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JUDICIAL REVIEW: THE FUTURE

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By way of a reference-point for this talk, attached are extracts from the imminent new edition of *Fordham, Judicial Review Handbook* (Hart Publishing, 6th ed. 2012):

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fairly, reasonably and in good faith and within the limits of any relevant statute. More than this: the imperative is one which cannot be set aside on utilitarian grounds, as a means to a further end. It is not in any way to be compromised"), [252] ("the constitutional principle which forbids abuse of State power") (HL is [2005] UKHL 71 [2006] 2 AC 221).

1.2.15 **The rule of law and modified review.** *R (Cart) v Upper Tribunal* [2011] UKSC 28 [2012] 1 AC 663 (SC adopting a restricted approach to judicial review of refusals of permission to appeal by the Upper Tribunal), [51] (Baroness Hale: "The real question, as all agree, is what level of independent scrutiny outside the tribunal structure is required by the rule of law"), [89] (Lord Phillips, explaining the need to avoid "in the interest if making the best use of judicial resources … a duplication of judicial process that cannot be justified by the demands of the rule of law"), [122] (Lord Dyson: "the scope of judicial review should be no more (as well as no less) than is proportionate and necessary for the maintaining of the rule of law").

1.2.16 **The rule of law and publicly funded litigation.** *R (Evans) v Lord Chancellor* [2011] EWHC 1146 (Admin) [2012] 1 WLR 838 at [25] (Laws LJ, describing it as "inimical to the rule of law" for "the state to inhibit litigation by the denial of legal aid because the court's judgment might be unwelcome or apparently damaging", as "an attempt to influence the incidence of judicial decisions in the interests of government").

1.3 **Judicial review's constitutional inalienability.**[3] It is no heresy to suggest that the Courts could properly choose to disapply as unconstitutional primary legislation which purported, even by the plainest of words, to exclude the right of access to justice by judicial review. Parliament can make allocational arrangements; it can identify an exclusive remedy for a statutorily-conferred cause of action; it can create an alternative remedy whose adequacy the Court may choose to accept; it can channel judicial review into a statutory mechanism with time limits backed by an effective ouster. But, in a system of dual sovereignty, even primary legislation has its limits. Inherent in legislative supremacy itself is the need for a judicial function of determination, to interpret and enforce express and implied limitations upon the executive's statutorily-conferred powers and duties. To purport to exclude judicial review would be to seek to deny the constitutional right of access to justice which stands as the safeguard against abuse of executive power and is the rule of law in action. It is to be expected that Courts would politely decline to apply such a restriction, as in truth they have always done. Why: because the constitutional implications are this grave, the rule of law and constitutional rights this important, and judicial review this valuable.

1.3.1 **Judicial review as a constitutional role and function.** <1.1.4>.

1.3.2 **Ousting judicial review: a hostile climate.** <28.1>.

1.3.3 **Judicial determination as an inalienable constitutional function.** *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin) [2011] QB 120 at [38] (Laws LJ: "the need for such an authoritative judicial source cannot be dispensed with by Parliament. This is not a denial of legislative sovereignty, but an affirmation of it … The requirement of an authoritative judicial source for the interpretation of law means that Parliament's statutes are always effective"), endorsed in the SC at *R (Cart) v Upper Tribunal* [2011] UKSC 28 [2012] 1 AC 663 at [30] (Baroness Hale: "The rule of law requires that statute law be interpreted by an authoritative and independent judicial source"); *R (Woolas) v Parliamentary Election Court* [2010] EWHC 3169 (Admin) [2012] QB 1 at [52] (referring to "constitutional principles derived from the separation of powers and the rule of law", under which "it is for the courts to determine the meaning of law enacted by Parliament"); *A v B (Investigatory Powers Tribunal: Jurisdiction)* [2009] EWCA Civ 24 [2009] 3 All ER 416 (CA) (Laws LJ: "It is elementary that any attempt to oust

[3] Michael Fordham [2004] JR 86 and [2011] JR 14; Lord Lester QC [2004] JR 95; Clause 14 [2004] JR 97; Constitutional Affairs Committee [2004] JR 100; Lord Steyn [2004] JR 107; Lord Falconer's Statement [2004] JR 109; Martin Chamberlain [2004] JR 112; Thomas de la Mare [2004] JR 119.

altogether the High Court's supervisory jurisdiction over public authorities is repugnant to the Constitution") (SC is [2009] UKSC 12 [2010] 2 AC 1).

1.3.4 **Judicial review's potential imperviousness to statutory exclusion.** <1.3.3> (judicial determination as an inalienable constitutional function); *R (Jackson) v Attorney General* [2005] UKHL 56 [2006] 1 AC 262 at [102] (Lord Steyn, querying whether Parliamentary supremacy would extend to "oppressive and wholly undemocratic legislation" such as "to abolish judicial review of flagrant abuse of power by a government or even the role of the ordinary courts in standing between the executive and citizens", given that "the supremacy of Parliament is … a construct of the common law"), [104] (Lord Hope, referring to developing qualifications to the principle of Parliamentary sovereignty), [107] ("the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based … the courts have a part to play in defining the limits of Parliament's legislative sovereignty"), [110] ("no absolute rule that the courts could not consider the validity of a statute"); *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46 [2012] 1 AC 868 at [51] (Lord Hope, recognising "conflicting views about the relationship between the rule of law and the sovereignty of Parliament"; and that, in the context of an Act of the Scottish Parliament at least, the response to an attempt to "abolish judicial review": "The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise").

1.3.5 **Court declining to recognise an exclusion of judicial review.**
(A) *CHELTENHAM COMMISSIONERS.* In May 1841, the cornerstone of judicial review was the prerogative writ of certiorari. In *R v Cheltenham Commissioners* (1841) 1 QB 467 a claim was made for certiorari of a decision by the Quarter Sessions made under its statutory powers, to which the Attorney General's response was that the Act of Parliament expressly provided that no order of the Quarter Sessions could be removed by certiorari. This was a clear and express statutory exclusion of certiorari (judicial review). Yet the Queen's Bench Division (Lord Denman CJ presiding) granted certiorari. As Lord Denman CJ explained: "We have already stated our opinion, that the clause which takes away the certiorari does not preclude our exercising a superintendence over the proceedings, so far as to see that what is done shall be in pursuance of the statute. The statute cannot affect our right and duty to see justice executed").
(B) OTHER ILLUSTRATIONS. *R v Secretary of State for the Home Department, ex p Fayed* [1998] 1 WLR 763, 771B-773C (Act of Parliament expressly providing that decision, as well as being unappealable: "shall not be subject to … review in, any court"; but this "does not prevent the court exercising its jurisdiction to review a decision on the traditional grounds available on an application for judicial review"); *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (judicial review available despite provision stating that determinations of FCC "not to be called into question in any legal proceedings whatsoever").

