

Mechanisms of Constitutional Review
Bilateral Exchange with the Italian Constitutional Court

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1. Overview

- 1.1 Unlike Italy, and most other countries, the UK does not have a codified constitution setting out the fundamental principles by which the country is governed, and defining the powers of its institutions. Its fundamental constitutional principles have been established by statutes, judicial decisions and unwritten conventions over the course of its history. Its most fundamental principle, established through the development of Parliamentary controls over the executive since the Middle Ages, and particularly as a result of conflict between the executive and Parliament during the seventeenth century, is the sovereignty of Parliament. Since the legislative power of Parliament is unlimited, it follows that legislation enacted by Parliament cannot be reviewed by the courts for its constitutionality. So the UK courts, including the Supreme Court, do not have the power to strike down Parliamentary legislation on the basis that is “unconstitutional”. They will, on the other hand, interpret legislation in accordance with principles of interpretation which have been developed by the courts and which are designed to protect constitutional values such as legal certainty, the protection of fundamental rights and the rule of law.
- 1.2 As in most common law jurisdictions, the UK also has no division between ordinary civil and criminal courts, administrative courts, and constitutional courts of the kind which exists in Italy and most other countries in continental Europe. The Supreme Court is a general apex court hearing appeals in cases of all kinds.²
- 1.3 Another typical feature of the common law tradition is that there is, in general, no right of appeal. It is necessary to obtain permission to appeal. Permission is generally granted for appeals to the first level of appeal court where it is arguable that there has been an error in the decision of the lower court. Permission is granted to appeal to the Supreme Court only where the proposed appeal raises an arguable point of law of general public

¹ President of the Supreme Court of the United Kingdom. I am grateful to my judicial assistant, Rebecca Fry, for her assistance in the preparation of this paper.

² Note that the Supreme Court does not have jurisdiction to hear criminal appeals from Scotland unless they raise an issue concerning compatibility with the European Convention on Human Rights or the UN Convention on the Rights of the Child, or an issue as to the powers of the Scottish Parliament or Scottish Government: Criminal Procedure (Scotland) Act 1995, s. 288AA, 288AC; Scotland Act 1998, sch 6, para 13(a). See further ‘The Jurisdiction of the Supreme Court of the United Kingdom in Scottish Appeals: Human rights, the Scotland Act 2012 and the Courts Reform (Scotland) Act 2014’: [The Jurisdiction of the Supreme Court of the United Kingdom in Scottish Appeals](#)

importance. As a result, the Supreme Court only hears about 60 appeals each year, covering all areas of the law. The same judges, sitting as the Judicial Committee of the Privy Council, also hear a similar number of appeals from countries in the Commonwealth.³ As these countries have written constitutions of a similar nature to Italy's, the judges frequently decide questions of constitutional interpretation of a kind which would be familiar to judges of the Italian Constitutional Court. In some of these cases, there is a constitutional right of appeal to the Privy Council, while other cases require permission to appeal.

- 1.4 In the UK, however, it follows from this background that our mechanisms of constitutional review are different from those of other jurisdictions, because our courts are not concerned with interpreting and enforcing a written constitutional instrument, and do not have the power to strike down Parliamentary legislation on the basis that it is "unconstitutional". Nevertheless, the Supreme Court decides constitutional questions of considerable importance.

2. Sources of UK constitutional law

- 2.1 To understand the mechanisms of constitutional review in the UK, it is first necessary to consider the sources of our constitutional law. The legal rules and principles which make up the UK constitution are laid down partly in legislation and partly in the common law developed by judges over time. Some statutes have particular constitutional significance. These include a number of historical statutes, dating mostly from the seventeenth and early eighteenth centuries (but in some cases much earlier), guaranteeing rights such as access to justice, freedom from arbitrary detention, freedom of speech and debate in Parliament, judicial security of tenure, and the necessity for taxation to be authorised by Parliamentary legislation. They also include legislation recognising the constitutional principle of the rule of law and requiring government ministers to uphold the independence of the judiciary; the Human Rights Act 1998, which incorporates the European Convention on Human Rights ("the **Convention**") into our domestic law; and the legislation which establishes and devolves power to the devolved legislatures and executives in Scotland, Northern Ireland and Wales.⁴ Constitutional principles established by judicial decisions include the sovereignty of Parliament, the accountability of the government to Parliament, and the necessity for interferences with citizens' rights or property to be authorised by Parliamentary legislation.

