieved through suitably nuanced legislation. If, on the other hand, some prerogative powers were placed on a statutory footing with clear limits on their extent and the circumstances in which they could be exercised, it would give greater clarity to the constitutional position. If some prerogative powers were placed on a statutory footing with clear limits on the exercise of executive powers and accountable to the legislature, the constitutional position would have greater transparency. The rule of law dictates that there must be a role for the courts to ensure that the executive is acting (at least) within the scope of its legal statutory powers. There must remain a role for the courts for this to be a constitutionally legitimate alteration to our system.

5: Grounds of Judicial Review

47. The call for evidence also asks, with regard to those areas of administrative power that are justiciable, 'on which grounds the courts should be able to find a decision to be unlawful' and 'whether those grounds should depend on the nature and subject matter of the power'. Section 1 of the Questionnaire included in the Call for Evidence asks both for comments in response to the specific questions provided to Government Departments, in addition to asking for suggestions for 'any improvements to the law on judicial review'.

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

48. In the specific questionnaire to Government Departments, the Call for Evidence provides a list of specific heads of judicial review. In the following paragraphs we discuss whether we believe there is sufficient clarity in the scope of application of judicial review. We discuss further, in more detail, whether codification would provide a means of clarifying a particular area of the law. In addition, we provide specific suggestions for improvements where we believe these may be merited.

5.1: Judicial Review for Mistake of Law and Mistake of Fact

49. The current case law demonstrates that courts will correct jurisdictional errors of administrative bodies and tribunals – i.e. a mistake made by an administrative body or tribunal as to whether it had the jurisdiction to act. It is also clear that English law generally considers legal errors to be jurisdictional errors, meaning that courts correct legal errors made by administrative bodies or tribunals when exercising their powers.[39] Although an argument can be made that this may grant too much power to the courts, it is important to recognise that this has been interpreted by the courts in a manner that recognises that there may, in some cases, be good grounds for not correcting a jurisdictional or legal error, particularly when it is recognised that the tribunal may have greater expertise to determine this issue, or where legislation clearly provides that this should be the case. In other words, courts are sensitive both to relative expertise of the administration and the need to respect democratic decision-making. Not only is there no need to modify the law in this area, but to do so may undermine legal clarity and upset the delicate balance drawn in this area between upholding the rule of law and the principles of good administration.

50. First, courts have shown flexibility by recognising that the meaning of a legal term may be reasonably open to a number of possible interpretations and, in these circumstances, courts grant a greater discretionary area of judgment to the administration. In *South Yorkshire Transport v Monopolies and Mergers Commission*, for example, the Commission was

[39] See e.g. *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *R v Lord President of the Privy Council, ex parte Page* [1993] AC 682.

empowered to investigate mergers where these would create a company with more than 25% of market share in a substantial part of the United Kingdom.[40] Whilst the court was prepared to correct the criteria used by the Commission to determine the meaning of a 'substantial part of the United Kingdom' it was only prepared to check the Commission's more detailed specification of these criteria, and their application to a particular area of the UK, through a test of rationality. This provided the Commission with the ability to exercise its discretion when determining whether a particular merger required regulation.

51. Second, courts have also recognised the need to give weight to the relative expertise of administrative bodies when making factual determinations as to the scope of jurisdiction. In *R (A) v Croydon*, for example, the court was asked to review determinations as to whether a particular individual was a 'child in need', therefore triggering an obligation on the part of the local authority to provide accommodation.[41] The Supreme Court distinguished between objectively verifiable facts and those facts that were not objectively verifiable in the same manner. Whilst the definition of 'child' was one to which there was only a yes or no answer – the legislation defining 'child' as a person under the age of 18 – the same was not true of whether a child was 'in need'. Therefore, whilst the court would correct a factual error made by a local authority as to whether an individual was a child, they would not correct an error as to whether the child was 'in need'. Again, this respects the discretionary choices of the local authority in an area that requires a local authority to make complex allocative choices.

52. Third, courts have granted discretion to legal determinations made by tribunals through the way in which they distinguish between 'errors of law' and 'errors of fact'. Legislation provides for appeals from the lower tribunal to the upper tribunal and from the upper tribunal to the high court as regards an error of law.[42] This requires courts to delineate between legal and factual errors, with only the former being able to be appealed or reviewed. In *R (Jones) v First Tier Tribunal*, the Supreme Court concluded that the distinction between 'fact' and 'law' should

[40] [1993] 1 WLR 248 (HL).
[41] [2009] UKSC 8, [2009] 1 WLR 2557.
[42] Tribunals, Courts and Enforcement Act 2007, sections 11 to 13.

be determined in a pragmatic manner.[43] This enables courts, for example, to recognise when the institutional composition and expertise of the upper tribunal means that a decision is better suited to determination by a tribunal rather than a court. Determining that an issue is one of fact removes it from oversight by the upper tribunal and the courts. Moreover, the Supreme Court also afforded relative power to tribunals to determine legal issues, again based, at least in part, on the relative expertise of tribunals to determine legal definitions.

53. Fourth, decisions of the lower tribunal can only be appealed to the upper tribunal when the upper tribunal has granted leave to appeal. The decision of the upper tribunal to refuse to grant leave to appeal can be subject to judicial review, but only if the applicant can show that the appeal raises an important point of principle or practice, or where there are other compelling reasons to hear the appeal. This provides an effective means of ensuring appeals are heard when needed, upholding the rule of law, whilst ensuring good administration by preventing the upper tribunal and, eventually, the courts being flooded by appeals which, in turn, could undermine the effective administration of justice.

54. Whilst the current situation in the UK may not be ideal and may raise issues of clarity, experience would suggest that this is an area of the law which requires courts to apply a range of factors in a contextual manner in order to strike the right balance between upholding the rule of law and respecting the relative autonomy of tribunals.

55. This assessment is supported by an analysis of how this issue is resolved in other jurisdictions. Although different solutions have been adopted in other jurisdictions, these differences are often explained by their different constitutional backgrounds, which may make them difficult to 'transplant' into English law. Moreover, it is not the case that these different solutions provide greater clarity. In the USA, for example, courts focus more on whether the legislation empowering a public body provides a clear legislative answer as to the scope of the jurisdiction of that particular public body, correcting legal errors that contradict clear legislative wording

[43] [2013] UKSC 19, [2013] 2 AC 48.

whilst allowing more discretion when the wording is not clear. Whilst this may appear to provide greater certainty, the case law applying this distinction suggests that the courts have found this a difficult distinction to apply in practice.

56. Consequently, it is hard to see how the law could be improved other than through the courts developing the list of relevant criteria through their application to a range of particular circumstances.