1.3.6 **No exclusion where public law nullity.**
(A) OUSTER NOT APPLYING TO A NULLITY. <28.1.9>.
(B) ALL GROUNDS OF JUDICIAL REVIEW PRODUCE NULLITY. <44.2.2>.

1.3.7 **Permissible statutory restrictions.**
(A) LEGITIMATE ALLOCATIONAL ARRANGEMENTS. *Farley v Secretary of State for Work and Pensions (No.2)* [2006] UKHL 31 [2006] 1 WLR 1817 at [18] (not an ouster where jurisdictional limitation part of a statutory scheme locating jurisdiction to another court).
(B) EXCLUSIVE REMEDY FOR NEW STATUTORY CAUSES OF ACTION. <36.2.2>.
(C) "REPLACEMENT" BY ADEQUATE ALTERNATIVE REMEDY. <P36> (alternative remedy). Parliament has successfully removed much of the burden on the Administrative Court, for example: (1) immigration and asylum cases went to the IAT/AIT; (2) homelessness cases went to the county court; (3) many public law issues are litigated through the Upper Tribunal, the Competition Appeal Tribunal and so on. But these are suitable alternative remedies, not jurisdictional exclusions.
(D) STATUTORY REVIEW/APPEAL WITH TIME-LIMIT OUSTER. <28.2>.
(E) CROWN COURT/MATTERS RELATING TO TRIAL ON INDICTMENT. This troublesome restriction <32.1> is embodied in statute (Senior Courts Act 1981 s.29(3)), but as

QB 169, 179D (paying tribute to the "total candour" of the defendant's affidavit); *R v Secretary of State for the Home Department, ex p Launder* [1997] 1 WLR 839, 856H (Secretary of State having "decided, in a commendable departure from the normal procedure in extradition cases, to give reasons for his decision"); *M v Home Office* [1994] 1 AC 377, 425H (privilege "commendably" waived).

10.4.6 **Criticising defendants for lack of candour.** *R (I) v Secretary of State for the Home Department* [2010] EWCA Civ 727 at [53]-[55] (regrettable state of affairs which could call for inferences adverse to the Secretary of State); *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin) [2010] HRLR 12 at [13] ("the approach of the Secretary of State to disclosure in this case was lamentable"); *R (S) v Secretary of State for the Home Department* [2006] EWHC 1111 (Admin) at [117] (indemnity costs awarded where defendant providing no grounds, evidence or explanation); *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 at [55] (defendant having "fallen short of those high standards of candour which are routinely adhered to by government departments faced with proceedings for judicial review"), [68] ("the approach taken to the public decisions that had to be made fell unhappily short of the high standards of fairness and openness which is now routinely attained by British government departments"); *R (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744 [2005] INLR 550 at [52] (criticising failure to cooperate and make candid disclosure of relevant facts and reasoning behind challenged decision); *Central Broadcasting Services Ltd v Attorney General of Trinidad and Tobago* [2006] UKPC 35 [2006] 1 WLR 2891 at [26]-[27] (non-disclosure of relevant facts), [36] ("highly regrettable" that lower courts allowed to proceed on false premise); *R v London Borough of Lambeth, ex p Campbell* (1994) 26 HLR 618, 622 ("lamentable" failure of duty "to disclose all the facts which it ought reasonably to appreciate are relevant to the issue or issues arising in a judicial review"); *Jordan Abiodun Iye v Secretary of State for the Home Department* [1994] Imm AR 63, 67 ("unsatisfactory" inability "to make clear" Secretary of State's position).

10.4.7 **Duty not to be selective.** *Lancashire County Council v Taylor* [2005] EWCA Civ 284 [2005] 1 WLR 266 (discussing evidence on HRA justification and legislative compatibility) at [60] ("Departments of state need … to bear in mind that they have an advantage in this field. They have access to materials to which other parties have no access or which it would be difficult and expensive for them to search out. But axiomatically an exercise of this kind, if it is to be carried out at all, must disclose the unwelcome along with the helpful"; "the cautionary reminder that if research of this kind is to be placed before the court, it cannot be selective in what it tends to show"); *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154 at [47] (Government not entitled to withhold ministerial briefing and give secondary account instead); <17.1.4(B)> (need to exhibit primary evidence).

10.4.8 **Due diligence duty for defendant's legal advisers.** *R (DL) v Newham London Borough Council* [2011] EWHC 1127 (Admin) [2011] 2 FLR 1033 at [42] (Charles J, explaining that it was not fair to place upon untrained employee of defendant authority "the obligation of extracting all relevant material"; "the exercise should be carried out or supervised by a lawyer (or other suitably trained and experienced person) by reference to the issues in the case"); *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin) [2010] HRLR 12 at [42] ("Secretary of State's agents … [duty] to carry out … critically important and obviously highly relevant searches"; solicitor was required "to take steps to ensure that their client knows what documents have to be disclosed"); *TSol Guidance* [2010] JR 177 <10.4.2> at [1.3] (solicitor's duty to investigate, explain and supervise, to go through the documents, and to ensure ongoing and prompt completeness), [2] (roles and responsibilities), [2.3] (Counsel's duties to advise on disclosure, on the issues and on the nature and extent of the search to be carried out"), [3] (sufficiency of the search "all-important"), [3.2] (relevance and proportionality), [4.2] (public interest immunity), [4.3] (redaction), [6.1] ("the case-handler should prepare and retain a statement recording: all searches made; all decisions (by lawyers and clients) about the extent of searches; all decisions made about the disclosability of documents; all decisions about all actions taken in relation to the preparation of documents for inspection").

10.4.9 **Candour and resisting permission.** *Treasury Holdings v NAMA* [2012] IEHC 66 (High Court of Ireland) at [127] (Finlay Geoghegan J, considering para 10.4 above in the previous edition of this book, and the proposition that candour "should include ... disclosure at the permission stage if permission is resisted"), [128] ("It is unnecessary on the facts of this application to determine the extent of the [defendant]'s obligation to disclose documents on an application for leave"), [129] ("it appears correct that [the claimant] should not be prejudiced by the absence before the Court of relevant documents"); *R (I) v Secretary of State for the Home Department* [2010] EWCA Civ 727 at [50] (Munby LJ, leaving the point open: "Whatever may be the position at an earlier stage, once permission has been granted to apply for judicial review there is an obligation on the Secretary of State to make proper disclosure"); *TSol Guidance* [2010] JR 177 <10.4.2>, 179 ("Take steps to preserve all potentially relevant documents as soon as proceedings are likely. Start early. At the outset formulate, record and implement a strategy for conducting the disclosure exercise ... Devote sufficient resources from the outset"), [1.2] ("The duty of candour applies as soon as the department is aware that someone is likely to test a decision or action affecting them. It applies to every stage of the proceedings including letters of response under the pre-action protocol, summary grounds of resistance, detailed grounds of resistance witness statements and counsel's written and oral submissions"); <21.1.10(B)>.