(a) Parliamentary sovereignty and the rule of law

- 2.2 Many of the common law rules which can be said to form part of the UK constitution tend "to be more in the nature of general principles which, at certain points, achieve

³ [About the Judicial Committee of the Privy Council - JCPC](#)

⁴ Scotland Act 1998; Northern Ireland Act 1998, Government of Wales Act 2006.

sufficient solidity to be enforced as legal norms.”⁵ The most important of these constitutional principles are Parliamentary sovereignty and the rule of law. These principles were identified as twin pillars of the UK constitution by the noted Victorian constitutional scholar A V Dicey, and they have been influential ever since.⁶

- 2.3 As the Supreme Court emphasised in a recent case, “[t]he most fundamental rule of UK constitutional law is that Parliament, or more precisely the Crown in Parliament, is sovereign and that legislation enacted by Parliament is supreme.”⁷ The essence of Parliamentary sovereignty can be expressed in eight words: what the King in Parliament enacts is law.⁸ In Dicey’s classic formulation, Parliamentary sovereignty has two aspects. First, the UK legislature has “the right to make or unmake any law whatever”.⁹ This is significant because it means that it would be open to Parliament to repeal any law, including so-called “constitutional” statutes like the Human Rights Act and the devolution legislation.¹⁰ Secondly, “no person or body is recognised... as having a right to override or set aside the legislation of Parliament.”¹¹
- 2.4 There is no single universally accepted definition of the rule of law but at its heart is the requirement that everyone in our society is protected by law against the arbitrary exercise of state power.¹² As Dicey explained, this entails that everyone, including public bodies, should be equally subject to the law of the land and the jurisdiction of the courts who enforce it.¹³ The rule of law demands that: (i) powers to interfere with individual rights must be conferred and defined by law; (ii) the law must be reasonably clear and accessible, so that everyone can find out what their rights are, (iii) the law is applied and enforced even-handedly and with reasonable efficiency, so that people’s rights are protected in practice, not just on paper, (iv) courts of law, as the final guardians of everyone’s rights under law, are impartial and independent of political influence, and (v) everyone whose rights have been threatened or infringed has

⁵ Lord Sales, “Constitutional Law Without a Written Constitution”, Lecture delivered at Trinity College, Dublin, 11 March 2025: https://supremecourt.uk/uploads/speech_lord_sales_110325_15bb3e1a96.pdf

⁶ A V Dicey, *Introduction to the Study of the Law of the Constitution*, 1885 (10th edn, 1959).

⁷ *In re Allister* [2023] UKSC 5 [66] (Lord Stephens).

⁸ This wording is based on V Bogdanor, “Our New Constitution” (2004) 120 LQR 242, 259: “... it has always seemed to be a fruitless exercise to codify the British Constitution. Indeed, it could have been formulated in just eight words--What the Queen in Parliament enacts is law.”

⁹ Dicey (n 6) p. 40.

¹⁰ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) [62] (Laws LJ): “We should recognise a hierarchy of Acts of Parliament: as it were “ordinary” statutes and “constitutional” statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.”

¹¹ Dicey (n 6) p. 40.

¹² Dicey (n 6), 188. The rule of law can be traced a long way back in our constitutional history. It was given statutory force in section 29 of Magna Carta 1297, which re-enacted a provision set out in the better-known Magna Carta of 1215. It is now recognised by section 1 of the Constitutional Reform Act 2005, which refers to “the existing constitutional principle of the rule of law.”

¹³ Dicey (n 6), p. 193: “every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”

reasonable access to the courts, so that unlawful behaviour can be challenged and redress can be obtained.¹⁴

- 2.5 It can be seen from this that the rule of law and Parliamentary sovereignty complement one another. Parliamentary sovereignty ensures that the lives of everyone in our society are governed by laws enacted by Parliament. But there “is little advantage in the promulgation of laws ... unless there are judges who are able and willing to enforce them. Otherwise, the powers that be can disregard the laws with impunity.”¹⁵ In other words, if the rule of law were not enforced through the courts, legislation could be arbitrarily applied or ignored, rendering Parliament’s role as the supreme law-making body meaningless. In the absence of a written constitution, the courts regularly refer to the rule of law “to legitimise and explain their constitutional role”,¹⁶ enabling them to define and delimit the role of the legislative and executive branches of government.

