(ver. 1)

26 October 2020

Submission to the *Independent Review of Administrative Law*

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I. SUMMARY

[1] Fundamental to the legitimacy of judicial review of administrative action is that it involves exercise of a supervisory jurisdiction. But over time judicial review has shown significant signs of "mission creep". Specifically, there are strong signs that judicial review is, in core respects, moving beyond a supervisory jurisdiction, according to which courts exercise a secondary judgement over the justifiability of government actions, to a conception of review within which courts exercise a primary and determinative judgement over the justifiability of government action. To the extent review has moved beyond a supervisory jurisdiction, its legitimacy is put in doubt. These trends are evidenced by significant changes in the nature of the grounds of review, including changes to substantive review, procedural fairness, and the principle of legality. Some of these changes involve courts applying merits or correctness review to evaluate the substance of administrative decisions and administrative systems. But, importantly, these trends are also manifested in changes to procedural aspects of judicial review, including the increasing propensity of courts to reverse the onus in review proceedings, requiring government to prove it has acted lawfully, and changes in the law and practice of evidence in review proceedings.

[2] It is submitted that these legitimacy concerns are real and as such some reforms of review are warranted. Such reforms would play a valuable role in reiterating the supervisory nature of judicial review. Such reforms will help to ensure the legitimacy of judicial review, and thus strengthen judicial review as an institution. Ensuring the legitimacy of review is vital, given the important role it has played and continues to play in mediating the relationship between citizen and government, and between organs of government.

[3] It is submitted that while reforms to the substantive law of judicial review are warranted, the principal focus should be on reform of procedural aspects of review. Most importantly, legislation ought to be enacted to make clear that administrative decisions are presumed to be valid and that the onus of overturning this presumption and proving unlawfulness and invalidity remains with the claimant throughout the proceeding. A presumption against oral evidence and disclosure should be enacted, and limits should be placed on the amount of documentary material placed before a court on review. These reforms should not apply to HRA claims. A number of further possible reforms to judicial review procedure are considered. These include a requirement that judicial review may only be brought in respect of exercise of a legal power; possible reforms to address the advent of abstract review; possible amendments to standing rules; and possible reforms in respect of interveners.

Reforms that could and should be made in respect of the substantive law of review include the statutory articulation of a list of factors that courts must consider in applying substantive review, which emphasise the bases on which deference ought to be afforded to administrative decision-makers. Legislation ought to provide that in judicial review claims in which the Human Rights Act 1998 is pleaded, courts are required to address the Human Rights Act 1998 matters first, and determine the claim on the basis of the Act if possible, before considering, if necessary, any claims on common law grounds. This reform would reinforce the priority of those rights enacted by the democratic legislature ahead of judicially-articulated norms.

II. PRELIMINARIES

[4] Three preliminary topics require to be addressed, which are of general significance in considering reform of judicial review: the rule of law, the culture of justification, and empirical studies. The basic insight in respect of each of these phenomena is that while each is relevant to considering reform of judicial review, each is also likely to be of limited utility in resolving detailed questions over whether and how judicial review ought to be reformed. Empirical studies are only one relevant factor, as the question of whether and how review should be reformed is normative, not merely factual. Values such as the rule of law and culture of justification are so abstract and also contested, that they are unlikely to resolve detailed matters of legal doctrine and procedure, even if they may play an important framing role in considering these more detailed matters.

[5] **The Rule of Law** First, the rule of law is a fundamental value of the legal system. Yet, like many abstract concepts, its application to detailed matters of law reform is more likely to raise questions than lead to solutions. At its most basic the rule of law means that government must abide the law. No one would doubt this proposition, but the principle of government under law is unlikely to provide significant insight into more detailed questions over what the content of legal norms ought to be. Certain, more drastic proposals such as ousting judicial review of administrative action implicate the principle of government under law, as such a proposal would render legal norms unenforceable, leaving government free to break the law with impunity. But outside of such examples, the principle of government under law does not necessarily lead to any one set of doctrinal norms. This is illustrated by the fact that there are significant variations in the substantive and procedural law of review across Australia, New Zealand, Canada and England, yet no one would dispute that each of these systems is characterised by the principle of government under law.

[6] Some would imbue the concept of the rule of law with more substantive content. Some would argue for example that the rule of law incorporates human rights and/or certain international norms. When the rule of law is deployed with such substantive content it is indistinguishable from a fully-fledged political theory. A more cynical view might be that by importing substantive moral or political commitments into the rule of law commentators seek to pre-empt legitimate debate over matters in respect of which people may reasonably and legitimately disagree in good faith. When the rule of law is used in this way the arguments made should carry no *a priori* weight, as they simply reflect different views over

the content of legal norms. What matters is the convincingness of the specific reasons put forward in support of particular proposals for law reform, not whether they are semantically framed as rule-of-law arguments.

[7] The rule of law is a fundamental value, but equally it is not an absolute value. That this is so is reflected for example in existing limits on access to review, such as standing, limitation periods, and the discretion to refuse relief even where government has acted unlawfully. The Supreme Court has itself created barriers to accessing the courts, absent any statutory underpinning, on the basis of the need to ration scarce judicial resources.[1] Moreover, the rule of law cannot be an absolute value, as that would be inconsistent with the one absolute rule of the British constitution – that Parliament is sovereign (assuming the rule of law does not require fidelity to parliamentary supremacy).[2] In turn that rule is underpinned by fundamental values, including democratic ideals. Thus, while the rule of law is relevant to consideration of reform of judicial review, it is questionable how far bald appeals to the concept can be taken.

[8] **A Culture of Justification** Second, many of the same points as have just been made in respect of the rule of law can also be made in respect of the "culture of justification".[3] This concept is increasingly deployed by commentators so as to justify many of the more expansive legal developments which have occurred in the law of judicial review (the details of which are discussed below), and its influence is evident in many of these developments – including the rise of proportionality, and the growing judicial propensity to place the onus of proving lawfulness on government defendants. The basic idea entailed in the "culture of justification" is that government ought to justify its actions, especially where it takes action which affects the interests of individuals or important values; it is never good enough for a public decision-maker to justify their exercise of power by saying "because I say so".

[9] In common with the highly abstract concept of the rule of law, applied to detailed questions of law reform the "culture of justification" may raise more questions than it answers.[4] For example, it is one thing to say that government ought to justify itself. But to whom should it justify itself and on what basis? Often arguments based on the culture of justification, when made by lawyers, assume that government must justify itself to the courts, and that the courts should be the ultimate arbiter of the convincingness of such justifications. But such assumptions ignore the important role of other modes of accountability, such as political or democratic accountability, including through Parliament. A narrow focus on legal accountability to courts could operate to undermine these other important mechanisms, constraining politics within a legal straightjacket. The presumptive preferencing of legal mechanisms also ignores questions of legitimacy, including the demands of the constitutional

[1] *R (Cart) v The Upper Tribunal* [2012] 1 AC 663.
[2] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 at [207]-[211]. Cf. [113]–[144].
[3] A concept originally coined in E Mureinik , 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 South African Journal on Human Rights 31. Mureinik himself, in the article, associated the culture of justification more with adoption of a bill of rights than administrative law, which he saw as more concerned with process.
[4] See further JNE Varuhas, "Against Unification" in H Wilberg and M Elliott (eds), *The Scope and Intensity of Review* (Hart 2015) at 124-126.

separation of powers and considerations of comparative institutional competence; justifications in relation to certain matters are more legitimately debated at the dispatch box than in the courts. Further, justification may be one basis of legitimation of authority, but there may be others too including democratic or technocratic legitimacy. Invocations of the culture of justification also tend to pass over the question of the basis on which courts will scrutinise justifications for convincingness. Increasingly courts scrutinise justifications on the basis of judicially-articulated fundamental values. But are the courts the right institution to determine which values are fundamental to the polity?[5]

[10] More generally, the culture of justification is based in a rather strong form of individualist liberal political theory, according to which any interference by government with the lives of citizens requires to be justified. But this is not an invariable view. Progressives would be less sceptical of government; rather than seeing government purely as a threat to liberty, some would view government as first and foremost an instrument for pursuit of beneficent ends, such as provision of welfare, healthcare and education. To this end constantly requiring government to justify itself in court could severely impede government's capacity to deliver important benefits to the most vulnerable in society. In this connection it is worth noting that those fundamental common law values recognised by courts do not include socio-economic rights. Other political theories, such as republicanism,[6] while emphasising a culture of justification, do not conceptualise every act of government as inherently suspect; in this regard republicans might be thought to have developed a more nuanced conception of liberty and government than classical liberals or neoliberals. The point is, arguments made on the basis of the culture of justification, reflect one view of the cathedral and an analytical framework based on a culture of justification is neither immutable nor invariable.

[11] Even if one accepts the premises of a culture of justification, it is still only one value. If too much emphasis is placed on justification other important goals could be undermined. In this way burdens of justification can be "simultaneously legitimating and delegitimating".[7] If government is constantly called upon to justify itself this could ossify the machinery of state, lead to defensive administration and a lack of administrative experimentation, flexibility and responsiveness, and divert resources away from the delivery of important public goods and towards the costs of justification. Thus, like the rule of law, the culture of justification is a relevant concern in considering reform of judicial review. But the concept's contestability, limits and potential drawbacks ought to be keep squarely in mind.

[12] **Empirical Studies** Third, empirical studies, for example of the impact of judicial review on government decision-making or the types of claims that make up the bulk of the Administrative Court's business or in regard to rates of settlement in judicial review, offer important insights into the operation of judicial review as an institution. These insights ought

[5] See JNE Varuhas, "The Principle of Legality" [2020] CLJ forthcoming.

[6] See F Lovett, "Republicanism", The Stanford Encyclopedia of Philosophy (Summer 2018 Edition), EN Zalta (ed), <https://plato.stanford.edu/archives/sum2018/entries/republicanism/>. For the locus classicus see P Pettit, *Republicanism: A Theory of Freedom and Government* (Clarendon Press 1997).

[7] JL Mashaw, "Public Reason and Administrative Legitimacy" in J Bell, M Elliott, JNE Varuhas and P Murray (eds), *Public Law Adjudication in Common Law Systems* (Hart 2016) at 11.

to inform consideration of reform of judicial review. But, importantly, bare insights into facts cannot, in and of themselves, resolve questions over whether and how the law of judicial review ought to be reformed. That is because questions of reform are normative questions, about how the law ought to be organised. Normative questions require consideration of matters such as constitutional legitimacy, and the balancing of competing values such as accountability and efficiency of government, which cannot be resolved merely by reference to facts; the resolution of such matters requires judgements to be made based on reasoned discourse. Furthermore, we are here concerned with normative questions that arise in the context of a pre-existing body of legal doctrine. In turn questions of reform directly implicate considerations of legal coherence. Such matters cannot be resolved through empirical work.