5.2: Judicial Review for Disappointing someone's legitimate expectations

57. There are two main types of legitimate expectation – procedural and substantive legitimate expectations. Procedural legitimate expectations arise from representations, past practice and policies that generate a legitimate expectation that the administrative body will follow a particular procedure when adopting an administrative decision. Substantive legitimate expectations arise from a representation as to a substantive outcome in a particular case.

58. This submission argues that there is no need for further clarification of the law regarding legitimate expectations. First, the lack of clarity surrounding legitimate expectations concerns where to place legitimate expectations in the taxonomy of heads of review, or the precise nature of the theoretical justifications for protecting substantive legitimate expectations. It has not created uncertainty as concerns the extent to which the courts protect procedural and substantive legitimate expectations in practice. Second, there is little evidence of the doctrine of legitimate expectations interfering with principles of good administration. On the contrary, the protection of legitimate expectations is governed by the need to promote principles of good administration and is often applied in a manner that facilitates good administration. Indeed, this is one aspect of the requirement that decisionmakers produce impact assessments for their decisions. Third, there is no evidence of the courts using this head of review to substitute its assessment of the outcome of a decision for that of the administration. Whilst the courts do balance the reasons for and against protecting a legitimate expectation, they do so in a manner that is deferential, particularly when assessing polycentric policy choices, and

are mindful of the need to ensure that they avoid substituting their assessment of the outcome for that of the administration.

5.2.1: Procedural Legitimate Expectations

59. A procedural legitimate expectation often adds to the procedural protections that would be provided through the provisions of natural justice. For example, a statement in a Government White Paper that 'Before a decision to proceed with the building of new nuclear power stations, there would need to be the fullest public consultation and the publication of a white paper setting out the Government's proposals' created a legitimate expectation of such consultation.[44]

60. The protection of procedural legitimate expectations is fairly uncontroversial in English administrative law for four reasons. First, the protection of procedural legitimate expectations does not place a fetter on the powers of a public body. Whilst a procedural legitimate expectation of consultation, for example, may require a public body to consult a wide range of bodies before adopting a particular policy, the public body is still free to choose which policy to adopt, within the lawful boundaries of its discretionary power. The public body exercises its own choice when selecting a particular policy outcome.

61. Second, courts have recognised that there may be circumstances where there are justifications for a public body to resile from a procedural legitimate expectation. For example, national security may justify resiling from a legitimate expectation of consultation.[45] The ability for public policy grounds to justify resiling from a procedural legitimate expectation was recently applied by the Supreme Court in *Finucane*.[46] The Court concluded that it was lawful for the Government to resile from its earlier statements that had given rise to a legitimate expectation

[44] *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry*, [2007] EWHC 311 (Admin).
[45] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
[46] *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7, [2019] 3 All ER 191.

of a public inquiry into the death of Patrick Finucane. Lord Kerr stated that: 'where political issues overtake a promise or undertaking given by government, and where contemporary considerations impel a different course, provided a bona fide decision is taken on genuine policy grounds not to adhere to the original undertaking, it will be difficult for a person who holds a legitimate expectation to enforce compliance with it'.[47] Here, after the original statement concerning public inquiries, a change of Government led to the adoption of a new policy: that there should not be long-running, open-ended and expensive inquiries into the past activities in Northern Ireland. The application of this new policy in the light of the earlier promise of a public inquiry was considered by civil servants and relevant ministers at a meeting chaired by the Prime Minister, which concluded in favour of a paper-based independent review of Patrick Finucane's murder. This clearly demonstrates that the courts are sensitive to the need for public bodies to alter policies in the light of changing circumstances, in a manner that takes account of principles of good administration and effective government.

62. Third, a procedural legitimate expectation can only arise when the expectation is sufficiently clear and precise. It is for the applicant to demonstrate this. Consequently, the current legal test aims to ensure that spurious claims of legitimate expectations do not interfere with good administration and effective government.

63. Fourth, a legal doctrine that provides for public bodies to adhere to clear specific representations, general policies, or past behaviour supporting the use of a particular procedure promotes legal certainty for both the administration and individuals and can facilitate confidence in the administration. The law has effectively balanced these aims with that of allowing public bodies to resile from procedural legitimate expectations when there are overriding justifications to do so. This provides an effective balance, recognising how procedural legitimate expectations do not directly limit the range of policy options open to public bodies.

[47] *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)*, [76].

5.2.2: Substantive Legitimate Expectations

64. English law has recognised substantive legitimate expectations since the Court of Appeal decision of *Coughlan* in 2000.[48] The existence of a doctrine of substantive legitimate expectations has since been recognised by the House of Lords, the Privy Council and the Supreme Court.[49] Recent decisions of the Supreme Court have clarified the law to a considerable extent. Moreover, this narrowing down of the doctrine and the manner in which courts focus on determining whether a public body can resile from substantive legitimate expectations, demonstrate that courts exercise sufficient care to ensure they do not interfere too greatly with the discretionary powers of public bodies. In addition, the protection of substantive legitimate expectations can facilitate good administration.

65. Recent developments in the case law have helped to significantly clarify the law in this area. First, substantive legitimate expectations are not protected in situations where an individual is merely relying on an expectation that a policy will apply, but the public authority later changes that policy. More is needed to generate a substantive legitimate expectation – for example a specific representation or promise to a small group of individuals of a particular substantive outcome.[50] Even when an individual has acted to their detriment in reliance on the policy, this may be insufficient to establish a substantive legitimate expectation. However, a series of communications between a public body and an individual concerning the application of a general policy, on which an individual has relied, may create a secondary procedural legitimate expectation. In these cases, the public body cannot abruptly change policy without providing some procedural protections – mostly by notification and potentially consultation – before

[48] *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213.
[49] *R (BAPIO) v Secretary of State for the Home Department* [2008] UKHL 27, [2008] 1 AC 1003; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 45; *Paponette v A-G* [2010] UKPC 32, [2012] 1 AC 1; *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546; *R (Gallaher) v Competition and Markets Authority* [2018] UKSC 25, [2019] AC 96; and *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7, [2019] 3 All ER 191.
[50] *R (Bhatt Murphy) v Independent Adjudicator; R (Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755.

changing a policy.[51] Again, the case law requires evidence of specific promises and representations to provide procedural protections when a public body changes a general policy.[52]

66. Second, it is now clear that individuals do not have to demonstrate detrimental reliance in order to demonstrate the existence of a substantive legitimate expectation.[53] However, detrimental reliance may be one factor courts take into account when deciding whether a public authority can resile from a substantive legitimate expectation. It is more likely to be an abuse of power to resile from a specific promise or reputation when an individual has relied on this promise or representation to their detriment.[54]