(b) Prerogative powers

- 2.6 The executive has some powers which do not derive from legislation passed by Parliament, but are instead authorised under the royal prerogative. In broad terms, the royal prerogative is the part of the common law which recognises the inherent powers, duties and privileges enjoyed by the Crown.¹⁷ Many functions of government are exercised under the royal prerogative, including the ratification of international treaties.¹⁸ The UK has what is sometimes called a “dualist” system, which means that international and domestic law operate on different planes. Treaties are binding on the UK on the international plane, but they do not form part of the law of the UK and the courts do not have any powers to enforce treaty rights or obligations, unless Parliament passes legislation to implement them.¹⁹ This is a necessary corollary of Parliamentary sovereignty.²⁰
- 2.7 The courts play an important constitutional role in preventing executive use of prerogative powers from infringing on Parliamentary sovereignty. The best-known recent examples of this are the two *Miller* appeals in the Supreme Court, which Lord

¹⁴ Lord Reed, *Written Evidence*, House of Lords Constitution Committee Inquiry on the Rule of Law, 24 April 2025: [Reed CC 56f89fb220.pdf](#)

¹⁵ T Bingham, *The Rule of Law* (Penguin 2011), p. 24.

¹⁶ Lord Sales (n 5).

¹⁷ Halsbury’s Laws of England, *Constitutional and Administrative Law* (Vol 20, 2023), para 164. See also *Attorney General v De Keyser’s Royal Hotel Ltd* [1920] AC 508, 526 (Lord Dunedin), citing Dicey (n 6) p. 424, who described the prerogative as “the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.”

¹⁸ Note that treaties must be laid before Parliament before ratification, as set out in Part 2 of the Constitutional Reform and Governance Act 2010.

¹⁹ *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 500 (Lord Oliver). See also *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (“*Miller I*”), [56], [167] and [244].

²⁰ *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [77]-[78] (Lord Reed), citing *JH Rayner (Mincing Lane) Ltd* and *Miller I*, *ibid*.

Stephens will discuss in more detail in his presentation.²¹ Both cases related to the UK's withdrawal from the European Union, but they were not about the merits of Brexit. In *Miller I*, for example, the Supreme Court decided (by a majority of 8-3) that an Act of Parliament was needed to authorise the government to notify the European Council of the UK's intention to leave the EU. This was because, although the government has prerogative powers to make and unmake treaties, those powers could not be used to change domestic law. So long as the European Communities Act 1972 was in force, EU law was "an independent and overriding source of domestic law".²² Withdrawing from the EU would therefore change domestic law in a fundamental way, which was something that could only be done by Parliament.

(c) The Human Rights Act 1998

- 2.8 The Human Rights Act maintains Parliamentary sovereignty while, at the same time, providing a means for violations of Convention rights to be remedied within the UK domestic legal system. Section 2 of the Act requires the UK domestic courts to take into account the case law of the European Court of Human Rights ("the **European court**") where they consider it to be relevant. The European court's decisions do not bind the UK courts, but it is now well established that, in the absence of some special circumstances, they will follow its "clear and constant jurisprudence."²³
- 2.9 Section 3 of the Human Rights Act empowers the UK courts to read and give effect to legislation in a way which is compatible with Convention rights, so far as it is possible for them to do so. Section 3 becomes relevant where ordinary methods of statutory interpretation reveal a potential breach of Convention rights.²⁴ It provides the courts with a much stronger interpretive power than they would have otherwise. As Lord Nicholls has explained, "section 3 is of an unusual and far-reaching character... [and] may require a court to depart from the unambiguous meaning the legislation would otherwise bear."²⁵
- 2.10 These comments were made in *Ghaidan v Godin-Mendoza*,²⁶ a housing case concerning the death of a tenant who lived in the property with his same-sex partner. The partner claimed that the tenancy had passed to him as the deceased's "spouse", but the relevant legislation defined "spouse" as a person living with the tenant "as his husband or wife." A case decided before the Human Rights Act came into force held that this definition did not include persons in a same-sex relationship (although they could qualify for

²¹ *Miller I* (n 19); *R (Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland* [2019] UKSC 41 ("Miller II").

²² *Miller I*, [65].

²³ *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, [20] (Lord Bingham).

²⁴ *S v L (No 2)* [2012] UKSC 30, [15] (Lord Reed).

²⁵ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [30].

²⁶ *Ibid.*

protection as members of the deceased’s “family”).²⁷ The House of Lords (the Supreme Court’s predecessor) found that treating same-sex couples differently from heterosexual couples in this context violated article 14 read with article 8 of the Convention. The majority of the court therefore concluded that, applying section 3, the relevant provisions of the housing legislation could be read as including same-sex partners.