[13] Moreover, it would be naïve to view empirical studies as necessarily value-free, or wholly scientific in nature. In this regard one must be attentive to underlying assumptions and methodology. Further, in framing studies or interpreting results qualitative judgements cannot be avoided. For example determining whether the impact of judicial review is positive or negative, or whether government reactions to judicial review are positive or negative, obviously implicates contentious value-judgments. Deciding whether data demonstrates that review imposes an undue burden on government depends on what one considers an undue burden, something which clearly calls for a value-judgment. It is also important to bear in mind that such studies are always necessarily limited by the given data being analysed, so that the insights provided may not be generalisable, while it is also important to take seriously the typical caveats included in such studies.

III. SUPERVISORY JURISDICTION

[14] In considering questions of reform of judicial review it is crucial to commence with an understanding of the nature of review, and specifically the axiomatic idea of review as a *supervisory jurisdiction*.[8] This is important to ensuring that any reforms adopted cohere with the basic nature of the field. But it is also important to considering whether reform is necessary in the first place. The basic nature of judicial review as a supervisory jurisdiction is critical to maintaining the legitimacy of the courts' role in reviewing government action. As such, to the extent that more recent legal developments evince a departure from the supervisory conception of review, the legitimacy of review is put in doubt, and reform may then be justified to effect a course-correction.

[15] What is meant by a "supervisory jurisdiction"? At its core a supervisory jurisdiction denotes that a court is concerned to keep a decision-maker "on track" in the exercise of their powers, but not to pre-empt the exercise of those powers. Necessarily entailed in the concept of a supervisory jurisdiction is the idea that the court is charged with conducting a *review*, not with adjudicating the bare convincingness of a decision, or deciding whether the court would,

[8] For an account of the development of modern judicial review see generally: JNE Varuhas, "The Public Interest Conception of Public Law" in J Bell, M Elliott, JNE Varuhas and P Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford 2016); JNE Varuhas, "Administrative Law and Rights in the UK House of Lords and Supreme Court" in P Daly (ed), *Apex Courts and the Common Law* (Toronto 2019).

if it had taken the decision, have reached the same outcome as the decision-maker. Lord Ackner explained the idea as follows:

> Where Parliament has given to a minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its, the judicial view, on the merits and on that basis to quash the decision.[9]

[16] The supervisory conception of review ensures its legitimacy. If courts were to judge government decisions based on whether they find them meritorious this would undermine parliamentary sovereignty, given that through the terms of the parent statute Parliament has conferred the power of decision on the decision-maker and not the courts. It would also collapse any meaningful distinction between government and law, and involve the courts ruling on matters in respect of which they lack institutional competence. If courts were to stand in the shoes of the statutory decision-maker and determine the review on the basis of how they would have exercised the statutory power, this would constitute an affront to concepts of democratic accountability, as courts are not directly accountable through democratic process for their decisions, whereas Ministers can be held democratically accountable for their actions and for those of their officials. An approach based on assessing the merits of government decisions would invariably draw courts into politics, thus undermining their perceived independence, and thus legitimacy.

[17] Let us turn to consider how specific grounds of review relate to the idea of review as a supervisory jurisdiction, as this is relevant to considering recent developments. It is consonant with the idea of review as a supervisory jurisdiction that courts may scrutinise the *legality* of a decision, in the strict sense of whether the decision conforms with the statutory terms of the grant of power; the requirement of legality necessarily follows from the principle of the supremacy of Parliament. The courts conduct such review on a correctness basis, as in the English tradition – in contrast with the approach in North America – questions of interpretation are quintessentially for the courts, being paradigm questions of law. Review on the ground of legality is consonant with a supervisory judicial role as the court simply ensures the decision-maker is operating within the four corners of their powers; as long as a decision is made within the bounds of the power conferred, the court is unconcerned with the substantive merits of the decision reached.

[18] Within a supervisory jurisdiction the court may permissibly scrutinise the *process* by which a decision is reached. Review for procedural fairness is consonant with the idea of a supervisory jurisdiction because ensuring proper process is followed does not pre-empt the ultimate decision reached by the decision-maker. As Lord Brightman observed in an important statement of principle: "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of

[9] *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 at 757.

usurping power".[10] It is because procedural fairness is concerned with the process by which a decision is reached, rather than the substance of the decision reached, that it is permissible for procedural fairness to be judged on a correctness basis. By ensuring a fair process is followed by a decision-maker, the court cannot be said to be trespassing on the sphere of decision-making authority conferred on the repository of the power. Furthermore, process is a matter in respect of which courts are acknowledged to have significant experience and expertise.

[19] But when it comes to *substantive review*, that is review of the substantive qualities of a decision and the reasons in support of the decision, the court cannot, consistently with a supervisory conception of the judicial role, apply a correctness standard, as this would be to completely usurp the role of the decision-maker, and would be irreconcilable with parliamentary sovereignty. Parliament, by the terms of the statute, has conferred the power of decision on the repository not the courts. In regard to substance therefore it is the decision-maker who exercises a primary judgement, and the courts are necessarily limited to exercising a secondary judgement. This contrasts with the approach in private law adjudication and adjudication under the HRA, where courts exercise a primary, determinative judgement on matters of substance.[11] Thus, within a negligence claim a court will assess for itself, according to a reasonableness simpliciter standard, whether a defendant acted reasonably in adopting a particular precaution. In a HRA claim a court will determine substantive matters for itself including whether the defendant breached the claimant's right, and whether the defendant's acts constituted a disproportionate interference with the claimant's rights. The reason why it is permissible for a court to exercise primary, determinative judgement according to wholly objective standards in private law and HRA proceedings, is that in such cases the normative basis of the claim is a claim of legal right. Within the separation of powers questions of legal right are quintessentially for courts. In contrast in judicial review proceedings, while rights or individual interests sometimes enter the analysis, they do not form the normative basis of the claim: the court is exercising a supervisory jurisdiction to check whether a primary decision-maker has properly exercised their powers.[12] The focus is upon the qualities of the exercise of the power itself, rather than on adjudicating or enforcing legal rights which may be impacted by the exercise of the public

[10] *R v Chief Constable of North Wales, ex p Evans* [1982] 1 WLR 1155 at 1173.

[11] For further discussion of this distinction between judicial review and private law/human rights law see: JNE Varuhas, "Against Unification" in H Wilberg and M Elliott (eds), *The Scope and Intensity of Review* (Hart 2015) at 94-108; "Taxonomy and Public Law" in M Elliott, JNE Varuhas and SW Stark (eds), *The Unity of Public Law?* (Hart 2018) at 63-71.

[12] As Lord Woolf has said, on review protection of the individual 'is incidental to the court's primary obligation, which is to stop the public body abusing its powers and the court does not so much establish the rights of the individual but confines the public body to performing its obligations and not exceeding its authority'. He further elaborated that administrative law is 'the system which enforces the proper performance by public bodies of the duties which they owe to the public', whereas private law is 'the system which protects the private rights of private individuals or the private rights of public bodies': 'The critical distinction arises out of the fact that it is the public as a whole, or in the case of local government the public in the locality, who are the beneficiaries of what is protected by public law and it is the individuals or bodies entitled to the rights who are the beneficiaries of the protection provided by private law'. See H Woolf, '"Public Law–Private Law": Why the Divide? A Personal View' [1986] PL 220 at 221, 227.

power. If the claimant has a claim of right they could simply bring an ordinary claim in civil proceedings; they would have no need for recourse to a supervisory jurisdiction. Thus, whereas common law review concerns itself with 'general duties', such as duties of legality or procedural fairness, which 'do not confer enforceable rights' - the focus being upon 'arguable abuse[s] of power' - in contrast HRA rights are 'clearly' 'civil or private law rights'.[13] Thus, if a court intervenes on review it is not because a right has been breached but because the donee of the power has abused that power;[14] that is, there is a defect in the qualities of the exercise of the decision-making power itself. While the courts' jurisdiction may be moved by an individual, the courts does not intervene on behalf of that individual but "on behalf of the public";[15] the public as a whole have a *collective* interest in proper government decision-making. As Lord Bridge said in *Gillick*, "the court's supervisory jurisdiction over the conduct of administrative authorities has been confined to ensuring that their actions or decisions were taken within the scope of the power which they purported to exercise".[16]

[20] It is because a court on judicial review is reviewing the decision of a person with primary decision-making authority, that the court's role is necessarily secondary, and necessarily must be calibrated so as not to supplant the role of the primary decision-maker. Whereas in a claim for false imprisonment or trespass, it is the court that is the primary decision-maker. Thus, traditionally the scope for intervention on the basis of the substantive qualities of decision has been limited, consonant with the idea of review as a supervisory jurisdiction. To this end courts have drawn a distinction between "the *Wednesbury* rationality test" according to which "the decision remains that of the decision-maker" and "entirely objective criteria of reasonableness" in respect of which "the decision maker becomes the court itself".[17] The former conception of rationality is appropriate to a supervisory jurisdiction, whereas the latter is appropriate to a claim based in legal rights, such as negligence. Thus, as Lord Lowry observed, on review

> the court's duty is not to interfere with a discretion which Parliament has entrusted to a statutory body or an individual but to maintain a check on excesses in the exercise of discretion. That is why it is not enough if a judge feels able to say, like a juror or like a dissenting member of the Cabinet or fellow-councillor, "I think that is unreasonable; that is not what I would have done." It also explains the emphatic language which judges have

[13] *R (R) v Children and Family Court Advisory Support Service* [2012] 1 WLR 811 at [91], [94]; [2013] 1 WLR 163 at [73], [83]. And see *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716 at 761, 767 ("a mere "right" to have the provisions of the law observed, shared as it is by every member of the public whether or not he is likely to suffer breach is … the antithesis of an 'individual' right").

[14] M Taggart , "Proportionality, Deference, *Wednesbury*" [2008] New Zealand Law Review 423.

[15] *R v Panel on Take-Overs and Mergers, ex parte Guinness Plc* [1990] 1 QB 146 at 193G.

[16] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at 192.

[17] *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116 at [66]. And see *R v Secretary of State for the Home Department , ex p Brind* [1991] 1 AC 696 at 758 ("To seek the court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the minister has made is to invite the court to adjudicate as if Parliament had provided a right of appeal against the decision - that is, to invite an abuse of power by the judiciary").

used in order to drive home the message and the necessity, as judges have seen it, for the act to be so unreasonable that no reasonable minister etc. would have done it.[18]

The "so unreasonable" standard has often been criticised as tautological. But such critiques miss that the importance of the *Wednesbury* standard lies not in the semantics of its formulation but in that it stands as a totem of restraint – it is designed to drive home that the courts' proper role in a supervisory jurisdiction is to exercise a secondary, and not a primary judgement. Within a supervisory jurisdiction substantive review is and ought to be a conceptual outlier, as the focus is simply on keeping the decision-maker on-track – ensuring they abide the terms of their decision-making power and follow correct procedure – rather than on pre-empting the outcome of that decision-process. *Wednesbury*, as traditionally conceived, operates as a safety net to catch the bad case of abuse of power; it does not involve a re-hearing of the matter on the merits.