67. Third, recent case law has clearly distinguished between situations in which a public body fails to apply a policy to a particular individual and those situations in which an individual relies on a policy, but the policy is later changed. If a public body publishes a policy setting out how it will exercise a discretionary power, then the public body must apply that policy to an individual unless there are good reasons not to do so.[55] In a similar manner, if such a policy is communicated between branches of the administration, the law will require that this is applied to an individual unless there are good reasons not to do so.[56]

68. In addition, in cases that do concern sufficiently clear and unambiguous representations, courts have developed a clear approach. It is for the applicant to demonstrate the existence of a substantive legitimate expectation. It is then for the public body to provide reasons for why they are resiling from that representation. The court examines the justification, applying a test of proportionality, modified to take account of the subject matter of the decision, in order to

[51] *R (Bhatt Murphy) v Independent Adjudicator; R (Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755.
[52] *R (Luton Borough Council) v Secretary of State for Education* [2011] EWHC 217 (Admin)
[53] *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7, [2019] 3 All ER 191.
[54] *R (on the application of Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363.
[55] *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546
[56] *R (WL (Congo)) v Secretary of State for the Home Department* [2012] 1 AC 245.

determine whether there is a sufficient justification to resile from a substantive legitimate expectation.

69. Codification would not be able to provide greater clarity in this area of the law. This can be illustrated by an examination of the cases which have tried to synthesise the law on legitimate expectations. In the most recent case examining substantive legitimate expectations in the Supreme Court, for example, Lord Kerr synthesised the case law as follows:

'where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context.'[57]

70. In a similar manner, Laws LJ provided his account of substantive legitimate expectations as follows:

'The search for principle surely starts with the theme that is current through the legitimate expectation cases. It may be expressed thus. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public.'[58]

71. These statements could form the basis of a codification of the law of legitimate expectations. Whilst they provide a clear account of the doctrine of substantive legitimate expectations, they also require further specification through a series of cases applying these principles to

[57] *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7, [2019] 3 All ER 191, [62].
[58] *R (on the application of Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, [68].

particular situations. It is hard to see how this would add further clarity to the current legal situation. In addition, given the need for the courts to balance a range of factors, to provide a precise list that was fully able to take account of all situations in which the doctrine of legitimate expectations may arise may produce a code that is too unwieldy and insufficiently responsive to the needs of fairness to the individual and the principles of good administration.

72. Whilst it may be possible to produce a list of factors that may influence whether a court will conclude both that a legitimate expectation has been created by a public authority, and that there were not good reasons to permit the public authority to resile from this promise, again the application of these principles would also be further refined in their application in specific examples. Laws LJ, for example, listed the following as factors that would count in favour of the protection of a substantive legitimate expectations: (i) when the representation relied on amounts to a clear and unambiguous promise; (ii) where there is detrimental reliance; (iii) where the promise is made to an individual or a specified group of individuals. On the other hand, when the public body is dealing with wide-ranging or macro issues of public policy, there are good reasons for the public body to be able to resile from a substantive legitimate expectation.[59] However, as Laws LJ recognised, and as the case law applying these factors demonstrates, each individual case is judged in the round. Even setting out criteria in a code may fail to provide further clarity.

73. It has been suggested that it may be better for courts to reverse the decision in *Coughlan*, ensuring that the law only protects procedural and not substantive legitimate expectations. However, we believe that this would be a move in the wrong direction. First, despite the perceived danger of courts substituting their assessment on the merits of the case or interfering too greatly in the choices of public authorities, recent cases demonstrate that courts apply the doctrine of substantive legitimate expectations in a manner that restricts its scope of application. Whilst courts have now recognised a principle of the consistent application of public policies, they have been cautious not to adopt a general principle of

[59] *R (on the application of Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, [69].

fairness as a distinct head of review, preferring, instead, for fairness to be protected either through the doctrine of legitimate expectations or through the application of *Wednesbury* unreasonableness.[60] Moreover, the doctrine of legitimate expectations has been applied in a manner that is sensitive to the need to respect policy choices of the administration,[61] and to macro-economic and polycentric decisions.[62]

74. In addition, the protection of substantive legitimate expectations can facilitate good administration. Policies setting out how public bodies exercise their discretion can provide legal certainty and ensure consistency. In addition, courts have demonstrated an awareness of the needs of good administration when determining whether to protect a substantive legitimate expectation. Whilst failing to uphold principles of good administration may provide a justification for ensuring that a policy is applied to an individual,[63] courts also recognise that good administration may allow a public body not to apply a policy when the policy itself appears to have misconstrued the scope of the administration's duties or powers.[64] Protecting substantive legitimate expectations increases confidence in the administration by ensuring that, unless there are good public policy grounds for doing so, public bodies adhere to their promises and representations. The current law on substantive legitimate expectations, particularly given the narrow range of circumstances under which the doctrine is applied, provides a good balance between protecting those who have relied on representations and enabling public bodies to change policies when there are good grounds for doing so.

5.3: Judicial Review for Wednesbury unreasonableness

75. Very few cases succeed solely on '*Wednesbury* unreasonableness'/irrationality or proportionality grounds of review. The threshold for unreasonableness (or irrationality)[65] is

[60] *R (Gallaher) v Competition and Markets Authority* [2018] UKSC 25, [2019] AC 96.
[61] *Re Finucane's application for Judicial Review (Northern Ireland)* [2019] UKSC 7, [2019] 3 All ER 191.
[62] *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 107, [[2002] 1 WLR 237.
[63] *R (on the application of Rashid) v Secretary of State for the Home Department* [2008] EWHC 232 (Admin).
[64] *R (on the application of Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363.
[65] *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374.

'notoriously high', and a claimant making a challenge under that head has 'a mountain to climb'.[66] Similarly, the courts have been clear that proportionality (which is only applied in a narrow set of circumstances), while involving the making of value judgments, is to be assessed objectively and is not an avenue for merits review.[67]

76. Reasonableness/rationality applies to all administrative decisions,[68] excluding cases involving rights incorporated from the European Convention on Human Rights into domestic law via the Human Rights Act 1998 and those involving EU law in which a test of proportionality is employed. Proportionality 'reasoning' – in particular, questions of the proper weight to be afforded to relevant considerations and the balancing of competing interests – has also been adopted in cases involving fundamental common law rights.[69]

77. There has been considerable development in the scope and content of the reasonableness test which 'is being increasingly rephrased to a decision which is "within the range of reasonable responses".'[70] There are two 'ways' in which a decision may be outside the range of reasonable responses:

> 'The first is concerned with whether the decision under review … is outside the range of reasonable decisions open to the decision-maker. … The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it – for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error…'[71]

[66] *R v Lord Chancellor Ex p. Maxwell* [1997] 1 WLR 104 at 109, per Lord Bingham.
[67] *R (SB) v Denbigh High School* [2006] UKHL 15, [2006] 2 W.L.R. 719, [30].
[68] *R v North and East Devon HA Ex p. Coughlan* [2001] Q.B. 213 at 243.
[69] See, for example, *R (Daly) v Home Secretary* [2001] UKHL 26, [2001] 2 AC 532 and *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591.
[70] Woolf et al., (eds) *De Smith's Judicial Review* (8th edn, Sweet & Maxwell, 2019) at 11-021.
[71] *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649, [98].