- 2.11 However, not all provisions of primary legislation can be rendered Convention-compliant through the application of section 3. Section 4 therefore empowers the courts to make a “declaration of incompatibility” where they are satisfied that a provision of primary legislation is incompatible with a Convention right. A recent example is *Mercer*, in which the Supreme Court declared section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 to be incompatible with the right to strike protected by article 11 of the Convention.²⁸ This was because the legislation protected employees who participated in lawful strike action organised by their trade union from being dismissed, but it did not prevent employers from imposing other sanctions on them.
- 2.12 Declarations of incompatibility do not affect the validity of the affected legislation, which continues to have full force and effect.²⁹ But they carry significant political weight. The legislature shares the judiciary’s commitment to the rule of law, so Parliament has invariably responded to declarations of incompatibility by amending the offending law, although there is no formal requirement for it to do so.³⁰ For example, following the Supreme Court’s decision in *Mercer*, Parliament passed new legislation which inserted a new section into the Trade Union and Labour Relations (Consolidation) Act 1992 to protect workers who participate in lawful strike action.³¹ In this way, section 4 often causes the law to change, but it is Parliament which makes that change, not the courts.
- 2.13 Section 6 of the Human Rights Act makes it unlawful for a public authority to act in a way that is incompatible with Convention rights. Government policies are regularly challenged on this basis. For example, in 2023, the Supreme Court considered a challenge to the lawfulness of the Home Secretary’s “Rwanda policy”, which provided for certain people seeking asylum in the UK to be sent to Rwanda, obliging them to claim asylum in Rwanda instead.³² The Court held that that the policy was unlawful on a number of grounds, including under section 6. This was because asylum-seekers sent

²⁷ *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

²⁸ *Secretary of State for Business and Trade v Mercer* [2024] UKSC 12.

²⁹ Human Rights Act 1998, s. 4(6).

³⁰ The UK government publishes an annual report on judgments of the European court and the UK domestic courts which find there has been a violation of Convention rights. This sets out the actions taken by the government and Parliament in response. The report for 2024-25 is available here: [Responding to human rights judgments - Report to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2024–2025](#)

³¹ Trade Union and Labour Relations (Consolidation) Act 1992, s. 236A, inserted by the Employment Rights Act 2025, s. 76(2).

³² *R (AAA (Syria)) v Secretary of State for the Home Department* [2023] UKSC 42.

to Rwanda would face a real risk of ill-treatment by reason of refoulement to their country of origin, contrary to article 3 of the Convention.

(d) Devolution

- 2.14 The UK is made up of four older nations which have joined together: England, Wales, Scotland and Northern Ireland. Like Italy, the UK is a unitary state rather than a federation.³³ For a long time after its creation, the UK maintained highly centralised governance arrangements based on the sovereign Parliament in Westminster. However, since 1998, power has been devolved to legislatures and executives in Scotland, Northern Ireland and Wales. Under the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006, these bodies are empowered to deal with specified areas of law and administration, while other matters are reserved to the Westminster Parliament and the UK government in Whitehall.
- 2.15 The powers of the devolved legislatures are limited by the devolution statutes. The three most important limitations are as follows.³⁴ First, the devolved legislatures cannot legislate on any of the matters which have been reserved to the UK Parliament in Westminster.³⁵ Secondly, they cannot legislate to change certain protected enactments, including the Human Rights Act.³⁶ Thirdly, the devolved legislatures cannot pass legislation that is incompatible with the rights protected by the Convention. Any statutory provision which exceeds these limits is outside the legislative competence of the devolved legislature in question and therefore has no effect.³⁷

3. Mechanisms of constitutional review in the UK

- 3.1 Many of the principles which form part of the UK constitution have emerged from successive judicial decisions taken in the cases which have come before the courts over time. Constitutional questions are not reserved to a specialist constitutional court. Instead, they are litigated at all levels in many different kinds of courts across the UK, as I will go on to explain.
- 3.2 Litigants can seek permission to appeal from those courts all the way up to the Supreme Court. As explained above, there is no automatic right to bring an appeal to our court.

³³ See further E Barendt, *An Introduction to Constitutional Law* (Oxford University Press 1998), Ch 3.

³⁴ This summary is based on that provided in J M Tirapu-Sanuy, “Devolution, National Pluralism and the Role of the UK Supreme Court (2025) 45(3) Oxford Journal of Legal Studies 640, 642.