10.4.10 **Opportunities for candour.** <19.1.5> (letter of response); <19.3> (summary grounds); <22.1.3> (detailed response/evidence).

(DOI inappropriate where grounds for making it would not apply to or assist the person seeking it); *R (Morris) v Westminster City Council* [2005] EWCA Civ 1184 [2006] 1 WLR 505 at [71] (abuse of power for a public authority to sue other powers to circumvent or replace non-compliant statutory provision); *R (Chester) v Secretary of State for Justice* [2010] EWCA Civ 1439 [2011] 1 WLR 1436 (inappropriate to grant a further DOI in relation to prisoners' right to vote, where DOI already granted in previous Scottish case); *R (Fletcher) v Secretary of State for Health* [2009] EWHC 1868 (Admin) (statutory scheme still not permitting a hearing, where DOI had been granted by the HL).

12.3 **Judicial review of primary legislation at common law.** This part of the judicial review map is a site under construction. What can be said is this. (1) The conventional wisdom beyond EU and HRA cases is that of judicial self-denial, holding that judicial review of primary legislation is forbidden. (2) Judicial review of primary legislation, without EU or HRA support, has already taken place and an open question has been posed as to what the limits might be. (3) In a system of dual sovereignty, there are constitutional fundamentals so powerful, such as judicial review and the rule of law themselves, that their purported abrogation by Parliament would surely expose those limits. (4) The principle of legality has the potential to operate as a constitutional principle of legality: a principle of constitutionality.

12.3.1 **JR of primary legislation: a traditional "forbidden area".** *R (Countryside Alliance) v Attorney General* [2007] UKHL 52 [2008] 1 AC 719 at [134] (subject to HRA and EU law and "provided always that it follows a proper parliamentary process", Parliament "can do whatever it likes"); *R (Southall) v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWCA Civ 1002 at [10] ("so far no court in the last century and more has set aside any provision of an Act of Parliament as being unlawful save in the circumstances set out in the European Communities Act"); *Hoffmann-La Roche (F) & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 349B-C ("the courts of law could not declare that an Act of Parliament was ultra vires"); *Pickin v British Railways Board* [1974] AC 765, 798F ("the courts in this country have no power to declare enacted law to be invalid"); <8.3.1(A)> (primary legislation declared incompatible with EU law); <12.2.1> (HRA declaration of incompatibility); *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513 (judicial review of failure to bring Act into force); *R v Secretary of State for Education and Employment, ex p Liverpool Hope University College* [2001] EWCA Civ 362 [2001] ELR 552 (judicial review of statutory instrument bringing Act of Parliament into force); *R (British Aggregates Associates) v Her Majesty's Treasury* [2002] EWHC 926 (Admin) [2002] EuLR 394 at [138]-[140] (measures to implement primary legislation treated as justiciable); *R (Jackson) v Attorney General* [2005] UKHL 56 [2006] 1 AC 262 at [27] (proper to investigate whether Hunting Act constituting enacted law), [51] (appropriate challenge to validity of statute, not investigating conduct of proceedings in Parliament and issue one of statutory interpretation of the Parliament Acts), [110] (justiciable because "no absolute rule that the courts could not consider the validity of a statute and ... the issue ... was one of statutory interpretation").

12.3.2 **A stage in an evolution.** *R v Lord Chancellor, ex p Witham* [1998] QB 575, 581E (Laws J, emphasising that on the *present* state of the law, the common law continues to afford legislative supremacy to Parliament); *R (International Transport Roth GmbH) v Secretary of State for the Home Department* [2002] EWCA Civ 158 [2003] QB 728 at [71] (Laws LJ: "In its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy").

12.3.3 **Judicial review of the Hunting Act.** *R (Jackson) v Attorney General* [2005] UKHL 56 [2006] 1 AC 262 (ruling on validity of the Hunting Act, by reference to the Parliament Acts).

12.3.4 **Limits of Parliamentary supremacy.** *R (Jackson) v Attorney General* [2005] UKHL 56 [2006] 1 AC 262 at [102] (Lord Steyn, querying whether Parliamentary supremacy would extend to "oppressive and wholly undemocratic legislation" such as "to abolish judicial review

of flagrant abuse of power by a government or even the role of the ordinary courts in standing between the executive and citizens", given that "the supremacy of Parliament is ... a construct of the common law"), [104] (Lord Hope, referring to developing qualifications to the principle of Parliamentary sovereignty), [107] ("the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based ... the courts have a part to play in defining the limits of Parliament's legislative sovereignty"), [110] ("no absolute rule that the courts could not consider the validity of a statute"); *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46 [2012] 1 AC 868 at [51] (Lord Hope, recognising "conflicting views about the relationship between the rule of law and the sovereignty of Parliament"; and that, in the context of an Act of the Scottish Parliament at least, the response to an attempt to "abolish judicial review": "The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise").

12.3.5 **Dual sovereignty: Parliament and the Judiciary.** *X Ltd v Morgan-Gampian Ltd* [1991] 1 AC 1, 48E (Lord Bridge: "The maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law"); *In re F (Adult: Court's Jurisdiction)* [2001] Fam 38, 56D (Sedley J: "The relationship between [Parliament and the courts] is a working relationship between two constitutional sovereignties", referring to *R v Parliamentary Commissioner for Standards, ex p Al Fayed* [1998] 1 WLR 669, 670, per Lord Woolf MR); *R (Jackson) v Attorney General* [2005] UKHL 56 [2006] 1 AC 262 at [102] (Lord Steyn, using the concept of "divided sovereignty"); *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428, 470B-G (Lord Steyn, referring to presumptions which "operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts").

12.3.6 **Judicial review of special "primary legislation".**
(A) PREROGATIVE ORDERS. *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No.2)* [2008] UKHL 61 [2009] 1 AC 453 at [34]-[35] (convention judicial review of prerogative Orders in Council, albeit "primary legislation", because "founded upon the unique authority Parliament derives from its representative character").
(B) ACTS OF DEVOLVED PARLIAMENTS. *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46 [2012] 1 AC 868[93] at [46], [52] and [147] (Act of Scottish Parliament amenable to judicial review for ultra vires, ie. action beyond the competence conferred by the Scotland Act 1998, including incompatibility with ECHR rights; not for conventional grounds of review such as irrationality), [149]-[154] (judicial review would also be available for violation of common law fundamental rights or the rule of law).