78. As for proportionality, in cases involving qualified Convention rights (for instance, the right to private life in Article 8), there are two questions a court must ask and answer. First, is the interference with the individual's right 'in accordance with the law'? And, second, is that interference 'necessary in a democratic society'? The former is an 'absolute requirement' and, in 'meeting it, Convention states have no margin of appreciation'. It is only in respect of the second question – namely, whether the interference is necessary in a democratic society – that proportionality arises.[72]

79. Proportionality is also a central tenet of EU law and has been held to entail 'a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method.'[73] While there is 'some debate as to whether there is a third question, sometimes referred to as proportionality stricto sensu: namely, whether the burden imposed by the measure is disproportionate to the benefits secured. In practice, the court usually omits this question from its formulation of the proportionality principle.'[74] Where it is applied, it tends to be addressed as a discrete issue, and 'means no more than that there should be a proper relationship between the advantages to be gained by the objective of the measure and the harm caused to fundamental rights in achieving that goal.'[75]

80. The domestic courts have conceptualised the proportionality test as applied to Convention rights incorporated via the Human Rights Act 1998 as involving the following four questions:

    (a) is the legislative objective sufficiently important to justify limiting a fundamental right?
    (b) are the measures which have been designed to meet it rationally connected to it?
    (c) are they no more than are necessary to accomplish it? and,

[72] *R (P) v Secretary of State for the Home Department* [2019] UKSC 3; [2020] AC 185, [12], per Lord Sumption.
[73] *R (on the application of Lumsdon and others) v Legal Services Board* [2015] UKSC 41, [2016] AC 697, [33].
[74] *R (on the application of Lumsdon and others) v Legal Services Board* [2015] UKSC 41, [2016] AC 697.
[75] *R (On the application of the Friends of Antique Cultural Treasures Ltd v The Secretary of State for the Department of Environment, Food and Rural Affairs* [2020] EWCA Civ 649, [105].

(d) do they strike a fair balance between the rights of the individual and the interests of the community?[76]

While this 'test' has been developed in the context of domestic rights – including those incorporated via the Human Rights Act 1998 – the courts have adopted a similar (if not analogous) approach in cases involving fundamental common law rights.[77]

81. As noted above, those questions may also be relevant in cases involving fundamental common law rights.[78] In such cases, while a 'more loosely structured proportionality challenge' may occur than the four-stage test outlined immediately above, that challenge nevertheless 'involves a testing of the decision in terms of its "suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages".'[79]

82. While much academic and judicial attention has been dedicated to the question of whether there should be a move away from reasonableness to proportionality including in cases that do not involve rights,[80] that has not occurred[81] and the courts have refused to extend its application to cases that do not involve fundamental rights.[82] In non-rights cases, proportionality has been described as a 'singularly inapt test'.[83]

83. Proportionality challenges rarely succeed on the basis of stages (a) and/or (b) of the test set out above. It is rare for a court to conclude that there is no rational connection between the

[76] *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 and *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621.
[77] See, for instance, *Kennedy v Information a Commissioner (Secretary of State for Justice intervening)* [2014] UKSC 20, [2015] AC 455.
[78] See, in particular, *Kennedy v Information Commissioner (Secretary of State for Justice intervening)* [2014] UKSC 20, [2015] AC 455.
[79] *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] AC 1355 at [282], per Lord Kerr.
[80] *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455; *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591; *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, [2016] AC 1457.
[81] See, for instance, the recent Court of Appeal case of *Browne v Parole Board for England and Wales* [2018] EWCA Civ 2024, 9 WLUK 246.
[82] *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] AC 1355, [283], per Lord Kerr.
[83] *Browne v Parole Board of England and Wales* [2018] EWCA Civ 2024, [38], per Coulson LJ.

challenged decision or measure and the objective it seeks to pursue.[84] Rather, if there is a 'weak' connection, it will be relevant 'when one turns to [the third and fourth] requirements' of the proportionality analysis.[85]

84. While the 'margin of appreciation' is a Strasbourg-specific concept that does not find direct application in domestic law when applying the Human Rights Act 1998, the domestic courts have developed an 'analogous concept' 'which has 'been variously described as a "discretionary area of judgement", a "margin of discretion" or in other ways, for example to refer to the appropriate weight which is to be given to the judgement of the executive or legislature depending upon the context'.[86] Accordingly, even in cases involving a focus on the necessity of the impugned decision or interference and/or the balance struck (i.e. stages (c) and (d) of the proportionality test), the courts are 'slow to occupy the margin of judgment more appropriately within the preserve of Parliament.'[87] This 'margin of judgment' rests on 'two foundations' namely, the institutional competence of the courts vis-à-vis Parliament and democratic legitimacy.

85. It is 'well settled' that 'the best guide as to whether the courts should deal with the issue is whether it lies within the field of social or economic policy on the one hand or of the constitutional responsibility which resides especially with them on the other' and the fact that the issue is 'political … also adds weight to the argument that … it is best left to the judgment of the legislature.'[88] Thus, courts have afforded decision-makers a wide margin of judgment in cases involving issues such as the deportation of foreign criminals,[89] assisted suicide,[90]

[84] Lord Kerr's judgment in *R (On the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657 is something of an anomaly in this respect.
[85] *R (On the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657, [111].
[86] *R (On the application of McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559, [2020] 2 All ER 813, [80].
[87] *R (On the application of McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559, [2020] 2 All ER 813, [82].
[88] *Re G (Adoption: Unmarried Couples)* [2008] UKHL 38, [2009] 1 AC 173, [48].
[89] *Ali v Home Secretary* [2016] UKSC 60, [2016] 1 WLR 4799.
[90] *R (On the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657.

humanist marriage[91] and the recording of a transgender person's biological sex on a child's birth certificate[92] to name but a few examples.

86. As noted above, courts have repeatedly disavowed a move towards merits review when applying the proportionality test: 'None of this means that in human rights cases a court of review is entitled to substitute its own decision for that of the constitutional decision-maker.'[93]

87. The limitations of proportionality review are also apparent in the context of substantive legitimate expectations when courts weigh the requirements of fairness against the overriding interests proffered for frustration of the expectation, as discussed above.