[21] Certain procedural features of review follow from the conception of review as a supervisory jurisdiction. First, administrative action is presumed lawful, and the onus is on the claimant to prove administrative unlawfulness and to convince the court of 'his entitlement to relief'.[19] The allocation of onus follows from the idea that the court is not conducting a re-hearing on the merits, but rather performing a supervisory function – as such the claimant must establish some recognised ground which enlivens the court's supervisory jurisdiction. The court cannot exercise the jurisdiction to grant relief if there is no demonstrated ground of unlawfulness. Moreover the ordinary principle is that the person seeking relief needs to make out his or her case. Importantly, the allocation of onus also reinforces the idea of restraint, which goes to the very heart of a supervisory jurisdiction: the starting-point is that the court should not intervene, unless there is a compelling basis for doing so. Further, the presumption of legality serves important public purposes including in facilitating certainty for government, and for those dealing with government.

[22] Second, oral evidence and disclosure play a limited role in judicial review proceedings compared to ordinary civil proceedings. The reason is that review is principally concerned with the legality of the decision-making process, which is a pure question of law, and not with conducting a re-trial of the merits. If courts were to probe questions of fact this could draw them into the merits, while to loosen restrictions on disclosure and cross-examination could lead to fishing expeditions and draw out the cost and time associated with litigation for public authorities and courts.[20] That the review procedure does not contemplate significant

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[18] *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 at 765-766.

[19] eg *F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 366; *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941 at 945; *R v Boundary Commission for England, ex parte Foot* [1983] QB 600, 634, 637.

[20] For example, Lord Neuberger MR has observed that in the "overwhelming majority of judicial review cases" oral evidence should be out of the question. It should be contemplated only in "the most exceptional case". This followed from "reasons of both principle and practice" including that (i) "if judges regularly allow witnesses and cross-examination in judicial review cases, the court time and legal costs involved in such cases will spiral"; and (ii) "judicial review involves a judge reviewing a decision, not making it; if the judge receives evidence so as to make fresh fi ndings of fact for himself, he is likely to make his own decision rather than to review the original decision" (*Bubb v Wandsworth LBC* [2012] PTSR 1011 at [24]-25]). And see: *O'Reilly v Mackman* [1983] 2 AC 237 at 257, 282, 284.

evidence-gathering is reflected in the very short three-month limitation period for bringing a judicial review claim; that brief window of time does not contemplate drawn-out processes of pre-trial disclosure, for example.

[23] Third, review has generally revolved around scrutiny of exercise of defined legal powers, such as powers under statute or exercise of the prerogative. There must be a power the outer limits of which can be supervised.

[24] Fourth, in terms of remedies the typical outcome on review, where unlawfulness is found, is for the court to quash the decision, or declare it unlawful, with the matter remitted to the decision-maker. This reinforces that the court's role is supervisory – not primary – as even where unlawfulness is demonstrated the ultimate decision remains in the hands of the governmental decision-maker.[21]

[25] Fifth, judicial review is said to be a jurisdiction of "last resort",[22] which may only be resorted to if other alternative remedies or accountability mechanisms are unavailable. This reinforces the conception of review as a "long stop"[23] supervisory jurisdiction.

IV. MISSION CREEP: DEVELOPMENTS IN SUBSTANTIVE LAW

[26] Thus judicial review is a supervisory jurisdiction, and all of the major substantive and procedural aspects of the law of judicial review reflect this fundamental conception. Furthermore, there are powerful reasons for why review has traditionally been conceptualised as a supervisory jurisdiction. And courts continue to characterise judicial review as a supervisory jurisdiction;[24] indeed, they necessarily must because if courts were to abandon the idea that their role is confined to conducting a review, the legitimacy of the whole enterprise would be in doubt. But as the law of judicial review has developed, especially over the last ten years, it is highly questionable, at least in certain doctrinal contexts, whether review remains a supervisory jurisdiction. To the extent that there has been a departure from this idea, the legitimacy of review is thrown into doubt for the reasons articulated in the previous section.

[27] Developments in substantive review, towards very strict scrutiny of administrative decisions, most clearly challenge the supervisory conception of review, and thus raise legitimacy concerns. But we shall also see that developments in procedural fairness and legality review challenge the conception of review as a supervisory jurisdiction; that is because courts have semantically re-framed what are in truth matters of substance as matters of procedure and statutory interpretation, with the result that the substantive qualities of administrative decisions (and administrative systems) are scrutinised by courts according to a correctness

[21] *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 KB 338 at 346-347: "an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity … The King's Bench does not substitute its own views for those of the tribunal, as a Court of Appeal would do. It leaves it to the tribunal to hear the case again".

[22] *R v Chief Constable of Merseyside, ex parte Calveley* [1986] QB 424; *R v IRC, ex parte Preston* [1985] AC 835 at 852, and see 862; *R v Epping and Harlow General Commissioners, ex parte Goldstraw* [1983] 3 All ER 257 at 262; *R v Panel on Take-Overs and Mergers, ex parte Guinness Plc* [1990] 1 QB 146 at 178, 183, 184.

[23] *R v Panel on Take-Overs and Mergers, ex parte Guinness Plc* [1990] 1 QB 146 at 177.

[24] *R (Miller) v Prime Minister* [2019] UKSC 41 at [31].

standard, and without deference. These developments raise especially serious legitimacy concerns.

[28] For completeness I note that I do not consider that the entirety of judicial review has been transformed. There are numerous cases of legality review, review for procedural fairness and application of reasonableness review where courts act in perfect conformity with their proper role on review. But, driven by a series of decisions of the higher courts, we see increasing instances of doctrines or approaches which are very difficult to reconcile with the idea of judicial review as a supervisory jurisdiction. In turn these changes raise legitimacy concerns – and concerns about where judicial review is heading.

[29] Substantive review The most significant development in the field of substantive review has been the adoption of structured proportionality at common law, at least in certain classes of case including where decisions affect interests – sometimes referred to as "rights", but which are not rights-proper[25] – or values the courts consider fundamental.[26] In such cases the courts have aligned their approach at common law with proportionality as practiced under the Human Rights Act 1998 (HRA), and they have explicitly said as much.[27] And herein lies the issue of principle. In applying proportionality under the HRA the courts exercise a *primary* jurisdiction: they determine for themselves whether administrative action is proportionate or not, which involves weighing the different variables and striking the balance for themselves.[28] This is a role that Parliament has conferred on the courts: the courts under the HRA are required to ensure that exercises of public power conform with Convention rights, and this necessarily involves ensuring Convention rights are not disproportionately infringed. Importantly, under the HRA the courts are not supervising the qualities of a statutory decision-maker's exercise of power under a parent statute, to ensure that it constitutes a proper exercise of power, but rather enforcing free-standing statutory rights in the face of exercise of an otherwise proper exercise of power. The role of a court under the HRA is analogous to its role in adjudicating claims of false imprisonment or battery or discrimination brought against a public officer: the courts' role is to enforce a private right, in the face of an otherwise proper exercise of power, adjudication of rights involving objective judgment. The

[25] For discussion of the intricacies of the House of Lords and Supreme Court's "rights"-jurisprudence see: JNE Varuhas, "Administrative Law and Rights in the UK House of Lords and Supreme Court" in P Daly (ed), *Apex Courts and the Common Law* (Toronto 2019); JNE Varuhas, "The Reformation of English Administrative Law? 'Rights', Rhetoric and Reality" [2013] CLJ 369.

[26] *Pham v Secretary of State for the Home Department* [2015] UKSC 19; *Kennedy v The Charity Commission* [2014] UKSC 20.

[27] eg *Pham v Secretary of State for the Home Department* [2015] UKSC 19 at [98]; *Kennedy v The Charity Commission* [2014] UKSC 20 at [40], [46], [54], [56], [132]-[133].

[28] *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420 at [12]–[15], [30]–[31], [37], [44]; *R (Begum) v Governors of Denbigh High School* [2007] 1 AC 100 at [29]–[31], [68]; *Huang v Secretary of State for the Home Department* [2007] 2 AC 167; *Tweed v Parades Commission* [2007] 1 AC 650 at [55]; *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at [46], [61], [91]; *E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536 at [13], [52]ff; *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 at [124]; *R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2014] UKSC 60 at [57], [105], [115], [137], [152].

courts in such a claim are not concerned with regulating the qualities of the exercise of power itself.

[30] By reading across structured proportionality, derived from the HRA context, to common law the courts have made a category error.[29] They have converted a supervisory jurisdiction, according to which courts exercise a secondary judgement over the substantive qualities of a decision, into a primary jurisdiction, according to which courts exercise determinative judgment over the correct balance between competing interests. It is true that the courts may afford weight to the balance struck by the primary decision-maker, but crucially the ultimate decision as to what represents a proportionate balance of concerns is for the courts. Thus, it is for the court to "exercise its own judgment in the matter",[30] that is, the court will "itself assess the appropriateness of the balance drawn", and it follows that only one possible outcome may be open.[31] This is to turn on its head the proposition that courts only exercise a secondary judgement; the courts' judgment becomes determinative. As such it is unsurprising that earlier courts had considered adoption of proportionality to be inconsistent with the supervisory jurisdiction, and that "acceptance of 'proportionality' as a separate ground for seeking judicial review … could easily and speedily lead to courts forgetting the supervisory nature of their jurisdiction and substituting their view of what was appropriate for that of the authority whose duty it was to reach that decision".[32]

[31] This method has spread to other common law review contexts including legitimate expectations.[33] In this context the courts may for themselves determine whether it is permissible for a defendant to resile from a legitimate expectation, on the basis of whether it is proportionate to do so. In such cases the court's conclusion can be determinative of whether the defendant can resile; if the court holds it is unlawful to resile, there will likely be no referral back of the decision to the decision-maker. The matter will be concluded by the courts' determinative judgment that the balance favours frustrating or fulfilling the expectation.[34]

[32] Even in contexts where the courts continue to apply reasonableness review, there are increasingly examples where the courts apply an approach which is difficult to describe as supervisory.[35] In the *Litvinenko* case the Minister decided not to launch a public inquiry.[36]

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[29] See further JNE Varuhas, "Taxonomy and Public Law" in M Elliott, JNE Varuhas and SW Stark (eds), *The Unity of Public Law?* (Hart 2018) at 71-78; "Against Unification" in H Wilberg and M Elliott (eds), *The Scope and Intensity of Review* (Hart 2015).

[30] *Kennedy v The Charity Commission* [2014] UKSC 20 at [132].

[31] *Pham v Secretary of State for the Home Department* [2015] UKSC 19 at [107]-[108].

[32] *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, eg at 722, 757-758, 767-768.

[33] eg *R (Patel) v GMC* [2013] EWCA 327.