³⁵ Scotland Act 1998, s. 29(2)(b), with the reserved matters listed in sch 5; Northern Ireland Act 1998, s. 6(2)(b), with the excepted matters listed in sch 2 and the reserved matters listed in sch 3; Government of Wales Act 2006, s. 108A(2)(c), with the reserved matters listed in sch 7A.

³⁶ Scotland Act 1998, s. 29(2)(c), with the protected enactments listed in sch 4; Northern Ireland Act 1998, s. 6(2)(f), with the entrenched enactments listed in s. 7; Government of Wales Act 2006, s. 108A(2)(d), with the protected enactments listed in pt 1 of sch 7B.

³⁷ Scotland Act 1998, s. 29(2)(d); Northern Ireland Act 1998, s. 6(2)(c); Government of Wales Act 2006, s. 108A(2)(e).

Instead, litigants must generally apply for permission to appeal. Every month, we decide a batch of these applications, sitting in panels of three Justices. The President and Deputy President approve the composition of these panels and the allocation of the applications to each panel. In almost all cases, we decide the applications on the basis of written arguments, without an oral hearing.³⁸ This system gives us control over the cases we hear, though we are not free to grant permission to appeal for any reason. When deciding each application, we apply the test set out in our Practice Directions. This provides that “[p]ermission to appeal is granted for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Court at that time.”³⁹ In the 2024-25 financial year, the Supreme Court Justices granted permission to appeal in 61 of 170 cases, giving a grant rate of just over 35%.⁴⁰

- 3.3 Some constitutional questions can be referred to the Supreme Court directly under procedures set out in the devolution statutes. These references do not require the Supreme Court’s permission.

(a) Judicial review

- 3.4 Judicial review enables people who are affected by decisions taken by the executive to challenge those decisions in court. Applicants are required to apply to the High Court for permission to bring a judicial review claim, which provides an important safeguard against claims which lack legal merit.⁴¹ They must also have standing to bring the claim, meaning that they must have “a sufficient interest in the matter” to which the application for judicial review relates.⁴² The courts have interpreted this requirement relatively broadly and flexibly, and are generally unwilling to dismiss a meritorious application for lack of standing.⁴³ A particularly liberal approach is taken in environmental claims on the basis that the quality of the natural environment is of interest to everyone.⁴⁴ Claims must ordinarily be brought promptly and in any event not later than three months after the grounds to make the claim first arose.⁴⁵

³⁸ Rules 17(2)(d) and 18 of the Supreme Court Rules 2024 make provision for applications for permission to appeal to be considered at an oral hearing, but in practice such hearings are rare.

³⁹ Supreme Court Practice Direction 3.32: [Practice Directions - UK Supreme Court](#)

⁴⁰ Supreme Court, Annual Report and Accounts 2024-25: [The Supreme Court and Judicial Committee of the Privy Council – Annual Report and Accounts](#). Note that the grant rate was lower in the 2023-24 financial year, when the Supreme Court granted permission to appeal in 38 of 185 cases giving a grant rate of 21%: Supreme Court, Annual Report and Accounts 2023-24: [annual report 2023 2024 14a511ecd0.pdf](#).

⁴¹ In England and Wales, this requirement is set out in the Senior Courts Act 1981, s. 31(3)

⁴² *Ibid.*

⁴³ *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386, 395 (Rose LJ): “the merits of the challenge are an important, if not, dominant, factor when considering standing.”

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

⁴⁵ CPR 54.5(1). Note that the High Court may refuse to grant permission for a judicial review claim if it considers that there has been undue delay in making the application and that granting the relief sought “would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration”: Senior Courts Act 1981, s. 31(6).