12.3.7 **Protecting constitutional rights/fundamentals.** <P7> (constitutional fundamentals); <7.4.1> (constitutional rights); *R (Chester) v Secretary of State for Justice* [2010] EWCA Civ 1439 [2011] 1 WLR 1436 at [27] (Laws LJ, explaining that courts having no role to sanction government for failing to act upon a declaration of incompatibility under the HRA, but: "Of course if the failure were also to involve a violation of a constitutional fundamental recognised by the common law, the position would be entirely different").

12.3.8 **Judicial review as an inalienable safeguard.** <1.3>.

12.3.9 **Towards a constitutional principle of legality.** <35.4>.

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[93] CJS Knight [2010] JR 163; Christine O'Neill and Charles Livingstone [2012] JR 11.

actionable duty against police in relation to investigation of crime); *X v Hounslow London Borough Council* [2009] EWCA Civ 286 [2010] HLR 47 (no assumption of responsibility so no actionable duty of care to move couple to temporary emergency accommodation); *Van Colle v Hertfordshire Chief Constable* [2008] UKHL 50 [2009] 1 AC 225 (no duty of care in protecting from death threats); *Jain v Trent Strategic Health Authority* [2009] UKHL 4 [2009] 1 AC 853 (no duty of care by registration authority applying for court order cancelling nursing home's licence); *Mohammed v Home Office* [2011] EWCA Civ 351 [2011] 1 WLR 2862 (no duty of care in relation to delays in immigration decision-making) at [18] (availability of other forms of redress can make it not fair, just and reasonable to add a common law liability in negligence), [25] (relevance of available recourse to the ombudsman); *Murdoch v Department of Work and Pensions* [2010] EWHC 1988 (QB) (no actionable duty of care owed by DWP to social security benefits recipient); *Rowley v Secretary of State for Work and Pensions* [2007] EWCA Civ 598 [2007] 1 WLR 2861 (no duty of care for defaults of Child Support Agency) at [54] (no assumption of responsibility), [84] (not fair just and reasonable to impose actionable duty of care); *Lawrence v Pembrokeshire County Council* [2007] EWCA Civ 446 [2007] 1 WLR 2991 (no duty of care owed to parent regarding child protection registration of children); *D v Bury Metropolitan Borough Council* [2006] EWCA Civ 1 [2006] 1 WLR 917 (no actionable duty of care in context of interim care order based on child abuse allegations).

25.2.8 **Other species of tort liability: illustrations.**[186] *Gulf Insurance Ltd v Central Bank of Trinidad and Tobago* [2005] UKPC 10 (damages for tort of conversion awarded in judicial review proceedings); *R (Atapattu) v Secretary of State for the Home Department* [2011] EWHC 1388 (Admin) (liability for conversion for wrongful retention of a Sri Lankan passport); *Checkprice (UK) Ltd v Her Majesty's Commissioners for Revenue & Customs* [2010] EWHC 682 (Admin) [2010] STC 1153 (damages for conversion available in judicial review); *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25 [2008] 1 AC 962 (assault and battery); *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 [2012] 1 AC 245 (false imprisonment); *Slough Estates Plc v Welwyn Hatfield District Council* [1996] 2 PLR 50 (deceit); *Gregory v Portsmouth City Council* [2000] 1 AC 419 (malicious prosecution); *Tomlinson v Congleton Borough Council* [2003] UKHL 47 [2004] 1 AC 46 (occupiers liability); *In re Organ Retention Group Litigation* [2004] EWHC 644 (QB) [2005] QB 506 (wrongful interference); *Clift v Slough Borough Council* [2010] EWCA Civ 1171 [2011] 1 WLR 1774 (defamation); *Feakins v DEFRA* [2005] EWCA Civ 1535 [2006] Env LR 1099 (trespass); *Keegan v Chief Constable of Merseyside* [2003] EWCA Civ 936 (malicious procurement of warrant); *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435 (conspiracy to injure); *R Cruickshank Ltd v Chief Constable of Kent County Constabulary* [2002] EWCA Civ 1840 (interference with contractual relations capable of lying against public officials); *Wainwright v Home Office* [2003] UKHL 53 [2004] 2 AC 406 (intentional infliction of harm); *Dennis v Ministry of Defence* [2003] EWHC 793 (QB) [2003] Env LR 741 (nuisance); *Transco Plc v Stockport Metropolitan Borough Council* [2003] UKHL 61 [2004] 2 AC 1 (rule in *Rylands v Fletcher*).

25.2.9 **Statutory compensation.** *Yarl's Wood Immigration Ltd v Bedfordshire Police Authority* [2009] EWCA Civ 1110 [2010] QB 698 (statutory compensation from police fund in respect of riot); *Westminster City Council v Ocean Leisure Ltd* [2004] EWCA Civ 970 (statutory compensation under compulsory purchase legislation); *R (O'Brien) v Independent Assessor* [2007] UKHL 10 [2007] 2 AC 312 (statutory compensation for miscarriage of justice detention); *Steed v Secretary of State for the Home Department* [2000] 1 WLR 1169 (statutory right to compensation); *British Telecommunications Plc v Gwynedd Council* [2004] EWCA Civ 942 [2004] 4 All ER 975 (allowable costs under street works legislation); <25.1.5(A)> (compensation schemes).

25.3 **Public law reparation: no damages for maladministration.** The mere existence of a recognised species of unlawfulness or 'public law wrong' does not give rise to any right to damages. Given the all-or-nothing nature of "damages", and the serious policy and

[186] Heather Williams QC [2007] JR 145; Christopher Knight [2007] JR 165.

resource implications of a blanket right to compensation, that is unsurprising. Parliament and the Courts have yet to fashion a *public law* solution to the well-recognised and continuing problem of injustice where unlawfulness by a public authority cries out for a monetary response. Judicial review remedies are contextual responses to individual cases and what is needed is the residual capacity on the part of the Court to award a monetary sum where necessary in the interests of justice. Were there the judicial will, the judicial way could not be far behind, invoking the same principled and incremental development of the common law which has seen pages turned and chapters begun.