[34] See M Elliott and JNE Varuhas, *Administrative Law*, 5 ed (Oxford 2017) at 215.

[35] For a detailed analysis of the cases that follow see: JNE Varuhas, *Judicial Capture of Political Accountability* (Policy Exchange 2016). Available at: http://judicialpowerproject.org.uk/wp-content/uploads/2016/06/Judicial-Capture-of-Political-Accountability-.pdf A series of responses to the paper, expressing different viewpoints, are available here: https://judicialpowerproject.org.uk/category/debates/varuhas-on-judicial-review-and-political-accountability/

[36] *R (Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194; JNE Varuhas, "Ministerial Refusals to Initiate Public Inquiries: Review or Appeal?" [2014] CLJ 238.

Such decision would typically be assessed according to a highly deferential standard because the Minister is directly accountable to Parliament, the decision implicated matters of foreign relations with Russia, the statutory power to launch inquiries (or not) is one of the most broadly framed on the statute books, and inquiries have significant resource ramifications. However, the court never turned its mind to the standard of review to be applied, effectively impugning the decision on the basis that the court disagreed with reasons given by the Minister.

[33] In the context of Ministerial rejections of findings of the Ombudsman, the courts have assessed such rejections on the basis of whether the court considers the rejection "cogent". As one might expect from the stated standard the courts have effectively impugned decisions on the basis that the court is simply not convinced by a Minister's reasons for rejecting the Ombudsman's findings. But as in the *Litvinenko* case, in Ombudsman cases such as *Bradley*, courts have not taken seriously reasons in favour of restraint.[37] Yet there are many strong reasons for restraint, in particular that the Ombudsman legislation was designed to create a *political* mechanism for accountability; to the extent that the courts have been willing to readily intervene in the process, they have undermined the nature of the system Parliament intended to create under the relevant legislation. A system intended to operate in the political sphere has, in significant respects, been juridified by the courts. Perhaps there may have been some rationale for judicial intervention if the Minister was not being held accountable in the political process, so as to ensure the accountability regime works as it should. But in each such case the Minister had been subject to extensive scrutiny through the Ombudsman process, and then in committees, in the House, and in the media.

[34] Procedural Fairness Procedural fairness is judged on a correctness basis.[38] This means it is for the courts to determine the requirements of procedural fairness, and to the extent administrative procedures do not conform with those requirements, they shall be unlawful. A correctness approach is justified on the basis that the court is, through procedural fairness, only regulating the process by which decisions are made, with the ultimate decision left to the decision-maker's judgement. The legitimacy of a correctness approach is also reinforced by the fact that courts have significant expertise in process (whereas, for example, they do not have expertise in substantive areas of policy). However, application of a correctness standard can only be legitimate to the extent that courts are *in fact* concerned with matters of *process*. Yet in recent times the courts have developed doctrines which it is difficult not to view as substantive, but which have been categorised as aspects of procedural fairness. Through semantic categorisation of such doctrines as "procedural" the courts effectively apply a correctness or merits approach to matters of substance.

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[37] *R (Bradley) v Secretary of State for Work and Pensions* [2008] 3 All ER 1116; *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC (Admin) 2495; JNE Varuhas, "Governmental Rejections of Ombudsman Findings: What Role for the Courts?" (2009) 72 MLR 102.

[38] *Osborne v Parole Board* [2013] UKSC 61 at [65].

[35] The prime example of this trend is the doctrine of structural or systemic unfairness.[39] Unlike orthodox procedural fairness challenges, which focus on whether procedural fairness was afforded to an individual in the course of a decision affecting their rights or interests, this doctrine is concerned with scrutinising entire administrative systems in the abstract, absent any individual decision before the court, to determine whether the system raises inherent risks of unfairness; if it does the entire system shall be unlawful. Despite the complexities involved in scrutinising the design of an entire administrative system, and the inherent difficulties in the speculative task of judging the 'risk' of unfairness in a system (absent any evidence of any case of *actual* unfairness), the courts have applied very little if any deference on the basis that this doctrine is categorised as an instantiation of procedural fairness, and procedural fairness is judged objectively on a correctness basis.[40] This is despite questions of administrative design transcending matters of mere 'process', and judges generally having no or limited expertise in designing complex administrative systems for delivery of public goods, which involve difficult decisions over distribution of scarce resources and difficult trade-offs among multiple competing concerns. Not only is it inappropriate for courts to judge the qualities of entire administrative systems on the merits, but it is questionable whether courts should be engaged in such enterprise at all – notwithstanding the standard of review applied. Court-based adjudication would seem an ill-suited vehicle for conducting an inquiry into the operation of entire administrative systems; such a matter would be more apt for an administrative review, inquiry or ombudsman investigation. Moreover, despite the courts being flooded with evidence in such cases, the legal conclusions in such cases tend to rely heavily on anecdotal evidence, hypotheticals constructed by lawyers or the courts, and government reports, and are generally reached absent the hearing of expert evidence. This seems an unsafe evidence base on which to reach legal conclusions about the operation of an administrative system affecting many hundreds of people; what is required is the commissioning of in-depth socio-legal studies of the relevant systems by independent experts. As was observed in *Howard League*, the leading case in this area, it is generally not possible to commission such a study within the three month limitation period on review.[41] This further goes to reinforce that judicial review is not the appropriate vehicle for assessing an entire system; such task is properly for an *investigatory* or *inquisitorial* process, associated with ombudsmen and inquiries, not an *adjudicative* process. Moreover invalidity seems a blunt instrument of reform.

[36] Principle of Legality When courts conduct legality review they examine whether a given administrative decision or act is consistent with the terms of the parent statute. In order to perform this task they must of course interpret the statute. It is a fundamental precept of the

[39] See especially *R (Howard League) v Lord Chancellor* [2017] EWCA Civ 244. See further, JNE Varuhas, 'Evidence, Facts and the Changing Nature of Judicial Review', U.K. Const. L. Blog (15th June 2020) (available at https://ukconstitutionallaw.org/).

[40] *Howard League* ibid at [50] (it is said a high threshold must be reached for a system to be systemically unfair, but in judging whether systems are systemically unfair the margin of discretion to be applied is "modest"; in other words the standards of unfairness in such cases are applied on a correctness basis or on a basis akin to correctness).

[41] *Howard League* ibid at [53].

English legal system that judges do not defer in the interpretation of statutes, and as such it can be said that legality review, like procedural fairness, is conducted on a correctness basis. Legality review involves application of ordinary maxims of interpretation to determine the meaning of statutes. One such maxim is the principle of legality. In its classic formulation the principle of legality requires that if Parliament intends to permit the abrogation of basic rights it must make its intent clear through express words or by necessary implication.[42] That principle is longstanding and relatively uncontroversial. But over time the courts have developed a variant of the principle of legality, which I term the "augmented" principle of legality.[43] According to this augmented principle, where a decision-maker makes a decision infringing rights, it shall not be sufficient that the statute explicitly authorises the infringement of rights. There is an additional criterion. If the court judges, applying a structured proportionality test, that the exercise of power is disproportionate, then it shall be unlawful unless the legislation expressly authorises an interference of such *extent*.[44] This augmented principle was endorsed and applied by the UK Supreme Court in *Unison*.[45] In that case Lord Reed observed that in determining the proportionality of a decision or administrative measure for the purposes of the principle of legality, the courts apply a method akin to the proportionality method applied under the HRA.[46] As I have argued,[47] a similar method was deployed in *Miller (No 2)* albeit in the context of exercise of a prerogative power.[48]

[37] As I argue in a forthcoming article which I annex to this submission,[49] the augmented principle of legality, while presented as an aspect of legality review, is in truth substantive review by another name. The effect of the application of the principle is that decisions ruled to be disproportionate by the courts are unlawful, unless the statute provides otherwise – which is extremely unlikely to be the case, as the very nature of discretions is that their exercise is not predetermined in advance by the legislature. Crucially, because the proportionality analysis is deployed in the process of statutory interpretation the courts do not apply any deference. Thus, Lady Hale, in a recent extra-judicial speech, discussing the legality line of cases including *Unison*, said: 'the courts have been prepared to construe Acts of Parliament in the light of the principle of legality without a hint of deference or pragmatism, indeed some might say quite the reverse'.[50] *Unison* concerned scrutiny of a complex system of fees, which had implications for the funding of the tribunal system, and yet in applying proportionality, under the rubric of the principle of legality, the Supreme Court did not at any point consider

[42] Eg *Raymond v Honey* [1983] A.C. 1.
[43] See JNE Varuhas, "The Principle of Legality" [2020] CLJ forthcoming.
[44] See eg *R v Secretary of State for the Home Department, ex parte Leech* [1994] Q.B. 198; *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115; *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 per Lord Bingham.
[45] *R (Unison) v Lord Chancellor* [2017] UKSC 51.
[46] Ibid at [89]; *Pham v Secretary of State for the Home Department* [2015] UKSC 19, at [118]–[120].
[47] See JNE Varuhas, "The Principle of Legality" [2020] CLJ forthcoming.
[48] *R (Miller) v Prime Minister* [2019] UKSC 41.
[49] JNE Varuhas, "The Principle of Legality" [2020] CLJ forthcoming.
[50] Lady Hale, "Principle and Pragmatism in Public Law', Sir David William Lecture 2019, Cambridge (18 October 2019), 12–15, available at https://www.supremecourt.uk/docs/speech-191018.pdf (last accessed 21 August 2020).

whether restraint was warranted. In another case where the augmented principle was applied the Judge said: "Even if some degree of infringement is impliedly authorised, it is incumbent on the executive to justify this by a pressing social need and as being the minimum necessary to achieve the objectives sought. These are matters for the court *and not for the decision-maker*'.[51]

[38] Thus, structured proportionality, a strict form of scrutiny, is deployed to scrutinise administrative action, with no deference applied, because proportionality is applied in the course of a putative exercise in statutory interpretation. Yet the legitimacy concerns associated with strong-form tests of review such as proportionality "are not washed away by a semantic re-framing of the basis of intervention as legality".[52] But proportionality as applied under the principle of legality raises even greater legitimacy concerns than those raised by substantive review. That is because (1) the courts are not transparent that they are conducting what is in effect substantive review; and (2) the courts in the course of substantive review may apply deference, but no deference is applied in application of the principle of legality, including the proportionality limb. It follows from the courts not applying deference that the courts effectively stand in the shoes of the decision-maker, and determine the correct balance between competing interests. This is to supplant the role of the statutory decision-maker, and thus to subvert Parliament's intent, that it is the decision-maker who should strike the balance.

[39] **General reflections on recent case law** Thus, we have seen that significant developments within the substantive law of review are difficult to reconcile with the supervisory conception of the judicial role on review, and in turn raise serious legitimacy concerns which cannot be ignored. Particularly concerning is the application of grounds such as procedural fairness and legality to conduct what is in effect substantive review, but on a correctness basis.