- 3.5 Importantly, a judicial review claim is not the same thing as an appeal against a decision. Judicial review does not determine whether the executive's decision was right or wrong as a matter of policy, nor whether the court would agree with it.⁴⁶ Instead, it allows the court to decide whether the decision taken by the executive was lawful, and to supervise the manner in which the decision was reached. Broadly speaking, the courts have the power to quash an executive decision only if it is illegal, irrational, or taken in a way that is procedurally improper.⁴⁷ A fourth head of judicial review based on the legitimate expectations of the applicant has arisen more recently.⁴⁸
- 3.6 Illegality was originally the only basis for judicial review. The rule of law requires that the executive is bound to comply with the law in the same way as everyone else, and that recourse to the courts must be possible when they do not. Accordingly, the courts have for many years tested executive decisions for illegality. As one of the Supreme Court's past Presidents, Lord Neuberger, has explained, "the courts have no more constitutionally important duty than to hold the executive to account by ensuring that it makes decisions and takes actions in accordance with the law".⁴⁹ This is a vital part of the constitutional system of checks and balances in our democracy, enabling the courts to prevent the executive from encroaching on Parliamentary sovereignty.
- 3.7 Substantive review of executive decisions has traditionally only been permitted on the ground of "irrationality".⁵⁰ This standard of review is also known as "*Wednesbury* unreasonableness" after the decision in *Associated Provincial Picture Houses v Wednesbury Corporation*.⁵¹ This is a high threshold: the courts are generally reluctant to find that a public body's decision is irrational, particularly where the decision-maker has particular expertise in the relevant area.⁵²
- 3.8 However, an example of a successful *Wednesbury* claim is *Duffy*,⁵³ in which the House of Lords held that the Secretary of State for Northern Ireland's decision to appoint members of the Orange Order to the Parades Commission of Northern Ireland was irrational. Parades in Northern Ireland have provided a flashpoint for sectarian violence. The Commission, established in the wake of violent clashes surrounding parades in the 1990s, had a statutory duty to attempt to resolve disputes over contentious parades by

⁴⁶ *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [41] (Lord Bingham).

⁴⁷ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 (Lord Diplock): "one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality,' the second 'irrationality' and the third 'procedural impropriety.'"

⁴⁸ See for example *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213.

⁴⁹ *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, [61].

⁵⁰ *Council of Civil Service Unions v Minister for the Civil Service* (n 47) 410 (Lord Diplock).

⁵¹ [1948] 1 KB 223.

⁵² See, for example, *Great North Eastern Railway Ltd v Office of Rail Regulation* [2006] EWHC 1942 (Admin) [39] (Sullivan J).

⁵³ *In re Duffy* [2008] UKHL 4.

mediation and, if those disputes could not be resolved, to make decisions as to whether parades could go ahead and, if so, under what conditions. The Orange Order is the organiser of controversial pro-Unionist marches. As Lady Hale explained, as members of this group, the men in question “could never have been perceived as impartial adjudicators or mediators by the public at large. A Secretary of State who had been properly advised of this could not reasonably have decided to appoint them.”⁵⁴

- 3.9 Judicial review is also concerned with the process by which executive decisions are taken. This is, in part, because “procedurally fair decision-making is... liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested.”⁵⁵ But at least two other important values are also engaged:

“The first... [is] the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel... justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions... The second value is the rule of law. Procedural requirements... promote congruence between the actions of decision-makers and the law which should govern their actions.”⁵⁶

- 3.10 Remedies in judicial review claims are discretionary. A court may therefore refuse to grant a remedy, even if the applicant can show that a public authority has acted unlawfully. This discretion “must be exercised judicially and in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it.”⁵⁷ However, the High Court is required by statute to refuse to grant relief “if it appears... highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.”⁵⁸

- 3.11 There are three remedies that are specific to judicial review proceedings: quashing orders, mandatory orders and prohibiting orders.⁵⁹ Applicants commonly ask the court to make a quashing order to set aside the decision under challenge, together with a mandatory order directing the relevant public authority to take the decision again in accordance with the court’s judgment. They may also ask the court to make a prohibiting order, for example, to restrain the public authority in question from exceeding its powers. Applicants may alternatively seek an injunction preventing the public authority from acting on the decision under challenge. The court also has the power to make a declaration setting out the applicable legal position or rights of the parties.

⁵⁴ Ibid [33].

⁵⁵ *Osborn v Parole Board* [2013] UKSC 61 [67] (Lord Reed).

⁵⁶ Ibid, [68]-[71] (Lord Reed).

⁵⁷ *R (Edwards) v Environment Agency* [2008] UKHL 22 [63] (Lord Hoffmann).

⁵⁸ Senior Courts Act 1981, s.31(2A).

⁵⁹ Senior Courts Act 1981, s. 29.

- 3.12 The fact that an executive decision is unlawful does not of itself entitle the applicant to damages for any loss suffered.⁶⁰ To claim damages, the applicant must establish that the unlawful action also constitutes a recognised tort or involves a breach of contract. Damages may also be awarded under section 8 of the Human Rights Act.