25.3.1 **No general right to damages for public law wrongs.** *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57 [2006] 1 AC 529 at [96] (Baroness Hale: "Our law does not recognise a right to claim damages for losses caused by unlawful administrative action … There has to be a distinct cause of action in tort or under the Human Rights Act 1998"); *R v Secretary of State for Transport, ex p Factortame Ltd (No.2)* [1991] 1 AC 603, 672H (Lord Goff: "in this country there is no general right to indemnity by reason of damage suffered through invalid administrative action"); *R v Ealing London Borough Council, ex p Parkinson* (1996) 8 Admin LR 281, 285C-F (Laws J, referring to the "general principle of administrative law, namely that the law recognises no right of compensation for administrative tort"), 291H; *R (Nurse Prescribers Ltd) v Secretary of State for Health* [2004] EWHC 403 (Admin) at [82] (compensation "not available directly in judicial review proceedings arising out of a claim for disappointment of a legitimate expectation"); *K v Secretary of State for the Home Department* [2002] EWCA Civ 775 at [30] (CA insistence on proximity requirement for a common law duty of care, lest "the court would have in effect created a category of administrative tort sounding in damages"); *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 1 WLR 521, 526A (difference between basis for judicial review and "actionable wrong"); *R (Banks) v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 416 (Admin) at [117] (unfair herd movement restriction order, but Court "not … able to award damages in these proceedings to the claimants even though they have suffered substantial financial loss"); *R v Knowsley Borough Council, ex p Maguire* [1992] COD 499 (rejecting, in the context of refusal of taxi licences, ingenious arguments as to contract, breach of statutory duty and negligence, attempting to remedy the absence of damages for breach of administrative law); *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39 [2003] 1 WLR 1763 at [49] (rejecting the idea of a new innominate tort); *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWHC 1743 (Admin) at [42] (Collins J, rejecting the suggestion of a "novel" claim for "breach of common law rights", being a hopeless "attempt to elevate a claimed legitimate expectation to become a right at common law").

25.3.2 **Cause of injustice/need for a solution.**[187] *Somerville v Scottish Ministers* [2007] UKHL 44 [2007] 1 WLR 2734 at [77] (Lord Scott: "A chapter of public law still, however, largely unwritten relates to the ability of courts, in actions where public law challenges to administrative action have succeeded, to award compensation to those who have sustained loss as a consequence of the administrative action in question"); *Jain v Trent Strategic Health Authority* [2009] UKHL 4 [2009] 1 AC 853 at [42] (Baroness Hale, describing "a serious injustice here which deserved a remedy", where "the common law of negligence does not supply one"); *Stovin v Wise* [1996] AC 923, 931F-G (Lord Nicholls: "a coherent, principled control mechanism has to be found"), 933F-G (referring to the "knotty problem" and "unease over the inability of public law, in some instances, to afford a remedy matching the wrong"), 940E ("public law is unable to give an effective remedy … A concurrent common law duty is needed to fill the gap"); *Hoffmann-La Roche (F) & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 359B-C (Lord Wilberforce, speaking of English law's "unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative action": "In more developed legal systems this particular difficulty does not arise"); *D v East Berkshire Community Health NHS*

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[187] Michael Fordham [2003] JR 104; John Corkindale [2004] JR 61; Charles Brasted & Jamie Potter [2009] JR 53.

Trust [2005] UKHL 23 [2005] 2 AC 373 at [49] (Lord Bingham, dissenting: "the concept of duty has proved itself a somewhat blunt instrument for dividing claims which ought reasonably to lead to recovery from claims which ought not"), [50] ("the law of tort should evolve, analogically and incrementally, so as to fashion appropriate remedies to contemporary problems"), [92] (Lord Nicholls, explaining the attractiveness of the idea that "the common law should jettison the concept of duty of care as a universal prerequisite to liability in negligence"), [93] ("identifying the parameters of an expanding law of negligence is proving difficult, especially in fields involving the discharge of statutory functions by public authorities"; in human rights law "In deciding whether overall the end result was acceptable the court makes a value judgment based on more flexible notions than the common law standard of reasonableness and does so freed from the legal rigidity of a duty of care"), [94] (removal of the duty of care-based approach "would be likely to lead to a lengthy and unnecessary period of uncertainty in an important area of the law", at least "unless replaced by a control mechanism"); Justice/All Souls Report, *Administrative Justice: Some Necessary Reforms* (1988), p.364 ("A remedy should be available where a person suffers loss as a result of wrongful administrative action not involving negligence"; and "where loss is caused by excessive or unreasonable delay in reaching a decision"); *R v Commissioners of Customs and Excise, ex p F & I Services Ltd* [2001] EWCA Civ 762 at [73] (Sedley LJ: "That the cases do not include damages for abuses of power falling short of [misfeasance] in public office does not necessarily mean that door is closed to them in principle. But the policy implications of such a step are immense, and it may well be that - despite the presence for some years in the rules of a power to award damages on an application for judicial review - a legal entitlement to them cannot now come into being without legislation"); *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWHC 1743 (Admin) at [44] (Collins J: "this case is yet another which shows that consideration should be given by Parliament to providing some possibility of a claim for damages for unlawful executive action which causes loss. It is clearly not something which can be done by the courts"); *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39 [2003] 1 WLR 1763 at [71] (solution, in addressing any lacuna in the law, should be a matter for public law not private law); *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15 [2004] 1 WLR 1057 at [2] (Lord Steyn: "This is a subject of great complexity and very much an evolving area of the law"; "On the one hand the courts must not contribute to the creation of a society bent on litigation, which is premised on the illusion that for every misfortune there is a remedy. On the other hand, there are cases where the courts must recognise on principled grounds the compelling demands of corrective justice"); *Sandhar v Department of Transport, Environment and the Regions* [2004] EWCA Civ 1440 [2005] 1 WLR 1632 at [57] (Brooke LJ: "I do not see how this court can remedy what appears to be a significant injustice", but "I for one would welcome it if some administrative means could be found of assisting [the claimant] out of public funds"); *R v Commissioners of Customs and Excise, ex p F & I Services Ltd* [2000] STC 364, 380c-d (Carnwath J, referring to negligence and public authorities as "a developing area of the law" in a "fluid state") (CA is [2001] EWCA Civ 762); *R (A) v Secretary of State for the Home Department* [2004] EWHC 1585 (Admin) (recognising actionable duty of care in asylum welfare benefits context, as an incremental step in the development of the law); *Chagos Islanders v Attorney General* [2004] EWCA Civ 997 at [20]-[26] (Sedley LJ, explaining the problem that common law tort claims are not available in English law against "the State" or "the Crown" as such, but only against limbs of the state having "corporate legal personality" or for personal responsibility of individuals or Crown vicarious liability for individuals' conduct; but, beyond the HRA, "the state is not a potential tortfeasor"); *Recommendation No.R(84)15 of the Committee of Ministers* (18th September 1984) (reparation from public authorities); *Mohammed v Home Office* [2011] EWCA Civ 351 [2011] 1 WLR 2862 at [25]-[26] (availability of redress from the ombudsman); cf. *Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No.2)* [1979] AC 385, 399F-G (constitutional "redress", not in tort but in public law); *C.O. Williams Construction v Donald George Blackman* [1995] 1 WLR 102, 109H (statutory damages under s.5(2)(f) of the Administrative Justice Act of Barbados).