88. Appellate courts have also taken a restrictive approach to the standard of review in appeals challenging a trial judge's assessment of proportionality. As Elias LJ has observed: 'The appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong'.[94]

89. While it is still debated as to whether the proportionality test and the reasonableness/rationality test are 'bluntly opposed to each other and mutually exclusive',[95] what is clear is that the proportionality test offers a degree of structure and clarity that 'reasonableness', at least *prima facie* does not:

[91] *R (On the application of Harrison) v Secretary of State for Justice* [2020] EWHC 2096 (Admin), [2020] 7 WLUK 481.
[92] *R (On the application of McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559, [2020] 2 All ER 813.
[93] *R (On the application of Lord Carlile of Berriew QC and others) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945, [31].
[94] *R (C) v Secretary of State for Work and Pensions* [2016] EWCA Civ 47; [2016] PTSR 1344, [34] cited with approval in *R v Chief Constable of Greater Manchester Police* [2018] UKSC 47, [2018] 1 WLR 4079, [64].
[95] *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] AC 1355, [278], per Lord Kerr.

'The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages'.[96]

90. Indeed, that was one of the key factors cited in favour of replacing the reasonableness standard with an all-encompassing proportionality test in all administrative law cases.[97] As noted above, courts have recognised that proportionality has limitations in cases that do not involve rights as they do not readily lend themselves to the examination of necessity and balance in stages (c) and (d).[98]

91. Moreover, the outcome of a review is, in the main, the same regardless of which 'test' is applied.[99] This is attributable to the fact that courts vary the standard of review – whether in cases involving proportionality or in those that turn on reasonableness – depending on the context of the case.[100]

92. Where the decision involves political and economic considerations, the threshold for a successful challenge based on unreasonableness or irrationality is particularly high.[101] This is because 'the margin of discretion' afforded to the decision-maker when reviewing the reasonableness of their decision should be greater 'in any context where … the courts are asked to review the administration's decision-making in an area which is within the administration's particular competence.'[102]

[96] *Kennedy v Charity Commission* [2014] UKSC 20, [2015] A.C. 455, [54], per Lord Mance.
[97] See, for instance, *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532.
[98] See, for instance, *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] AC 1355, [284], per Lord Kerr.
[99] See, for instance, *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591.
[100] *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455, [51].
[101] See, for instance, *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, [2015] 3 All ER 1; *R (Asif Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789, [2002] QB 129, [49]; *R v Secretary of State for the Home Department; Ex parte Bugdaycay* [1987] AC 514, at 531
[102] *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, [2015] 3 All ER 1, [142].

93. As an illustration of the flexibility with which the test is applied, the Court of Appeal has confirmed that a broad measure may be reasonable even if it is both 'over- and under-inclusive in that it catches some cases in which there is no or no significant problem and fails to catch some cases in which the problem occurs … What matters is that overall a reasonable balance is struck.'[103]

94. When applying either the reasonableness or proportionality tests, the courts will moderate the intensity of their review depending on the nature of the case. Thus, when challenged decisions are within a decision-maker's particular competence or involve macro-policy considerations, courts afford decision-maker's a wide margin of discretion.

95. As can be seen from the above, judicial review in this area has been developed in a manner that is sensitive to the need to protect policy choices of public bodies and to facilitate good administration. There is also reluctance to expand proportionality beyond an application to cases involving rights and this too is applied in a manner which is sensitive to complex policy choices. Where proportionality is preferred, it is more due to the possibility that it would provide greater structure and clarity than because it would provide a more stringent form of review beyond when this is required in Convention rights cases. In all cases, the matter remains one of review and not appeal.

5.4: Rules on who may make an application for judicial review

96. Standing reflects the law's view of the role of citizens in the state, as it determines the circumstances in which a concerned citizen will be able to bring proceedings, in his or her own personal interest or in the wider interest, to test the lawfulness of governmental or administrative rules, decisions or actions. We believe that the current rules of standing in England and Wales provide an effective balance between these interests and there is no need

[103] *Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 778, [50] citing with approval the Divisional High Court in *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649, [98].

for further modification. In addition, the provisions on standing are already codified, and are applied by the court in a manner that balances the requirements of the rule of law, good administration, and the need to separate political and legal debate.

97. The position adopted by English law has for centuries been that, subject to certain nuances considered below, people are allowed but not compelled to be merely self-interested in maintaining the rule of law; but that limits have to be maintained to protect the courts against vexatious trouble-makers. In addition, people without the resources and expertise to litigate economically and effectively may be aided by groups who are able to challenge decisions on their behalf. What is sometimes called the 'law' of standing has for centuries been, in reality, a matter of judicial discretion, exercised according to certain principles but maintaining sufficient flexibility to permit courts to exercise their supervisory role over the lawfulness of actions of state bodies and officials where there is reason to fear that those actions are unlawful.

98. Standing is thus at the heart of the constitutional relationship between citizen and state. But like many matters governed by constitutional principle, it is fact-sensitive and governed by the exercise of judgment rather than rules. At the same time, challenges to the lawfulness of acts and decisions of inferior courts and tribunals and governmental acts and decisions consumes public resources, including the increasingly scarce time of courts and tribunals and the human and financial resources of the officials and bodies whose act and decisions are challenged. The balance is currently maintained through requiring that people seeking judicial remedies must have a 'sufficient interest in the matter to which the application relates'[104] – sufficient, that is, to justify the use of public resources in ensuring lawful government in the circumstances of the case.

[104] Senior Courts Act 1981, s. 31(3).

99. The determination of a sufficient interest has always been highly fact-specific and is also strongly related to the nature of the remedy being sought. Before the AJR procedure was introduced by reform of what was then Rules of the Supreme Court Order 53 in 1977 (coming into force in 1978), judges approached standing questions rather differently in respect of each remedy.[105] This gave rise to a series of nuanced standing requirements, sensitive both to the nature of the case and to the remedy being sought. The 'sufficient interest' test, found in the 1977 version of Order 53 of the Rules of the Supreme Court, also found in the Senior Courts Act 1981, section 31(3), was calculated to permit the then flexible approach to be carried forward into a procedure in which all the remedies were potentially available. Whilst people often speak of 'sufficient interest' as if it were a test for standing, it was really an umbrella term avoiding the necessity for the drafter to specify the circumstances and remedies in which different levels of interest would apply. This remains the case today. The matter is ultimately one governed by judicial discretion, assessing the suitability of the claimant in the light of the nature of the issue and its social, legal or constitutional importance.

100. In the modern AJR procedure, principles relating to standing rarely give rise to problems, for two reasons. First, they are sufficiently flexible to take account of the wide variety of situations in which judicial review may be sought. Secondly, if an applicant's interest in a case is insufficiently close to justify an application, another applicant who is more closely involved can usually be found.