[40] At a more general level the emergent *methodology* of judicial review,[53] especially as practiced by the Supreme Court, raises concerns.[54] There has been a general move towards open-ended balancing approaches according to which the courts adjudicate cases by identifying some constitutional or fundamental value or right, identifying a range of other interests or values implicated by the matter at hand, calibrating deference, and then weighing all of these considerations to determine how the case ought to be determined. Such an approach obviously affords flexibility to the courts to adapt review to different facts. But it also raises serious concerns, in particular over unpredictability, uncertainty, inconsistency, and

[51] *R (DSD) v Parole Board* [2019] QB 285 at [190] (emphasis added).
[52] JNE Varuhas, "The Principle of Legality" [2020] CLJ forthcoming.
[53] Note that this method, having taken hold in public law, is increasingly spreading to other legal contexts such as private law: JNE Varuhas, "The Socialisation of Private Law: Balancing Private Right and Public Interest" (2021) 137 LQR 141 (forthcoming).
[54] See further on this point JNE Varuhas, "Taxonomy and Public Law" in M Elliott, JNE Varuhas and SW Stark (eds), *The Unity of Public Law?* (Hart 2018) at 51-56. And see eg CF Forsyth, '"Blasphemy Against Basics": Doctrine, Conceptual Reasoning and Certain Decisions of the UK Supreme Court' in J Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford, Hart, 2016); D Stratas, "'It All Depends on the Circumstances': The Decline of Doctrine on the Grounds and Intensity of Review" in M Elliott, JNE Varuhas and SW Stark (eds), *The Unity of Public Law?* (Hart 2018).

incoherence.[55] It affords significant scope for subjectivity to enter the analysis, as decision-making is relatively unconstrained by rules or even principles. Nor is the enterprise constrained to any meaningful extent by precedent, as each instance of balancing is simply a response to the particular facts before the court, and therefore exerts little precedential force. This it has been said that: 'The nature of judicial review in every case depends on the context';[56] 'Every case turns on its own facts, and analogies with other decided cases can be misleading.'[57] In light of this emergent judicial approach it is difficult to know how an administrator, seeking to comply with the law should approach their task, or how a citizen should judge whether they have been treated unlawfully;[58] each shall find themselves floating adrift, mid-ocean on a sea of values, 'bereft of the equipment necessary for navigation'.[59] There are also concerns that this model of judicial decision-making ceases to have the qualities associated with recognisably *legal* decision-making; a method of decision-making according to which multiple values and interests are weighed to reach an outcome is difficult to distinguish from political or administrative decision-making. Such approach also renders the law aimless – the law no longer serves any set function or goal. Rather the law is reinvented with each new case, potentially raising serious concerns of legal coherence and stability of the legal system. This is evident in, for example, the treatment of parliamentary sovereignty in a series of recent cases, decided over the course of a two-year period by the Supreme Court. In *Miller*, the Supreme Court recited the standard definition of parliamentary sovereignty, that no person or body can set aside a law made by Parliament;[60] in other words, Parliament's legislative power is absolute. But not long after *Miller*, in *Privacy International*, some of the same judges who decided *Miller* considered parliamentary sovereignty not to be an absolute norm after all, but to be subordinate to the rule of law.[61] Soon after, in *Miller (No*

[55] As judges have acknowledged in other contexts: open-ended balancing tests reveal 'no principle whatever to guide the evaluation other than the judge's gut instinct … An evaluative test dependent on the perceived relevance and relative weight to be accorded in each individual case to a large number of incommensurable factors leaves a great deal to a judge's visceral reaction to particular facts' (*Patel v Mirza* [2016] UKSC 42 at [263] per Lord Sumption (dissenting), in the context of the illegality defence).

[56] *Kennedy v The Charity Commission* [2014] UKSC 20 at [51]. This approach was subsequently reiterated in *Pham v Secretary of State for the Home Department* [2015] UKSC 19 at [60], [94], [105]ff.

[57] *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 at [26]. In some contexts it has even been indicated that lower tier judicial bodies conducting balancing should not in general find it necessary to refer to prior authorities: *Ali v Secretary of State for the Home Department* [2016] UKSC 60 at [82].

[58] Such concerns have been raised by Supreme Court Justices in connection with case-by-case decision-making in public law albeit the Justices have not as yet recognised these concerns in connection with current trends in substantive review: *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 at [60] (the problem with case-by-case judicial decision-making 'is that it can make it difficult in practice for decision-makers (and individuals affected by decisions) to predict what is required … In a context in which vital national interests are engaged … it is of great importance that the Treasury should be in no doubt as to what is required').

[59] P Birks, 'Preface' in P Birks (ed), *The Classification of Obligations* (Oxford 1997) at vi. And see T Poole, '*Between the Devil and the Deep Blue Sea*: Administrative Law in an Age of Rights' in L Pearson et al (eds), *Administrative Law in a Changing State* (Hart 2008) at 39, 42, using the same metaphor to describe unstructured balancing in judicial review.

[60] *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 at [43].

[61] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 at [113]–[144].

2), the Supreme Court seemed to suggest that interferences with parliamentary sovereignty could potentially be justified.[62]

[41] Approaches based in the weighing of diffuse values and interests afford the courts significant leeway to determine which values and interests ought to be weighed in the decision-calculus, and importantly to determine which interests or values ought to be characterised as "fundamental" and "constitutional", and thus of greater weight than other variables. But there are serious questions over whether the courts are the right institution to determine which rights or values are constitutional in a democratic society.[63] Not only are these matters of great moment for the polity, but they involve bare distributive choices. Significantly the courts have not articulated criteria which can be consistently applied to determine which rights or values are constitutional.[64] In turn this has raised questions over why the courts have held some values or rights are fundamental but not others; for example freedom of expression and access to court have been so classified,[65] but the right to life is apparently not a constitutional common law right.[66] Many will consider this an odd sense of priority, and there are significant inconsistencies in the reasoning from one case to the next, raising the spectre of unstated normative concerns lying behind the court's decision-making.[67] The courts have held that various court-centric values such as the bindingness of court decisions and maintenance of the supervisory jurisdiction of the courts are fundamental,[68] but have shown little interests in recognising values such as devolution as constitutional in nature.[69] Again, this raises questions as to why certain values or principles warrant the designation "constitutional" but not others. But there are probably reasons why the courts have not sought to identify a framework – including that the process of doing so would only obviate that decisions over whether rights or values are constitutive of the polity directly implicate bare questions of politics and morality, which the courts are ill-suited to determine. Moreover, the choice of rights and values that should stand in the name of the polity is something in respect of which ordinary citizens would legitimately demand a voice, reinforcing that the appropriate method for determining these rights and values is through a transparent, open and democratic process.

[42] And indeed the polity has, through Parliament, determined a list of rights it considers fundamental, in the terms of the HRA. But the Supreme Court has held that the "ordinary approach" is to apply its own common law constitutional rights jurisprudence ahead of applying those rights in the HRA.[70] The premise of such approach appears to be that the rights

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[62] *R (Miller) v Prime Minister* [2019] UKSC 41 at [41]–[45], [50].
[63] JNE Varuhas, "The Principle of Legality" [2020] CLJ forthcoming.
[64] As judges have observed: P Sales, 'Rights and Fundamental Rights in English Law' (2016) 75 CLJ 86.
[65] *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115; *R (Unison) v Lord Chancellor* [2017] UKSC 51.
[66] *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10.
[67] Lord Kerr, in dissent, pointed out many of these inconsistencies in *Elgizouli* ibid.
[68] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22; *R (Evans) v Attorney General* [2015] UKSC 21.
[69] See, for example, the cursory treatment of arguments based on the Sewell Convention in: *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 at [136]-[151].
[70] Eg *R (Osborn) v Parole Board* [2013] UKSC 61 at [54]–[63].

in the HRA, are rights in international law, and in some way external to the legal system. But those rights *are* domestic rights, having been enacted in domestic law by the Westminster Parliament. As a democratically-sanctioned statement of fundamental rights, one might have thought those rights ought to be afforded priority ahead of any judicially-articulated rights or values. Further, there is no need for the courts to risk their legitimacy, so as to recognise a whole slew of new legal norms at common law, given the HRA already affords strong protection to fundamental individual interests.

[43] Reform? While many judicial review cases do not raise any legitimacy concerns whatsoever, there is a growing body of case law, particularly from the higher courts, which does raise concerns that courts are going beyond a supervisory role on review. These developments do raise serious legitimacy concerns.

[44] I do not intend to conduct a full examination of the issue of codification. But it is my view that codification of the grounds of review or judicial review more generally is not a solution to the legitimacy concerns I have identified. Any codification of grounds would be so broad in its terms that it would not provide a meaningful constraint. Reinforcing this is the conception of judicial review in England. Compared to other jurisdictions such as Australia, where courts view statute as providing the analytical framework of review, the English courts clearly conceptualise review as a common law endeavour; as such it is unlikely the courts would view the common law of judicial review as ousted or replaced by a statutory code. The courts would most likely see common law review as continuing to subsist in parallel with, and unconstrained by, any code. I also do not think abolishing problematic grounds of review presents a viable solution. The Australian experience demonstrates that such measures are generally ineffective, and may spur courts to develop review even more aggressively.[71] For example, a statute providing for the abolishment of proportionality at common law, might be met with judicial articulation of a new ground of "disproportion". I also do not consider legislating "no-go" zones of non-justiciability to be a solution. The concern raised by recent Supreme Court jurisprudence is not one of justiciability, but that courts are applying standards of scrutiny that exceed what is legitimate within a supervisory jurisdiction. There would also be inordinate problems in delineating the scope of any zone of non-justiciability, and courts would likely read any such restrictions down, or simply circumvent the restriction.[72] But moreover there are real dangers in creating legal black holes; even in areas of government activity where courts are generally not competent to rule there is always the possibility of an extreme case where intervention is warranted. It is dangerous to send a signal that there are areas of government activity where government may act with impunity.