25.3.3 **The Law Commission debacle.**[188] *Mohammed v Home Office* [2011] EWCA Civ 351 [2011] 1 WLR 2862 at [19]-[23] (Sedley LJ, describing the work of the Law Commission, aborted in the light of Government opposition: "this debacle", "it is a troubling comment on the functioning of the separation of powers that the state's independent law reform advisory body has had to abandon a project affecting the liability of government to govern principally because the control exercise by government over Parliament would frustrate any reform, however wise or necessary, which would make government's life more difficult"). There were high hopes: see *Watkins v Secretary of State for the Home Department* [2006] UKHL 17 [2006] 2 AC 395 at [10] (relying on the ongoing work of the Law Commission in relation to monetary remedies in public law), [26] (describing the "undesirability of introducing by judicial decision, without consultation, a solution which the consultation and research conducted by the Law Commission may show to be an unsatisfactory solution to what is in truth a small part of a wider problem").

188 [2012] JR 211.

in the language of jurisdictional error). Step two: *In re A Company* [1981] AC 374 and *R v Hull University Visitor, ex p Page* [1993] AC 682 (recognising that *Anisminic* introduced error of law independently of whether the error went to jurisdiction).

(B) USING UNREASONABLENESS TO INTRODUCE SUBSTANTIVE FAIRNESS. Step one: *R v Inland Revenue Commissioners, ex p Unilever Plc* [1996] STC 681 (describing unfairness as an abuse of power, but linking that conclusion to unreasonableness). Step two: *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 (recognising that substantive unfairness not wedded to a test of unreasonableness).

(C) USING ERROR OF LAW TO INTRODUCE UNFAIR ERROR OF FACT. Step one: *Edwards v Bairstow* [1956] AC 14 (gross factual error described in the language of error of law). Step two: *R v Criminal Injuries Compensation Board, ex p A* [1999] 2 AC 330, 344G-345C and *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 [2004] QB 1044 (treating unfair misunderstanding or ignorance of an established and relevant fact as a self-standing ground).

(D) USING UNFAIRNESS TO INTRODUCE MATERIAL ERROR OF FACT. Step one: *R v Criminal Injuries Compensation Board, ex p A* [1999] 2 AC 330, 344G-345C and *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 [2004] QB 1044, using the concept of "unfairness" to explain judicial review for misunderstanding or ignorance of an established and relevant fact. Step two: subsequent cases have dropped the reference to "unfairness", and focused on the materiality of an error of fact. See eg. *Bubb v Wandsworth London Borough Council* [2011] EWCA Civ 1285 [2012] PTSR 1011 at [21] (Lord Neuberger MR), citing *Begum v Tower Hamlets London Borough Council* [2003] UKHL 5 [2003] 2 AC 430 at [7]; and *R (March) v Secretary of State for Health* [2010] EWHC 765 (Admin) (2010) 116 BMLR 57 at [20(iii)]. <49.2.2>, <49.2.3>

(E) USING UNREASONABLENESS TO INTRODUCE PROPORTIONALITY. Step one: *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 (proportionality treated as an aspect of unreasonableness). Step two: *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26 [2001] 2 AC 532 at [21] & [23] (Lord Bingham, finding the "degree of intrusion ... greater than is justified by the objectives the policy is intended to serve, and so violates the common law rights of prisoners"), [23] (a conclusion available "on an orthodox application of common law principles derived from the authorities and an orthodox domestic approach to judicial review"). <58.3.3>

(F) USING UNREASONABLENESS TO INTRODUCE EQUALITY. Step one: the idea of the common law "principle of equality" as simple an application of unreasonableness (still maintained in cases like *R (E) v Nottinghamshire Healthcare NHS Trust* [2009] EWCA Civ 795 [2010] PTSR 674 at [90]. Step two: the dropping of that link, articulating a freestanding principle, building on observations such as *N v Secretary of State for the Home Department* [2005] UKHL 31 [2005] 2 AC 296 at [9] ("in principle the law should seek to treat like cases alike. A similar principle applies to the exercise of administrative discretions"). <55.1>

(G) USING PRECEDENT FACT TO INTRODUCE OBJECTIVE FACT. Step one: *R v Secretary of State for the Home Department, ex p Khawaja* [1984] AC 74 ("illegal entrant" an objective question of fact for the Court under the statutory scheme, through an analysis of precedent fact). Step two: *R (A) v Croydon London Borough Council* [2009] UKSC 8 [2009] 1 WLR 2557 ("child" under the Children Act 1989 an objective question of fact for the Court under the statutory scheme, whether or not also a precedent fact). <49.1>

33.3.2 **The "temporary divergence" dynamic.**

(A) INJUNCTIONS AGAINST THE CROWN. Step one: *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] 2 AC 85 and *R v Secretary of State for Transport, ex p Factortame Ltd (No.2)* [1991] 1 AC 603 (injunction against the Crown available but only in EU law and not in a domestic law context). Step two: *M v Home Office* [1994] 1 AC 377 (injunction available against the Crown even in a domestic law context).

(B) SUBSTANTIVE LEGITIMATE EXPECTATION. <54.2>. Step one: *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 (substantive legitimate expectation protected by means of a justification test, but only in certain circumstances, distinguishing *R v Secretary of State for the Home Department, ex p Hargreaves* [1997] 1 WLR 906). Step two:

the reasonableness standard having fallen into disuse, without it being yet considered necessary to overrule *Hargreaves* and *In re Findlay* [1985] AC 318. <54.2.5>

(C) COMMON LAW PROPORTIONALITY. <P58>. Step one: *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26 [2001] 2 AC 532 at [21] & [23] <58.3.3>, recognising proportionality analysis as available at common law in a human rights context. Step two: the invocation of the proportionality template <P41> in cases beyond rights: penalties and sanctions <58.3.2> and general public law decision-making. The language can be seen in cases like *Ganga v Commissioner of Police* [2011] UKPC 28 at [21], [28] (whether chosen system "rationally connected" to the statutory criteria); *R (Law Society) v Legal Services Commission* [2010] EWHC 2550 (Admin) at [107] (process "could not rationally achieve the aim for which it was designed"); *R (Essex County Council) v Secretary of State for Education* [2012] EWHC 1460 (Admin) at [38] (whether criteria adopted were "rationally connected to the object to be achieved"); *R (Watford Grammar School for Girls) v Adjudicator for Schools* [2003] EWHC 2480 (Admin) [2004] ELR 40 at [82] (failure to appreciate "that there were other possible ways of achieving the result which he considered to be desirable"). <58.3.7>, <58.3.8>