(b) Claims under the Human Rights Act

- 3.13 Claims under the Human Rights Act can only be brought by a victim of the alleged breach of Convention rights.⁶¹ Proceedings must be brought within a year of the alleged breach or such longer period as the court considers equitable having regard to all the circumstances.⁶² Many Human Rights Act claims are brought on an application for judicial review. In such cases, proportionality rather than illegality, irrationality or procedural irregularity, is the appropriate standard of review.⁶³
- 3.14 Proportionality generally allows for more intensive scrutiny of legislative and executive decisions than *Wednesbury* unreasonableness. However, it does not permit the court to engage in a full merits review of legislation or executive decisions; the court cannot substitute its own view for that of the original decision-maker. Instead, the court is asked to decide whether the measure's restriction of Convention rights is proportionate to the legitimate aim it pursues, having regard to the width of the margin of appreciation permitted at the international level.⁶⁴ Judges apply a four-part test, which asks: "(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."⁶⁵
- 3.15 The fourth part of the test in particular takes the courts closer to a review of the merits of the decision under review, because it requires judges to consider whether the severity of the measure's effects on affected persons' rights is outweighed by the importance of the objective. However, the level of scrutiny will vary depending on the width of the

⁶⁰ *Financial Services Authority v Sinaloa Gold Plc* [2013] UKSC 11 [31] (Lord Mance).

⁶¹ Human Rights Act 1998, s. 7(1) and (7).

⁶² Human Rights Act 1998, s. 7(5).

⁶³ *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26. See further Lord Reed, "What judges talk about when they talk about proportionality", Lecture delivered at Oxford University on 13 May 2026: [What judges talk about when they talk about proportionality](#)

⁶⁴ See further *Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] UKSC 30, [120]-[130] (Lord Sales and Lady Rose).

⁶⁵ *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39 [20] (Lord Sumption) and [74] (Lord Reed). As noted at [73], this four-part analysis is derived from decision of the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103 (Dickson CJ).

margin of appreciation, as the examples to be discussed by Lord Stephens make clear. In applying the four-part test, the courts will have regard to the balance struck by the public authority and will give appropriate weight to its view, depending on the institutional competence and the constitutional responsibility of that public authority relative to the court. The Supreme Court has shown relatively greater deference to the legislature and the executive in claims relating to matters of foreign policy,⁶⁶ national security⁶⁷ and economic policy.⁶⁸ This is essentially because, as Lord Bingham has put it, “[i]t is the function of political and not judicial bodies to resolve political questions.”⁶⁹

(c) Devolution references

- 3.16 When there is a dispute as to whether legislation passed by any of the devolved legislatures exceeds the limitations prescribed by the UK Parliament in the devolution legislation, the Supreme Court can be asked to provide an authoritative resolution. These disputes can be referred to the Supreme Court by the law officers of both the UK and the devolved governments, as well as by private litigants. The provisions can be referred to the Court either before or after their enactment. In his presentation, Lord Stephens will discuss two recent examples. The first of these asked whether the Scottish Parliament had the power to pass legislation which made provision for a referendum on the question of Scottish independence.⁷⁰ The second asked whether a clause of a Bill passed by the Northern Ireland Assembly preventing anti-abortion protests within “safe access zones” around abortion clinics interfered unlawfully with the protesters’ rights under articles 9, 10 and 11 of the Convention.⁷¹
- 3.17 In considering devolution references, the Supreme Court has been concerned to enforce the limits the UK Parliament has set out in the devolution legislation, thereby protecting the constitutional principle of Parliamentary sovereignty. The Court has described Parliamentary sovereignty as “the essence of devolution: in contrast to a federal model, a devolved system preserves the powers of the central legislature of the state in relation to all matters, whether devolved or reserved.”⁷² This principle is recognised and protected by the three devolution statutes, which contain provisions stating that devolution does not affect the power of the UK Parliament to make laws for each of the devolved nations.⁷³

⁶⁶ *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60.

⁶⁷ *U3 v Secretary of State for the Home Department* [2025] UKSC 19.

⁶⁸ *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26

⁶⁹ *A v Secretary of State for the Home Department* [2004] UKHL 56 [29].

⁷⁰ *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31.

⁷¹ *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32.

⁷² *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64, [41].

⁷³ Scotland Act 1998, s. 28(7); Northern Ireland Act 1998, s. 5(6); Government of Wales Act 2006, s. 107(5).