101. Where a claimant asserts breach of the claimant's own legal right, it will always be sufficient (if we leave aside exceptional cases in which, for example, a persistently vexatious litigant requires the leave of the court, or a person lacks capacity to act in his or her own right). Actions to vindicate private rights may sometimes be brought through the AJR procedure, but the vast majority of applications are made by people who are not trying to vindicate rights but are aggrieved by a decision that affects them but does not interfere with their rights. When an

[105] On the pre-1978 position, see S. A. De Smith, *Judicial Review of Administrative Action,* 3rd edn (London: Stevens, 1973), *passim*, and particularly the passages referred to below.

applicant challenges an individual decision affecting him or her alone, concerning denial or deprivation of a benefit rather than infringement of a right, there is no difficulty in establishing that the applicant has a sufficient interest in the matter.

102. It becomes more difficult in four circumstances: first, when a person challenges a rule or policy under which a decision is made rather than the individualised decision itself; secondly, when a person challenges the lawfulness of a benefit granted to someone else that does not directly affect any personal interest of the applicant; thirdly, when a person seeks to represent before a court the interests of another person or people who is or are unable or unwilling to bring the challenge in person; fourthly, when a person challenges a decision or action affecting a community, or the group of people, or the population as a whole, in which the applicant, while interested, has no greater stake than anyone else. Each of these is considered in turn.

103. Challenging a rule, guidance or policy is potentially problematic because the rule, guidance or policy will probably have been calculated to apply to the affairs of a wide range of people, not merely to a limited class of identifiable persons. If the challenged instrument does not interfere with legal rights, who, if anyone, should be allowed to challenge its lawfulness? From a private-law perspective, the answer may be 'Nobody', but from a public-law perspective the strong public interest in ensuring that government is conducted according to law and that burdens are not imposed on people, or benefits denied to them, unlawfully. As it can be expected that front-line decision-makers will act in accordance with the rule, guidance or policy (and, if it is lawful, would be acting unlawfully in not doing so), the lawfulness of the instrument is of great importance to the principle of government under law. There is a strong public interest in efficient administration, but there is an equally strong public interest in lawful administration. Standing should therefore be accorded to any person or organisation affected by the rule, guidance or policy. This has long been largely uncontroversial.[106]

[106] See, e.g., *Padfield v Minister of Agriculture, Fisheries and Food [*1968] AC 977, HL, *Royal College of Nursing v Department of Health and Social Security* [1981] AC 800, HL, and *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, HL.

104. When a person challenges a decision conferring a benefit on someone else, the question is whether the challenger is more than a busybody interfering with matters that do not affect him or her. Since *R v Commissioner of Inland Revenue, ex parte National Federation of Self-Employed and Small Businesses Ltd,*[107] the position has been that standing will not be accorded to someone who is regarded as meddling in strictly personal and confidential matters between a public body and other individuals, but this stance may be relaxed in order to allow people who can be trusted to bring to bear appropriate expertise, resources and experience to litigate issues of serious constitutional, legal and social concern. Accordingly, the more significant the constitutional issue, the wider will be the range of potential challengers, although a genuine personal (rather than legal) interest will always be needed, as well as appropriate expertise and resources.

105. This can be seen in challenges to grants, whether of overseas aid,[108] of parole,[109] or planning permission without proper compliance with the duty to give reasons,[110] or challenges to government policies favouring authorisation of a new runway at Heathrow Airport.[111] This does not mean that the requirement for standing is a dead letter. In several recent cases, courts have decided that challengers lack standing. In the *DSD* case, the Mayor of London was refused standing to challenge the Parole Board's decision that a prisoner should be released from prison after serving eight years of a sentence of indefinite detention for public protection for serious sexual offences while working as a cab-driver in London, because he sued as a public official whose functions were not related to the criminal justice system.[112] A victim and a newspaper were, by contrast, regarded as having standing. Generally the law recognises that ordinary citizens (as opposed to public bodies and officials with inherently circumscribed functions) have a genuine emotional and personal interest in the provision of public goods and

[107] [1982] AC 617, HL.
[108] *R v Secretary of State for Foreign and Commonwealth Affairs, ex part World Development Movement*, [1995] 1 WLR 386.
[109] *R (DSD) v Parole Board for England and Wales* [2018] EWHC 694 (Admin), [2019] QB 285, DC.
[110] *R (CPRE Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR. 108.
[111] *R (Plan B Earth and others) v Secretary of State for Transport and others* [2020] EWCA Civ 214, CA.
[112] [2018] EWHC 694 (Admin), [2019] QB 285, [108]-[109].

in maintaining the Rule of Law in respect of those public goods, particularly but not exclusively when the public goods have effects in the areas where those citizens live and work.

106. When a person seeks to represent before a court the interests of another person or people who is or are unable or unwilling to bring the challenge in person, there are many advantages to good administration and government under law. It allows knowledgeable, experienced, expert people to prepare and advance cases on behalf of those who might lack the resources and knowledge to bring them effectively as individuals, and reduces the burden on the court and tribunal systems of having to cope with myriad challenges to decisions by inexpert litigants in person.[113] It also allows the lawfulness of instructions, rules, policies and guidance to be determined authoritatively, helping administrators by providing clarity as well as keeping them within the boundaries of their powers. Clarifying the scope of a public body's powers helps the body to manage its programmes and predict the effect of future decisions.[114] It is therefore not surprising that courts have been willing to hear organisations such as Child Poverty Action Group and Shelter, both as principal parties and as interveners, in challenges to regulations affecting social security and housing regulations.

107. When a person challenges a decision or action affecting a community, or group of people, or the population as a whole, in which the applicant, while interested, has no greater stake than anyone else, broadly similar considerations apply. The greater the constitutional implications, the more important it is to have the legality of actions or decisions tested in court, because independent judicial assessment of legality is a key requirement both of parliamentary sovereignty (as otherwise compliance with statute would be no more than a matter of opinion) and of government under law (as otherwise compliance with law in general would be no more than a matter of opinion). Thus courts have accepted that private citizens have standing to litigate matters which would not otherwise be brought before the court if they have a legitimate concern and are in some way potentially affected, such as the use of the

[113] See for example *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289.
[114] See e.g. *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54, [2011] 2 AC 15.

international development budget,[115] the lawfulness of foreign military intervention,[116] the lawfulness of giving notice of the United Kingdom's intention to withdraw from the European Union without parliamentary authority,[117] the lawfulness of the decision of the Serious Fraud Office to discontinue an investigation into negotiations for an arms contract involving Saudi Arabia,[118] and the Prime Minister's decision to advise Her Majesty to prorogue Parliament.[119] In some of these cases there was a question as to whether the issues were justiciable, but the sufficiency of the claimant's interest in the matter was undisputed: they had sufficient interest to bring before the courts matters of great public interest and constitutional significance.