(D) JUDICIAL REVIEW AND PRIMARY LEGISLATION. Step one: *R (Jackson) v Attorney General* [2005] UKHL 56 [2006] 1 AC 262 (considering whether primary legislation valid for the purposes of the Parliament Acts). Step two: the invocation of the *Jackson* principle (judicial review of primary legislation can be available) in a broadening range of contexts. <12.3>

33.4 **Next steps in public law: forecasting.**[40] It is dangerous to think, and quite impossible to believe, that administrative law is at a point of self-satisfied maturity. Identifying the state of flux in the law, and the trend towards empowerment in the landmark cases, can inspire those who would favour further principled yet dramatic developments. Many seeds have discernibly been sown. Various areas can be identified as being under development, or in need of it. Whether or not the incremental groundwork has begun, it is possible to identify clear candidates for development in the coming years and decades. Future generations will look back on developments such as these, just as current generations can look back on dramatic highlights from those which have past. Here are some suggested pointers.[41]

33.4.1 **Empowering highlights: the story so far.** <33.2>

33.4.2 **General duty to give reasons.** A proposition: "Subject to exceptions where the context does not require it, public bodies are required to give reasons for their decisions, and to do so at the time when the decision is made." The groundwork has been laid in *R v Lambeth London Borough Council, ex p Walters* (1994) 26 HLR 170 (Sir Louis Blom-Cooper QC: suggesting a general duty to give reasons); and in *Stefan v General Medical Council* [1999] 1 WLR 1293, 1301A-B ("There is certainly a strong argument for the view that what were once seen as exceptions to a rule may now be becoming examples of the norm, and the cases where reasons are not required may be taking on the appearance of exceptions"). <P62>

33.4.3 **General application of the proportionality template.** A proposition: "Consistently with the latitude and so intensity of review which are appropriate to the context in question, the response by a public body should in general be suitable and proportionate to the achievement of an identifiable and legitimate aim, striking a fair balance between the interests in play." The groundwork has been laid in *R (Alconbury Developments Ltd) v Secretary of State for the Environment Transport and the Regions* [2001] UKHL 23 [2003] 2 AC 295 at [51] (Lord Slynn: time to recognise proportionality as a conventional ground for review), after *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410E (Lord Diplock, contemplating "the possible adoption in the future of the principle of 'proportionality'"). The

[40] Richard Clayton QC [2006] JR 9; Rabinder Singh QC [2007] JR 1; Helen Mountfield [2008] JR 1; Nathalie Lieven QC [2009] JR 9; Martin Westgate QC & Kate Markus [2011] JR 22. 'Silk Survey' [1996] JR 144; Christopher Knight, 'Silk Survey - Ten Years On' [2008] JR 184; 'Solicitor Survey' [1997] JR 241 & [1998] JR 53.

[41] Michael Fordham QC [2003] JR 67, [2004] JR 122, [2006] JR 98, [2008] JR 66.

CA has explained in *R (British Civilian Internees - Far Eastern Region) v Secretary of State for Defence* [2003] EWCA Civ 473 [2003] QB 1397 at [35] that "we have difficulty in seeing what justification there now is for retaining the *Wednesbury* test". The point is an open one: *Somerville v Scottish Ministers* [2007] UKHL 44 [2007] 1 WLR 2734 at [55]-[56], [82], [147], [198] (HL leaving open whether proportionality an independent ground for judicial review). <58.3> (proportionality at common law), <33.3.1(E)> (proportionality masked by reasonableness); and <33.3.2(C)> (proportionality: temporary divergence).

33.4.4 **Defendant's post-permission onus.** A proposition: "At the substantive hearing of a judicial review claim the onus is on the defendant to satisfy the Court as to the public law legitimacy of the impugned act." The groundwork lies in rediscovering the operation of the prerogative writs (show cause) <42.2.7>; and see *R v Civil Service Appeal Board, ex p Cunningham* [1991] 4 All ER 310, 315j (Lord Donaldson MR: "the fact that [permission] has been granted calls for some reply from the [defendant]"). <42.2>.

33.4.5 **Defendant disclosure: certified due diligence.** A proposition: "Summary or detailed grounds of resistance in which judicial review is opposed should state whether or not it is confirmed that, having undertaken all reasonable searches of materials available or known to the defendant or interested party, there is no relevant material remaining undisclosed to the claimant and the Court." The groundwork lies in the recognition of the duty of due diligence <10.4.8>, and the prejudice to a claimant if the claim is being resisted without clarity as to whether the duty has been discharged <10.4.9>.

33.4.6 **Costs: successful permission renewal.** A proposition: "A party whose summary grounds resist permission for judicial review should generally bear the costs of a subsequent renewal which succeeds in securing a grant of permission." The rationale would be that: (a) one of the functions and disciplines of the summary grounds is to concede that cases are arguable, thus saving the Court time and the claimant cost; (b) it is unsatisfactory that the defendant can, without adverse costs consequences, resist permission and require court time to be spent where the case is arguable; (c) in other areas of law where a party seeks unsuccessfully to have a claim peremptorily disposed of at a hearing, that party will expect to have to bear the costs of that hearing.

33.4.7 **Fully developed principle of legality (POL).** The principle of legality has the capacity to develop so as: (1) to constitute an interpretative principle matching the force of HRA s.3 <35.4.2> & <9.4.7>; (2) to address the principled application of international law obligations <35.3>; and (3) as a principle of constitutionality addressing whether and when Acts of Parliament may overstep constitutional boundaries defended by the common law <12.3> (judicial review and primary legislation) & <1.3> (judicial review's constitutional inalienability). <P35>.

33.4.8 **Completion of emergent judicial review grounds.**
(A) MATERIAL ERROR OF FACT. <33.3.1(D)>.
(B) EQUALITY. <33.3.1(F)>.
(C) OBJECTIVE FACT. <33.3.1(G)>.

33.4.9 **Monetary remedy for maladministration.** Public law awaits its *Donoghue v Stevenson*. It needs a fresh look: a new public law approach to monetary remedies in administrative law, free from the "on-off" restrictions of tort law. <25.3>.