[45] Nonetheless, real legitimacy concerns are raised by the legal developments discussed above. I consider that one response lies in reforms to procedural aspects of review, considered below. But there are some possibilities for reform in the context of substantive review, albeit they may be difficult to frame in a way that is satisfactory. One possibility might be to require

[71] See M Aronson, "The Growth of Substantive Review: The Changes, their Causes and their Consequences" in J Bell, M Elliott, JNE Varuhas and P Murray (eds), *Public Law Adjudication in Common Law Systems* (Hart 2016).
[72] As an example of such judicial method see: *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

courts in conducting review to have regard to certain mandatory considerations which are relevant to calibrating the degree of deference that ought to be afforded to decision-makers. These might include the democratic credentials of the decision-maker, the comparative experience and expertise of the court in the subject-matter of the decision, whether the matter raises issues of high policy or foreign affairs, whether the decision-maker or decision-making process is subject to alternative forms of accountability, the breadth of the decision-making power, and so on. This might help to avoid cases such as *Litvinenko* and the Ombudsman cases where review is conducted absent any serious judicial consideration of the degree of deference that ought properly to be afforded to the decision-maker. Importantly the articulation of such factors would serve symbolically to reinforce that review is a supervisory jurisdiction, and that in matters of substance the courts exercise a secondary judgement, and must afford respect to the primary decision-maker who Parliament has bestowed with the authority to decide. A further reform, which would serve a valuable purpose would be provide that, in judicial review proceedings the HRA must be applied first, ahead of any other sources of law, in any case which pleads a HRA claim. This would afford the Act the priority it warrants, as a democratic charter of basic rights. There is no good reason of principle for the HRA to play second fiddle. Furthermore, this would serve to reinforce that common law development is not necessary to the extent that a matter can be determined on the basis of the HRA. It would also be consonant with the longstanding concept of common law judicial review as a jurisdiction of "last resort",[73] a "long stop"[74] supervisory jurisdiction, to be resorted to only where there is no other remedy provided by law.

V. MISSION CREEP: DEVELOPMENTS IN PROCEDURAL LAW

[46] Judicial review's mission creep is not only evident in developments in substantive law, but also in more procedural aspects of judicial review proceedings. It should not surprise us that the changing nature of review is evident in both the substance and process of judicial review. Judicial review is a *system* and a change in one part of a system is likely to be echoed in other parts of the system.

[47] The interconnectedness of process and substance is also an important characteristic of review to bear in mind in considering potential reforms. As has been observed above, there are limits as to what reforms can be made to the substance of review, but amendments to the procedure of review could play a vital role in reemphasising the supervisory nature of review. Given the interconnectedness of process and substance these procedural changes are highly likely to filter through to, and shape, the trajectory of substantive legal development.

[48] Onus/Burden It is a basic and longstanding principle of judicial review that the claimant bears the onus of establishing unlawfulness; this allocation of onus is the corollary of the

[73] *R v Chief Constable of Merseyside, ex parte Calveley* [1986] QB 424; *R v IRC, ex parte Preston* [1985] AC 835 at 852, and see 862; *R v Epping and Harlow General Commissioners, ex parte Goldstraw* [1983] 3 All ER 257 at 262; *R v Panel on Take-Overs and Mergers, ex parte Guinness Plc* [1990] 1 QB 146 at 178, 183, 184.
[74] *R v Panel on Take-Overs and Mergers, ex parte Guinness Plc* [1990] 1 QB 146 at 177.

presumption of validity.[75] As has already been observed, that the claimant bears the onus reflects the supervisory nature of the jurisdiction to grant judicial review: the applicant must demonstrate there is some recognised ground justifying the exercise of the court's supervisory jurisdiction to intervene. Furthermore, the presumed validity of administrative action plays a fundamental role in ensuring certainty in public administration and trust in the acts of government by citizens. The business of government would become impossible if the validity of decisions, acts, and secondary legislation were perennially in question. The presumption of validity also serves as a protection for government against unmeritorious claims; claimants know that they must have a case strong enough to overturn the starting presumption of validity.

[49] However, in an increasing range of contexts the courts have shifted the onus of negativing a case of unlawfulness to the defendant. This is a significant change yet has largely gone unnoticed by most commentators. The most obvious context where courts have shifted the onus is where proportionality is applied as a head of substantive review; if the claimant demonstrates a prima facie invasion of a protected interest or value then defendants will be required to justify their acts,[76] and this may cast at least an evidential onus.[77] But the practice has spread to other contexts, albeit it has not always been explicitly acknowledged. In the context of the augmented principle of legality, where exercise of a statutory power touches protected interests or values then the onus has effectively been shifted to the defendant, in that if they cannot demonstrate that the measure adopted was the least intrusive means of achieving the given policy goal then their acts will be found unlawful;[78] that this is the case is unsurprising as the proportionality method applied echoes that under the HRA, where it is clear the onus formally shifts to the defendant upon proof of a prima facie interference. In the context of review for structural unfairness, the court in *Howard League* repeatedly found against the government on the basis that it had not provided any evidence of procedural safeguards in given administrative systems; but this very mode analysis presumes the burden of justification is on the government, as opposed to the claimant.[79] And in *Miller (No 2)*, in the context of review of the prerogative, the onus was explicitly shifted to the Prime Minister to lead evidence to justify his advice to HM The Queen.[80] In many of these cases, including *Miller (No 2)*, the shifting of the onus was determinative of the outcome.

[50] The courts have not directly addressed why the onus should be shifted to the defendant, and nor have they sought in any serious way to rationalise or justify the approach, or explain how such approach can be reconciled with the presumption of validity; indeed in many cases the

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[75] eg *F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295; *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941 at 945; *R v Boundary Commission for England, ex parte Foot* [1983] QB 600, 634, 637.

[76] Contrast prior cases, which albeit they advocated alignment of substantive review with HRA-style proportionality, nonetheless acknowledged that a different approach to onus was taken as between the HRA and common law contexts: *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418 at 439.

[77] See for example in the context of legitimate expectations: *Patel v GMC* [2013] EWCA 327 at [59]-[60].

[78] *R (Unison) v Lord Chancellor* [2017] UKSC 51 at [99]-[101].

[79] *R (Howard League) v Lord Chancellor* [2017] EWCA Civ 244 at [75], [78], [80], [84], [92], [108], [122]

[80] *R (Miller) v Prime Minister* [2019] UKSC 41 at [51], [61].

burden has effectively been switched but without formal recognition of this fact. Yet shifting the onus is a significant deviation from the axiomatic principle that the claimant bears the onus, which follows from the supervisory nature of the jurisdiction and is underpinned by important policy concerns, and it also can make a significant difference to the outcome of cases. It also reflects the basic idea that a person seeking relief, ought to bear the burden of making out the case for such relief. But perhaps even more significantly the casting of an onus of justification on the defendant is a symptom or by-product of the courts increasingly exceeding the bounds of a supervisory jurisdiction and encroaching on the merits of administrative decisions. It is no coincidence in this regard that all of the contexts in which courts have shifted the onus to the defendant, either explicitly or effectively, are those contexts where the courts have significantly pushed into the substance of administrative action: proportionality, structural unfairness, the principle of legality and so on. And importantly the onus cast may be a heavy one – for example of demonstrating proportionality – and as we have seen, the justification may be judged on a correctness basis. Importantly, to justify its acts the the defendant will typically be required to lead significant swathes of evidence, including policy reports and statistical studies which underpin its policy choices, and courts have shown they will trawl that material with a fine-tooth comb – in accordance with a correctness approach.[81] As will be discussed further below, this flooding of the court with material further encourages courts to push even more deeply into the administrative sphere. Indeed, the switching of the onus may be seen as a surrogate process of disclosure – whereas on ordinary principles disclosure may only be ordered rarely on review. Tellingly, it is a pre-requisite to a court being able to conduct a merits review, that it needs an adequate evidence base on the basis of which it can assess the merits; in this way there is a clear and obvious link between the move to merits or correctness review and imposition of an evidential onus on the defendant.

[51] The rationale for shifting the onus to the defendant – though so far largely unaddressed and unarticulated by the courts – arguably lies in the culture of justification. But as was discussed in section II, that is a difficult and highly contested concept, which reflects a particular political ideology that is strongly individualist in orientation and deeply suspicious of government. That ideology is far from invariable nor immutable. And importantly the concept represents only one set of values. There are other legitimate concerns to be balanced. I have already raised some, including the need for certainty in public life, which has traditionally been provided by the presumption of validity; the shifting of the onus turns this presumption on its head in that government action is presumed unlawful until it is justified. If government action is presumed unlawful how can anyone, including official and citizen alike, act confidently on the basis of it? Furthermore, such approach is an encouragement to litigation, as the starting point in litigation is that the claimant should win, and within such litigation the government will, as discussed, bear a heavy onus. Significant public resources are, and will be diverted, to court proceedings, and not be available for use for other activities of government. Significant time and energy will be diverted to gathering evidence for litigation.

[81] See in particular *R (Howard League) v Lord Chancellor* [2017] EWCA Civ 244; *R (Unison) v Lord Chancellor* [2017] UKSC 51.

Public administration may ossify and is highly likely to become less flexible and less responsive, as government may be unwilling to act unless it has a dossier of evidence in support of its acts which could survive granular analysis on a correctness basis in the Supreme Court – and yet action may be required urgently in the public interest. One expects government decision-making to be led by evidence, but one cannot help but sense that there is a somewhat unrealistic, hyper-rationalist conception of public administration which underpins some elements of contemporary judicial review. It is worth observing in this connection that Mureinik, the progenitor of the idea of the culture of justification, in fact associated it with bills of rights; he considered the focus of *administrative law* by contrast to be more on ensuring the soundness of the process by which decisions are made – as opposed to being focused on substance – and while he considered the provision of reasons for decisions to be a good thing, he also considered such requirements should not be taken so far as to become overburdensome for government.[82] This sort of nuanced approach stands in contrast to much contemporary thinking about the culture of justification.

[52] One response to the foregoing arguments may be to say that the onus has only been shifted where some value or protected interest is touched by a government act. But such an argument is unconvincing, as that pre-requisite is virtually meaningless. Given that the values and interests that are recognised as triggers are myriad, the difficulty would lie in finding a government decision that cannot be shown to touch one of the values or interests which triggers a reversal of onus. And the courts have shown that in cases where such interests or values are not triggered, they are perfectly capable of recognising new triggers. Furthermore, the requirement for triggering a reversal of onus is simply that the interest or value is affected in some way by the decision; there does not for example have to be a serious or significant interference.

[53] It thus seems that one possible reform, which would be straightforward, but of potentially great significance in reemphasising the supervisory nature of review and protecting important public interests in effective public administration, would be to provide in legislation that the onus remains with the claimant throughout the proceeding. Consider the following example of such a provision, drawn from the law of torts:

> In determining liability for damages for harm caused by the fault of a health professional, the plaintiff always bears the onus of proving, on the balance of probabilities, that the applicable standard of care (whether under this section or any other law) was breached by the defendant.[83]

If such reform were adopted HRA claims should be exempted, because it is a matter of Convention law that the onus of justification is on the defendant. Furthermore, HRA rights are true rights, that arise in a primary jurisdiction. It is well-established in English law, including in fields such as tort and contract, that where an individual claim-right is breached the onus shifts to the defendant to demonstrate a defence. As discussed above, it is in the

[82] E Mureinik , 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 South African Journal on Human Rights 31, 32, 41-42.
[83] Civil Liability Act 2002 (WA), s 5PB(6).

nature of a supervisory jurisdiction that the claim is not based in an enforceable legal right. Equally, if the claim is based in a claim of legal right, then it cannot be one for exercise of the supervisory jurisdiction; it is a claim that implicates a primary jurisdiction.