108. It seems to us to be proper for people to be able to bring such claims before the courts. Judicial review, and related procedures, have a profoundly important function in a functioning representative democracy. Accountability of decision-makers through the political process for their decisions is a necessary condition for representative democracy, but not a sufficient one. Not all public officials are accountable to Parliament, and even for those who are the process of accountability is unreliable and the ability to secure a change of decision is rare. Accountability to the electorate is intermittent and a blunt weapon incapable of remedying specific decisions. Neither form of accountability necessarily takes account of the lawfulness of decisions. It needs to be recognised that exempting decisions from legal challenge, by way of standing rules or otherwise, goes against the grain of democracy under the rule of law. Exemption may exceptionally be justifiable, but the onus is on those claiming an exemption to establish that the damage to the constitution from allowing unlawful decisions to go unchecked is justified by extremely important, demonstrable benefits in each case.

[115] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement* [1995] 1 WLR 386.
[116] *R (Campaign for Nuclear Disarmament) v Prime Minister and others* [2002] EWHC 2777 (Admin), [2003] ACD 36.
[117] *R (Miller) v Secretary of State for the European Union* (where the Government accepted that it was appropriate for the court to adjudicate on the matter and so did not challenge the claimant's standing) [2017] UKSC 5, [2018] AC 61.
[118] *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756.
[119] *R (Miller) v Prime Minister (Lord Advocate and others intervening)* [2019] UKSC 41, [2020] AC 373.

109. Even more significantly, representative democracy works well for people with political influence, including wealth, connections, and an ability to come together and mobilise to protect their interests. It works badly for people who lack wealth, connections, and an ability to mobilise. Poor, marginalised, and underprivileged people have no leverage in the political system and can often protect their interests only through organisations established to represent them in political, administrative and, if necessary, judicial processes. The judiciary cannot fill gaps in protection in the political field, but they can ensure that, on the issue of legality, largely unenfranchised people such as asylum-seekers, prisoners, mental-health patients and homeless people have a forum to which they can resort for an independent and impartial adjudication.

110. Judicial review has a great advantage: it allows issues which may affect many people to be determined authoritatively in a way that governs all the cases, instead of leaving it to tribunals or lower courts to make decisions about lawfulness in individual cases while leaving it open for the matter to be re-litigated in every case that comes along. From the point of the administration, it is useful to have a clear answer to a question of law relating to the powers and duties of officials, even if the judgment goes against the public body. At best, it provides certainty for the future. If the judgment presents real administrative difficulty, the Government is usually in a position to promote amending legislation, as happened, for example, following the judgment of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission*.[120] Even in such a case it has the advantage of pushing the matter back into the political sphere as proposals for amendment are negotiated between different public-sector bodies and with members of both Houses of Parliament. Judicial review and representative democracy are allies.

[120] [1969] 2 AC 147, HL.

6: *Remedies*

111. In addition to specific questions concerning remedies, the Terms of Reference also asks: 'are remedies granted as a result of successful judicial review too inflexible?'; and 'if so, does this inflexibility have additional desirable consequences'? It also asks whether alternative remedies would be beneficial.

112. It is often said that any error of law (which today includes a wide variety of errors, including some errors of fact) renders a purported decision a 'nullity' as a matter of law. The justification for this claim is that a public official acting unlawfully steps outside the scope of any legal authority, and accordingly the purported 'decision' is, in law, no decision. The idea that an error of law has this effect is powerful, as (for example) it underpinned the decision in *Anisminic Ltd v Foreign Compensation Commission*[121] that a statutory provision excluding the jurisdiction of the courts to call in question a determination of the Commission did not protect a 'determination' held to be infected by the Commission's having misinterpreted a provision in an Order in Council under which it acted. It also underpinned the judgment of a majority of the Supreme Court in *Ahmed v H.M. Treasury (No. 2)*[122] that certain asset-freezing orders made in relation to people suspected of involvement in terrorism under the United Nations Act 1946 had been made unlawfully and so were of no effect regardless of whether the court deferred making a declaration to that effect: nullity flowed from the breach of law, and did not depend on the grant of any remedy.

113. In reality, however, this idea has never operated automatically to determine the impact of a legal flaw on the effect of an impugned decision or instrument. There are four reasons for this. First, regulations and decisions which appear to be regular have to be acted and relied on by people to whom they are directed. It is unsafe to act on one's own assessment that the regulation or decision is probably legally flawed. As a result, steps may be taken, money paid, penalties levied, building projects started, and so on, in reliance on the decision or regulation

[121] [1969] 2 AC 147, HL.
[122] [2010] UKSC 5, [2010] 2 AC 534.

before someone challenges its lawfulness before a court and seeks an appropriate remedy. If a court authoritatively determines that it was unlawful, it may not be simple, or even possible, to return all parties to the position in which they would have been had the decision or regulation not been made. The question is not 'Does this decision or regulation have any effect?' but 'What effect is it to be allowed notwithstanding the legal flaw?'.

114. Secondly, there may be nobody who has (i) an interest in challenging the decision or regulation, (ii) standing to challenge it, and (iii) resources to challenge it before a court within the time limit for bringing proceedings. In such a case, the decision or regulation has to be taken to be valid and effective in law regardless of the legal flaw infecting it. (A person unable to challenge it might be able to wait for a public body to enforce it against him or her and then raise the putative unlawfulness as a defence to civil or criminal proceedings – the process known as 'collateral challenge' – but, while this may ultimately relieve that person of liability under the decision or regulation, it might not have the effect of authoritatively determining that the decision or regulation is ineffective as against the world; for example, the case might be determined in a criminal court or a County Court which lacks authority to make such a determination, although the position could be different if there is an appeal from that court to a court whose judgments are capable of establishing an authoritative precedent. An example is *Boddington v British Transport Police*,[123] where a defendant charged with breaching a bye-law criminalising acts of smoking on trains was allowed to raise unreasonableness of the bye-law as a defence.

115. Thirdly, even if a court concludes that a decision or regulation is legally flawed, the court has a discretion as to the grant of a remedy. In English law, the only non-discretionary remedies are common-law pecuniary compensation, principally damages for tort and breach of contract. All remedies available in AJR proceedings are discretionary, including whether to award damages in those proceedings. A number of factors make it more or less likely that remedies will be

[123] [1999] 2 AC 143, HL.

awarded, including the nature of the matter, the interests of third parties, the nature and effect of the particular remedy sought, and the practical benefit that the claimant would derive from the remedy.