(d) Ordinary litigation

- 3.18 Constitutional questions regularly arise in the course of ordinary civil and criminal litigation. An example is *Attorney General v Wilts United Dairies*,⁷⁴ an action for payment in which the House of Lords held that the Ministry of Food could not levy money for the use of the Crown without the authority of Parliament. It followed that the Food Controller had no power to impose charges for licences to purchase milk, since the charges had not been authorised by Parliament.
- 3.19 Protest rights, considered by the Supreme Court in the devolution reference about safe access zones mentioned above, came back to the Court in a criminal case decided earlier this year.⁷⁵ We were asked to decide whether a criminal offence concerned with expressions of support for terrorist organisations was an unjustified interference with the right to freedom of expression under article 10 of the Convention, and whether that question had to be decided on the particular facts by the jury at the trial. Those questions were raised by people who had been prosecuted for allegedly making speeches in support of Hamas. Their cases had not yet gone to trial, so the facts had not been established. After analysing the background to the creation of the offence, identifying its essential elements, and considering judgments of the European court in cases concerned with counter-terrorism legislation in other European countries, we concluded that the restriction on free speech imposed by the offence was compatible with the Convention, and that the issue was not one for decision by the jury at the trial.
- 3.20 Another appeal, decided last year, concerned a civil claim brought by a lawyer who alleged that she had been assaulted by a Scottish judge.⁷⁶ She sued the judge for damages. She also sued the Scottish Ministers, who had appointed the judge and paid his salary, relying on an Act of Parliament which makes the Crown responsible for wrongs committed by its servants in circumstances where an ordinary employer would be liable for the wrongs committed by its employees.
- 3.21 When her appeal came before the Supreme Court, we were asked to decide whether the Scottish Ministers could be held liable for the judge's behaviour if the allegations were proved at trial. The answer to that question depended on the constitutional question whether the Scottish Ministers were the Crown, or servants of the Crown, and on whether, if so, the relationship between the judge and the Crown possessed the features which result in the imposition of liability on an employer for the wrongs committed by his employees.
- 3.22 After research into constitutional history, the Supreme Court concluded that the Scottish Ministers were not the Crown, but were servants of the Crown, and that the relationship

⁷⁴ [1922] All ER Rep Ext 845.

⁷⁵ *R v ABJ; R v BDN* [2026] UKSC 8.

⁷⁶ *X v Lord Advocate* [2025] UKSC 44.

between the judge and the Crown did not possess the features of employment which justify the imposition of liability on employers for the wrongs committed by their employees. The constitutional principle of judicial independence means that neither the King nor the Scottish Ministers can tell a judge what to do or how to do it, and they are therefore in a different kind of relationship with the judge from the relationship between an employer and an employee.

4. The Judicial Committee of the Privy Council

- 4.1 The Justices of the Supreme Court assume a different constitutional role when they sit as the Judicial Committee of the Privy Council. The Privy Council is a legacy of the British Empire: it is the final court of appeal for the UK overseas territories and Crown dependencies, and for those Commonwealth countries which have chosen to retain it as their final court of appeal. Many of these jurisdictions have written constitutions, so the Privy Council regularly hears appeals which challenge the compatibility of legislation or policies with those constitutions. These cases have required us to grapple with complex issues, including the death penalty⁷⁷ and the rights of same-sex couples,⁷⁸ among others.
- 4.2 By way of illustration, in a recent case from Trinidad and Tobago, we were asked to consider a legislative provision which prevented bail from being granted to any person charged with the offence of murder.⁷⁹ The bail provision was challenged by a person who was charged with murder. He remained in custody for over eight years without trial, before the charges against him were dropped. All parties accepted that the bail provision infringed a number of the rights protected by the constitution of Trinidad and Tobago, including the right not to be deprived of liberty except by due process of law and the right not to be deprived of reasonable bail without just cause. However, the Attorney General argued that the bail provision was lawful under the proviso in section 13 of the constitution because it had been passed by Parliament with a special majority. The Privy Council rejected this argument. The section 13 proviso does not apply to legislation that is “shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.” The bail provision was not reasonably justifiable because the severe consequences of the complete prohibition of bail were disproportionate to the objectives of the measure, which could have been achieved through less intrusive measures. The JCPC therefore held the bail provision to be unconstitutional. For the reasons given above, this conclusion could not have been reached by the same Justices when sitting as the Supreme Court: they would have made a declaration of incompatibility with the Convention, and left it to Parliament to enact amending legislation.

⁷⁷ *Chandler v The State of Trinidad and Tobago (No 2)* [2022] UKPC 19.

⁷⁸ *Attorney General for Bermuda v Ferguson* [2022] UKPC 5 and *Day v Governor of the Cayman Islands* [2022] UKPC 6.

⁷⁹ *Attorney General of Trinidad and Tobago v Akili Charles (No 2)* [2022] UKPC 31.