[54] **Evidence** It is a defining characteristic of review as a supervisory jurisdiction that oral evidence and disclosure shall be rare,[84] and that review shall be conducted on the basis of a relatively confined body of witness statements and annexed documents which establish the material facts of the dispute, provided in accordance with the duty of candour. Yet it is less rare than it once was for disclosure and oral evidence to be ordered.[85] And courts are increasingly flooded with material by the claimant, seeking to establish their case, and/or the defendant, because of the significant burden placed on them by the reversal of onus. Importantly these trends are evident in those contexts where the courts have increasingly verged on entering or entered the merits of administrative action, specifically in cases involving application of proportionality, the augmented principle of legality or structural review.

[55] A driver of these changes has been the HRA, but such changes may be justifiable in that context as the courts there exercise a primary jurisdiction, so it is right that claims be treated as procedural akin to ordinary civil proceedings. But the increasing procedural flexibility evident in HRA claims has spilled over to the different context of common law review, as the methods of human rights law, specifically proportionality – whether as a head of substantive review or aspect of the principle of legality – have spilled over into the substantive law of judicial review.[86]

[56] Further, as courts have increasingly shifted focus from scrutinising individual exercises of power to scrutinising entire administrative systems, the range and variety of evidence put before the court has changed significantly. The ability to scrutinise an entire system depends vitally on evidence. Thus, in the most significant structural unfairness case to date, *Howard League*, the Court observed the 'very large' body of evidence before it.[87] This included, for the claimant, 28 statements by 18 witnesses, and accompanying exhibits, and for the defendant, five statements with exhibits from senior officials, as well as a statement from the former Chairman of the Parole Board. All of this added up to 1,417 pages, plus an additional 920 pages comprised of various other documents, generally governmental and legislative reports. At the end of the hearing the Court asked the parties to provide further written submissions on the evidence, which it observed would be a helpful practice in

[84] *O'Reilly v Mackman* [1983] 2 AC 237 at 257, 263, 282, 284; *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 638, 654; *Tweed v Parades Commission* [2007] 1 AC 650 at [2], [29]; *R (CC) v Commissioner of Police for the Metropolis* [2012] 1 WLR 1913 at [28]; *R (Z) v Croydon LBC* [2011] PTSR 748 at [24]. More generally, courts traditionally emphasise review procedure is inappropriate for determining factual questions: *Roy v Kensington and Chelsea and Westminster FPC* [1992] 1 AC 624 at 650, 654; *R v East Berkshire HA, ex parte Walsh* [1985] QB 152 at 173.

[85] For detailed consideration, and citation of relevant cases see: JNE Varuhas, 'Evidence, Facts and the Changing Nature of Judicial Review', U.K. Const. L. Blog (15th June 2020) (available at https://ukconstitutionallaw.org/).

[86] See eg *R (Bourgass) v Secretary of State for Justice* [2015] UKSC 54 at [126]; *R (Kiarie) v Secretary of State for the Home Department* [2017] UKSC 42 at [47].

[87] *R (Howard League) v Lord Chancellor* [2017] EWCA Civ 244 at [12].

systemic review cases. The sheer volume of evidence follows from the fact that the Court had to understand not only the system under challenge, legal aid for prisoners, but also five different decision-making systems pertaining to prisoners, in the context of which legal aid had been withdrawn, and which were the subject of scrutiny for systemic unfairness. We see a similar deluge of evidence in the case of *Unison*, where the augmented principle of legality was applied, to scrutinise an entire fees system.

[57] All of this is a long way from the orthodox narrative of evidence not playing a significant role in review proceedings. A significant aspect of the justification for tightly circumscribing evidence on review, including oral evidence and disclosure, is that not doing so could lead to fishing expeditions and draw out the cost and time associated with litigation for public authorities and courts.[88] Furthermore, courts had previously stressed that the more courts probe the facts, the more they risk entering the merits, and straying beyond the supervisory role.[89] And it is perhaps this last point that is most telling for present purposes. The changes we see in respect of evidence on review reflect the changing nature of review. Specifically, the more deeply the courts delve into the administrative sphere, and probe the justifications for administrative action, and do so on a correctness basis, the more material comes before the court. And by the same token, the more material that comes before the court, the more courts may be drawn into the substance of the matter. Further, the greater the evidence base the more confident courts may be to intervene. Elsewhere I have described this as the "snowball effect".[90] This interplay between the depth of scrutiny and the treatment of evidence reinforces the interconnectedness of substance and process within judicial review.

[58] Reforms in relation to treatment of evidence would serve an important function in reemphasising the supervisory nature of review, and that judicial review proceedings are not to be equated with a full trial in ordinary civil proceedings. One possible reform may be enactment of a presumption against oral evidence and disclosure, and that such may only be ordered if there are compelling grounds for doing so;[91] this was the position originally adopted in *O'Reilly*.[92] Another option could be to introduce limits on the extent of documentary material placed before courts; this should be coupled with an exception for complex cases which warrant greater material. Such reforms would be consonant with modern trends in civil procedure, aimed at proportionate dispute resolution, and with the vision of judicial review as a relatively quick and accessible remedy for the citizen. Furthermore, there are increasingly concerns over marshalling of scarce judicial resources,

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[88] *Bubb v Wandsworth LBC* [2012] PTSR 1011 at [24]–[25]: 'if judges regularly allow witnesses and cross-examination in judicial review cases, the court time and legal costs involved in such cases will spiral'. See *O'Reilly v Mackman* [1983] 2 AC 237 at 257, 282 (disclosure "time consuming", and "rarely allowed" and "kept within strict bounds" given it was liable to "roam unchecked"); *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941 at 947.

[89] *Bubb v Wandsworth LBC* [2012] PTSR 1011 at [24]–[25]: 'judicial review involves a judge reviewing a decision, not making it; if the judge receives evidence so as to make fresh findings of fact for himself, he is likely to make his own decision rather than to review the original decision'.

[90] JNE Varuhas, 'Evidence, Facts and the Changing Nature of Judicial Review', U.K. Const. L. Blog (15th June 2020) (available at https://ukconstitutionallaw.org/).

[91] Cf. CPR Practice Direction 54A, para 12.1.

[92] *O'Reilly v Mackman* [1983] 2 AC 237 at 257, 282.

which the courts have themselves emphasised;[93] a court being flooded with thousands of pages of evidence in respect of one case necessarily limits the judicial resources available for other cases, which may be of equal importance. Any such reforms to evidence should not apply to HRA claims, which are – as has been discussed – necessarily different in nature, in that HRA claims do not involve exercise of a supervisory jurisdiction.[94]

VI. FURTHER ISSUES IN PROCEDURAL LAW

[59] Having addressed the core theme of judicial review's mission creep away from a supervisory jurisdiction, I now turn to discuss a miscellany of further procedural issues which are relevant to the work of the Panel.

[60] Legal Power A noticeable trend in judicial review is for courts to scrutinise government acts, where it is not clear that there has been an exercise of any defined legal power. This is important because if there is no exercise of legal power, it is unclear what the legal "hook" is that renders the matter one appropriate for judicial consideration and resolution. One way to put this might be to say that absent a legal hook, the courts may be operating in the domain of pure politics. Moreover, logically a court must be able to define the limits of a power before it can hold those limits have been exceeded.

[61] One example of this phenomenon is the Ombudsman cases, which were introduced above. The typical facts of those cases are as follows.[95] The Ombudsman, in exercise of his or her statutory powers, renders a report following an investigation, and in that report makes certain findings, which form the basis of remedial recommendations. A Minister then responds to the report, rejecting the findings. The Minister's rejection of the findings is then judicially reviewed on the ground of rationality. But a fundamental question is never asked: what precisely is being reviewed? The Minister has no power under the relevant legislation to accept or reject a finding, so there is no exercise of a statutory power. Giving a view on whether findings in a report are credible does not seem to necessitate the invocation of a prerogative power. In these cases it seems the Minister has simply given an opinion, and that opinion has then been held unlawful. It might be that the view expressed by the Minister was an exercise of the "third source"[96] but even that is questionable as third source powers are usually conceptualised as ancillary or managerial powers to aid in the carrying out of the functions of government, such as administration of government departments. And in any case it is not established that such powers can be reviewed on the basis of reasonableness.[97]

[62] *Miller (No 2)* raises a similar issue.[98] The subject of the judicial review was the Prime Minister's advice to HM The Queen. It is clear that on the facts HM Queen exercised a

[93] *R (Cart) v The Upper Tribunal* [2012] 1 AC 663.
[94] In HRA claims, the courts may permissibly have a more significant role in fact-finding: *Manchester City Council v Pinnock (Nos 1 and 2)* [2011] 2 AC 104 at [74]; *R (Kiarie) v Secretary of State for the Home Department* [2017] UKSC 42 at [46]–[47].

[95] See eg *R (Bradley) v Secretary of State for Work and Pensions* [2008] 3 All ER 1116.
[96] M Elliott and JNE Varuhas, *Administrative Law*, 5 ed (Oxford 2017) at 128-129.
[97] Ibid.
[98] *R (Miller) v Prime Minister* [2019] UKSC 41.

prerogative power. But if HM Queen exercised the prerogative power, what was the legal nature of the Prime Minister's advice, which is what was in fact the subject of the judicial review? On one view, the Prime Minister gave HM Queen advice just like anyone else could, and he exercised no legal power in doing so – other than possibly a third source power. It might be argued that his power was a legal power ancillary to HM Queen's prerogative power. The point is that the Court never addressed the legal status of the act it ultimately held unlawful, and specifically whether it had any formal status in law.

[63] Connected to the foregoing there is a growing body of jurisprudence where courts have scrutinised and found unlawful non-statutory guidance or policy which government has adopted on its own motion.[99] Again, it is unclear what the legal status of such non-statutory documents is, and why such documents are legitimately subject to review, especially where those instruments have not been applied in the course of exercise of a legal power, for example a statutory power, nor contemplated in the text of any statute.

[64] These are issues which have so far been little recognised, and more research on these questions would be desirable. But the material discussed does at least raise a prima facie concern that courts are entering spheres of activity not properly amenable to judicial review. On the other hand, it is certainly the case that review is on safe ground where the object of review is the exercise of a power based in a recognised legal source, such as statute or the prerogative. A question is thus raised as to whether a judicial review challenge needs to be in respect to the exercise of a defined legal power? For example under the Australian Administrative Decisions (Judicial Review) Act 1977, there are various conditions that must be met before a claim may be brought including that there must be a decision of an administrative character made under an enactment.[100] That is just one example and it does have drawbacks, in particular that the "administrative character" rider is probably unnecessary and its meaning obscure, while requiring a decision under an enactment would be too narrow, as excluding review of common law powers. Nevertheless the relevant provisions provide an example of a more detailed definition of the types of acts that may be reviewed, including by reference to their legal source.