116. Fourthly, not all breaches of law are treated, as a matter of law, as sufficiently serious to render purported decisions or regulations null. For example, many statutory powers are subject to procedural preconditions for their exercise, but it does not follow that a court will treat minor or insubstantial breaches of those conditions as nullifying the action which follows. The question is, essentially, whether the condition is so important a part of the scheme of the legislation (usually because of the importance of protection is offers to people likely to be affected by the legislation) that failing to comply with the precondition is fundamentally at odds with the ethos of the scheme. What is the effect of the breach on the party before the court? For example, if a statute requires a regulator to consult certain people before making a regulation and the regulator makes a regulation after consulting most relevant people but without having consulted X, who should have been consulted, is the regulation to be deemed entirely inapplicable to anyone or would it be fairer to make a declaration that it does not apply to X?[124] This might be viewed as an exercise of the court's discretion as to remedies, but it also shows that a legal flaw serious enough to make a regulation inapplicable to one person does not, as a matter of law, necessarily make it null, and so ineffective against everyone.

117. To say that an error of law makes a decision 'null' is therefore to deploy a metaphor, not to state a legal rule. Establishing a significant breach of law (either statutory or common-law) in the making of a decision will usually lead to the decision's being ineffective against those to whom it is addressed, or at least against the person who challenged it in court. It would usually be unjust and inconsistent with the rule of law to impose a sanction on someone, deny them a legal right, or subject them to legal liability by virtue of a decision or regulation that is legally

[124] See e.g. *Agricultural, Horticultural and Forestry Industrial Training Board v Aylesbury Mushrooms Ltd* [1972] 1 WLR 641.

flawed, but 'nullity' does not flow automatically and ineluctably from the mere establishment of a legal error.

118. This flexibility is not merely pragmatic; it is also principled and valuable. The relevant principles, to be taken into account when deciding on the effect of a rule or decision that is legally flawed, can be summarised in a rough and ready way as follows: (i) judicial review resources should be deployed proportionately to the significance of the case, as long as the claimant has had a fair overall opportunity to have the lawfulness of his or her treatment decided by an independent and impartial court or tribunal; (ii) it is in principle unacceptable to coerce or penalise a person without authority for so doing from a valid legal rule; (iii) people should be entitled to a reasonable level of certainty as to their rights and duties, and be able to place reliance on rules and decisions; (iv) there is value in finality; (v) courts will not grant remedies that offer no practical benefits; (vi) courts should recognise that a single rule or decision may affect people differently, and remedies should be tailored sensitively to their distinct needs; (vii) courts should act in ways that are morally acceptable and avoid chaos as far as possible.[125]

119. Given this flexibility, we would argue that the current way in which English law approaches remedies enables the courts to balance the rule of law with effective administration. There are clear guiding principles through which the courts exercise this flexibility. Codification of these principles would not provide any further clarity and may cause confusion as to whether the principles currently developed should be applied to a new codified system of remedies.

7: Conclusion - The Politicisation of the Judiciary

120. Although not raised as a specific question in the call for evidence, it is clear from the introduction to the call for evidence that the Panel is interested in submissions of evidence that assess 'how well or effectively judicial review balances the legitimate interest in citizens

[125] For further argument and elucidation of these principles, see D. Feldman, 'Error of law and flawed administrative decision-making' [2014] CLJ 275.

being able to challenge the lawfulness of executive action with the role of the executive in carrying on the business of government, both locally and centrally'. The Government's Press Release issued when the Panel was established included a quotation from the Lord-Chancellor that the review 'will ensure this precious check on government power is maintained, while making sure the process is not abused or used to conduct politics by another means.' Given this context, we felt it was helpful to provide an assessment of whether we believe that there was evidence, in the last forty years, of a 'politicisation' of the judiciary or of judicial review and if so, whether this required modification of the laws of judicial review.

121. 'Politicisation of the judiciary' can have several meanings. First, it may refer to a constitutional process for making the appointment or accountability of judges subject to political considerations and constraints, as happens widely in the USA. This is not a factor in the UK.

122. Secondly, it may refer to a suspicion that judges, individually or collectively, are acquiring political (not necessarily party-political) affiliations that are affecting their judicial decision-making. To some extent this is inevitable, as we do not and should not expect our judges to be divorced from the society in which they work, and it would be unrealistic and improper to expect them to be able to avoid developing views on politically contentious matters. All that we can expect, in a democracy, is that they make every effort to decide cases by reference to legal rather than political standards and arguments. As Sir John Laws wrote,[126] judges justify their decisions by looking backwards at rules and principles already embedded in law, developing that law by a process of analogical reasoning while maintaining loyalty to precedent. This judicial morality is, he wrote, different from that employed entirely legitimately by politicians, who more typically justify their policies and legislation by consequentialist arguments, seeking to pursue future goals rather than remain loyal to pre-set legal principles. Indeed, it is the essence of legislation to change law rather than merely develop it.

[126] John Laws, 'The Good Constitution' [2012] CLJ 567.

123. Thirdly, politicisation may refer to an effect on judges, or on popular perception of judges, being dragged into political rather than legal fora by virtue of being called on to decide cases which are politically controversial or seem to fall particularly within the political sphere of public life. The mere fact that a case arises from a politically contentious field does not mean that it does not also raise a legal issue worthy of judicial resolution. The general principle is, and under the rule of law ought to be, that judges are bound to determine cases properly brought before them that raise a legal issue.

124. The UK has never developed a 'political cases' doctrine whereby it would be improper for a court to decide questions of law on matters of political controversy. Even in the USA, sometimes said to have such a doctrine in its federal law, the effect is very limited: it has not prevented the federal courts from exercising their jurisdiction over such matters as rights of detainees in off-shore detention centres, or racial desegregation, or public funding of medical or educational programmes. In the UK in the litigation concerning the Government's power to notify the EU of the UK's intention to withdraw from the EU, perhaps the most politically contentious judicial decision of our lifetimes, the Government accepted that it was proper for judges to determine the legal limits on the scope of their foreign-affairs prerogative and the constitutional role of Parliament in the process.[127]

[127] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.

125. In the UK the judiciary cannot of its own motion initiate litigation, and we have no equivalent of the process available in India whereby any citizen can initiate a constitutional review merely by writing to the court.

126. There is a significant difference between judges deciding legal issues arising out of political controversies and producing outcomes that some politicians dislike and judges becoming politicised. Public law is inherently political in the sense that it is concerned with allocation and management of power in the state. The separation of powers requires that the judiciary decide questions of law by reference to legal standards, not political goals. Where the allocation of powers to institutions is determined by legal rules and principles, the judges are the appropriate officials to decide whether institutions have exceeded their legal bounds. That does not politicise the judiciary (save in the trivial sense that anyone who has anything to do with a matter subject to current political controversy is politicised).