[65] Abstract review There is a growing trend towards courts conducting "abstract review". That is, review is conducted absent an application of a legal power or norm to a particular person or set of facts. The cases on structural review are an obvious example: courts scrutinise whether an entire administrative system has a propensity to unfairness, absent any individual case before them of claimed unfairness. Similarly in *Unison* the Supreme Court held the system of fees for employment tribunals unlawful on the basis that the system created a risk of barring access to the courts; but there was no specific case before the court where a person had been barred from accessing the tribunal because of the fees charged.[101] In each case the courts relied on hypotheticals fashioned by counsel, and various official reports and

[99] M Elliott and JNE Varuhas, *Administrative Law*, 5 ed (Oxford 2017) at 181-185, and see also 524-528.
[100] Administrative Decisions (Judicial Review) Act 1977, s 3.
[101] *R (Unison) v Lord Chancellor* [2017] UKSC 51 at [90].

statistical evidence to determine whether the respective systems created risks which were such as to render the systems unlawful.

[66] One can certainly understand the courts' motivations in such cases: if a court assesses that a system has a propensity to unlawfulness, is it not better to act pre-emptively, and thus prevent cases of unlawfulness? But on the other hand there may be concerns with courts conducting this sort of abstract systemic review.[102] First, it might involve courts in tasks they are ill-equipped to perform. There is certainly such concern with courts scrutinising entire administrative systems. Second, where a court is not acting to address a live controversy it may be more different to maintain that courts are performing their constitutional function of adjudication; and there may be more of risk of courts straying beyond their constitutional role, for example into the realm of administrative reform. Third, abstract review is generally thought inappropriate where the matter is heavily fact-dependant. Yet in the *Howard League* case on structural review and in *Unison*, the respective courts' determinations were heavily fact-dependant. That is because their determinations required an inquiry into how the systems under review actually operated. In *Howard League* a central question for the court was whether, in practice, there were measures provided for in the administrative systems which might alleviate unfairness in specific cases, and in *Unison* a central question was how fee-remission operated in practice. Fourth, where a court makes a decision in respect of an administrative system which affects many people, it might be considered unfair if those individuals are not afforded a voice in decisions that affect them. Fifth, a court may fail to fully recognise material considerations or fully appreciate the nuances of the legal issues before it or the consequences of its decision absent a concrete set of facts to focus the mind.

[67] If such abstract review were considered to raise serious concerns the solution would be adoption of a requirement that there must be a live dispute between parties before a case may proceed to judicial review. The "matter" test applied under the Australian Constitution is an example.[103]

[68] Time limits I do not consider that any change needs to be made to the time limits for review. The current limitation period is three months, and the period is even shorter in particular contexts. These are exceptionally tight time limits, and to make them any shorter could be productive of unfairness.

[69] Standing I do not consider there is any need for significant reform to the law of standing. The basic approach is that a claim will be permitted to proceed if it is bona fide and presents an arguable case. This approach is consonant with a conception of review concerned with legality; unlawful acts should not be allowed to persist simply because of the absence of a directly affected challenger. This is particularly important in certain contexts such as environmental judicial review. But it must be observed for completeness that as the Supreme Court has increasingly oriented judicial review towards concepts of rights, this does raise

[102] See for discussion of the issues raised by abstract review: M Elliott and JNE Varuhas, *Administrative Law*, 5 ed (Oxford 2017) at 524-532.
[103] M Aronson et al*, Judicial Review of Administrative Action and Government Liability*, 6 ed (Thomson Reuters 2017) at [2.230].

questions of coherence with a public interest approach to standing. Take *Unison* as an example.[104] The case focused on the right to access court, but there was no person before the court whose right had been infringed, the claim being brought by the union, Unison, on the basis of an arguable case of unlawfulness. I am highly sceptical about how much weight can be placed on the increasing judicial reliance on the rhetoric of "rights", as the terminology is used so freely and imprecisely, and it is doubtful whether much of this rhetoric refers to any genuine claim-right, conceptually akin to rights in private law.[105] But if the idea is that individuals have a right to access court and that right is personal to them it would then seem an affront to their status as a right-holder that a judicial decision is made affecting their rights, but in proceedings to which they were not a party. In the case of *Unison* perhaps no right-holder would have had a complaint about the outcome, but in other cases the result may not be one that all affected right-holders would consider in their interest. And notwithstanding whether the result serves a person's interest, as a rational agent, should they not at least have the chance to put their view in respect of their interests? As such there may be a concern that if the basis of certain claims in judicial review are individualist norms, that this cannot be reconciled with application of broad standing rules in those contexts; a significant aspect of the holding of a right is the capacity to make decisions in respect of it, including whether or not to bring proceedings. My preferred approach however would be not to reform standing rules (for example, so as to adopt a "victim" requirement), but to reemphasise that review is not at base about rights, but ensuring the proper exercise of power and redressing abuses of power. On this conception of review broad standing rules pose no problem of incoherence.

[70] **Remedies** For a period of time the Supreme Court seemed interested in reinvigorating the remedial discretion on judicial review.[106] However, more recently in *Unison* and *Miller (No 2)* the Court has asserted that where an act or decision is beyond the scope of power it shall automatically be invalid,[107] but where the unlawfulness goes to the exercise of the power the act or decision is seemingly voidable. By taking such approach to decisions outside the scope of power, the Court apparently considered it had relieved itself of having to determine whether to exercise its remedial discretion in contentious circumstances. In *Unison* the effect of the decision was to invalidate the whole fees system for employment tribunals, and in *Miller (No 2)* the effect was that Parliament was never prorogued. Such drastic consequences would generally be material to an inquiry into whether the court should exercise its remedial discretion or not.

[71] There are several points that might be made. First, the distinction between scope and exercise seems elusive. In *Miller (No 2)* for example the Prime Minister's advice was held

[104] *R (Unison) v Lord Chancellor* [2017] UKSC 51 at [90].

[105] See JNE Varuhas, "The Reformation of English Administrative Law? 'Rights', Rhetoric and Reality" [2013] CLJ 369

[106] *Walton v Scottish Ministers* [2013] PTSR 51 per Lord Carnwath; *R (Champion) v North Norfolk DC* [2015] UKSC 52 at [54]ff; *Youseff v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 at [61]. See JNE Varuhas, "Judicial Review: Standing and Remedies" [2013] CLJ 243.

[107] *R (Unison) v Lord Chancellor* [2017] UKSC 51, at [118]–[119]; *R (Miller) v Prime Minister* [2019] UKSC 41, at [69].

unlawful on the basis that he had no reasonable justification for advising HM The Queen to prorogue Parliament. This was held to invalidate the advice on the basis that it was outside scope, yet the whole basis of intervention concerned the qualities of a particular exercise of power and whether that exercise of power was reasonably justified. The approach collapses any meaningful distinction between scope and exercise. That the distinction is fraught is unsurprising; many similar distinctions such as that between jurisdictional and non-jurisdictional errors have collapsed as being unsustainable – and easily manipulable. Second, there is no rule or principle known to the common law that remedial discretion only applies in some cases; it applies in all cases as a matter of principle. So albeit remedial discretion was never mentioned in *Unison* nor *Miller (No 2)* the discretion was in principle available to save the fees order and Prime Minister's advice from invalidity. Third, an automatic remedial consequence of voidness is a blunt instrument. For example, there may be cases where to void an administrative system would seriously prejudice the rights of innocent third parties or cause untold administrative chaos. These are matters that one would think a court ought to have in its contemplation in determining remedial consequences. And the truth is that if the court considered the consequences untenable it would save the decision from invalidity. The problem in this area is that courts often make grand statements to the effect that unlawfulness necessarily results in voidness, but when application of that approach would lead to chaos the courts resile. This is a significant part of the reason why the area of remedial consequences is chaotic and fraught.[108] Fourth, it is questionable whether there is a rational justification for differentiating remedial consequences on the basis of the distinction between scope and exercise. Putting aside that the distinction is itself unsafe, a legal error as to scope could be merely technical, whereas a legal error as to exercise of a power could involve a gross abuse. To hold the former is automatically void, whereas the latter is not, is somewhat difficult to rationalise.

[72] If reform were considered warranted, a preferable approach would be to reiterate that the discretion to refuse relief is available in every case, can be applied to save a decision from invalidity, and should at least be considered by a court in every case where a court holds administrative action unlawful. There are strong reasons why the starting-point in any case of proven unlawfulness should be a presumption of nullity, and it should generally be the case that strong reasons would be required to overcome the presumption. The types of factors that might lead a court to refuse relief could be transparently stated, and to this end a useful starting point is the statement of principle in *Argyll*.[109]

[73] Interveners It has been observed that the increasing role of interveners in public law proceedings leads to such proceedings resembling a political process,[110] especially as the interveners may often be those who were unable to secure their desired policy goals through political process. There is in this regard a risk of moving too far from the orthodox paradigm of a bipolar adversarial process, in that courts may find themselves embroiled in politics. And there are risks that litigation, and by extension the exercise of public power, may be captured

[108] D Feldman, 'Error of law and Flawed Administrative Acts' (2014) 73 CLJ 275.
[109] *R v Monopolies and Mergers Commission, ex parte Argyll* [1986] 1 WLR 763 at 774-775.
[110] C Harlow, "Public Law and Popular Justice" (2002) 65 MLR 1.

by organised interests, possibly at the expense of the public interest. Further, it is clear that intervention is significantly on the rise, and that the vast majority of applicants are granted permission to intervene.[111] Given the significant, and growing role of interveners in judicial review litigation, it is desirable that courts give greater attention to the grounds on which intervention is permitted, and that there is greater transparency – for example in the terms of the judgment – as to why interventions have or have not been permitted. Judgments in general never articulate why permission has been granted to intervene. It is typically not made clear in support of which legal position or party the intervention is made. The role of interveners in general, and the reasons for allowing intervention in particular cases, are rather opaque, at least from what one can discern from the terms of judgments – which are the ultimate public record of the case. One further concern is that in high stakes judicial review cases which reach the Supreme Court there may be an imbalance, in that many interveners intervene in aid of one party's position, and none intervene in aid of the other. Anecdotally it seems there are often no or few interveners on the side of government, or at least that has been the case in a number of the most high stakes judicial reviews that have recently come before the Supreme Court.[112] This does raise at least a prima facie concern over government being "out-muscled" in litigation. It is true that governments are powerful, but so too are vested interests. One can easily imagine powerful corporate interests lining up to intervene on the claimant's side in a significant regulatory judicial review, for example. This might suggest that an important factor in courts deciding whether to permit intervention ought to be the maintenance of a fair balance of representation as between the two sides of the dispute; and such a principle should apply equally to ensure both parties are treated fairly.

Attachment: JNE Varuhas, "The Principle of Legality" [2020] Cambridge Law Journal forthcoming.

[111] S Shah, T Poole and M Blackwell "Interveners and the Law Lords" (2014) 34 OJLS 295.
[112] See for example *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10; *R (Miller) v Prime Minister* [2019] UKSC 41.