33.4.10 **Judicial review of unconstitutional primary legislation.** We await the re-calibration of the constitutional balance, as the Supreme Court recognises the proper function of holding primary legislation to fundamental constitutional principles reflected in the common law. <12.3>; <33.3.2(D)>; <1.3>.

35.2.10 **The POL and the duty of transparency.** <1.2.12> (transparency and the rule of law); *R (Limbu) v Secretary of State for the Home Department* [2008] EWHC 2261 (Admin) [2008] HRLR 1219 at [65] (Blake J: "Transparency, clarity, and the avoidance of results that are contrary to common sense or are arbitrary are aspects of the principle of legality to be applied by the courts in judicial review"); *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36 [2004] 1 AC 604 at [27] (principle of legality used to support duty to notify citizen of decision before it can adversely affect citizen's rights), an approach applied in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 [2012] 1 AC 245 at [35]-[36] (duty to publish detention policy); *Al Rawi v Security Service* [2011] UKSC 34 [2012] 1 AC 531 at [10]-[11] ("the open justice principle" as "a fundamental common law principle"), [84] ("Open justice is a constitutional principle of the highest importance. It cannot be sacrificed merely on the say so of the parties"); *R (Secretary of State for the Home Department) v Inner West London Assistant Deputy Coroner* [2010] EWHC 3098 (Admin) [2011] 1 WLR 2564 (coroner having no power to exclude properly interested persons), [23] ("the legislature would not have created a procedure with such exceptional consequences in the absence of clear language to that effect"), [37] (need for "specific and clear words").

35.2.11 **The POL and protecting the public interest.** *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government* [2011] UKSC 15 [2011] 2 AC 304 (SC, implying into the statutory planning framework a "public policy" exclusion), [46] (principle of statutory interpretation that law should serve the public interest), [54] (Lord Mance, describing "conduct [which] will on public policy grounds disentitle a person from relying on an apparently unqualified statutory provision"), [69] (Lord Brown, discussing why "appropriate to import into this apparently self-contained legislative planning scheme the principle of public policy that no one should be allowed to profit from his own wrong").

35.2.12 **The POL and freedom of expression.** <7.4.15> (constitutional right of freedom from expression); *R (Calver) v Adjudication Panel for Wales* [2012] EWHC 1172 (Admin) at [41] (Beatson J: "The status of freedom of expression at common law ..., although at one stage characterised as a residuary right, has been enhanced by developments of the common law under the influence of rights in international human rights treaties ratified by the United Kingdom, and in particular, even before the Human Rights Act 1998, the European Convention: see *Derbyshire CC v Times Newspapers Ltd* [1993] AC 554 and *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 at 126. The result was that a narrower construction was given to legislative instruments restricting the right, and, albeit subject to Parliamentary sovereignty, clear words were required to achieve a restriction ... This is similar to the position under the Convention"), [42] ("One of the consequences of giving ... constitutional status to freedom of expression is that clear words are required to restrict it"); *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 130C (insofar as standing orders to be construed as permitting restriction with freedom of expression, ultra vires under the principle in *Leech* because no pressing social need);

35.2.13 **The POL and basic humanity/freedom from destitution.** <7.4.9> (freedom from cruelty/ destitution); *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 (asylum benefit-removing regulations ultra vires as incompatible with basic humanity), 292F-G (human rights at issue so basic that unnecessary to resort to the ECHR; applying "the law of humanity").

35.2.14 **The POL and torture.**
(A) FREEDOM FROM TORTURE. <7.4.10(A)>.
(B) TORTURE-OBTAINED EVIDENCE. <7.4.10(B)>; *A v Secretary of State for the Home Department* [2005] UKHL 71 [2006] 2 AC 221 (identifying prohibition on torture-induced evidence, not displaced by clear statutory words) at [96] (provision for use of torture "would have to be expressly provided in primary legislation"), [114] ("Nothing short of an express provision will do, to which Parliament has unequivocally committed itself").

35.3 **International law and the principle of legality.** Securing compatibility between (a) the actions of the State's public authorities and (b) the State's international law obligations

is a legitimate concern for public law. The principle of legality (POL) is able to provide a principled solution, giving those obligations practical effect. The key points are these. (1) The protected values which engage the POL have long-since included international law obligations, which is precisely why ECHR rights were seen as protected by the POL prior to the HRA: they were international law obligations which informed the content of the common law.[53] (2) A link can properly be made between the POL as a principle of interpretation and the well-established principle of presumed compatibility with international law obligations. (3) This is not "direct effect" of undomesticated treaty obligations, since that would rule out the proviso: statutorily-endorsed abrogation for which the POL makes room. (4) The POL supplies public law's answer to the question of what is the analytical manner by which, as is often acknowledged but rarely explained, customary international law obligations are part of the common law.

35.3.1 **The POL and international law obligations.** <6.3.1> (rule of law and international law compatibility); *R (Calver) v Adjudication Panel for Wales* [2012] EWHC 1172 (Admin) at [41] (Beatson J, discussing the principle of legality, explaining: "The status of freedom of expression at common law ... has been enhanced by developments of the common law under the influence of rights in international human rights treaties ratified by the United Kingdom, and in particular, even before the Human Rights Act 1998, the European Convention").

35.3.2 **Interpretative principle of international law compatibility.** <6.3.2> (presumption of domestic law compatibility with international law obligations); *Assange v Swedish Prosecution Authority* [2012] UKSC 22 [2012] 2 WLR 1275 at [10] (Lord Phillips, describing "the presumption that our domestic law will accord with our international obligations"), [98] (Lord Brown: "the general presumption that the United Kingdom legislates in compliance with its international obligations"), [112] (Lord Kerr: "The domestic law presumption that Parliament did not intend to legislate contrary to the United Kingdom's international obligations"), [122] (Lord Dyson: "there is no doubt that there is a 'strong presumption' in favour of interpreting an English statute in a way which does not place the United Kingdom in breach of its international obligations").

35.3.3 **International law compatibility: general public powers.**
(A) INTERNATIONAL LAW AND THE COMMON LAW: GENERAL. Note especially *R v Lyons* [2002] UKHL 44 [2003] 1 AC 976 at [27] (Lord Hoffmann (emphasis added): "there is a strong presumption in favour of interpreting *English law (whether common law or statute)* in a way which does not place the United Kingdom in breach of an international obligation"); *A v Secretary of State for the Home Department* [2005] UKHL 71 [2006] 2 AC 221 at [27] (Lord Bingham: "If, and to the extent that, development of the common law is called for, such development should ordinarily be in harmony with the United Kingdom's international obligations and not antithetical to them"); <6.3.10> (international law and the common law).
(B) ECHR RIGHTS INFORMING THE COMMON LAW. *Director of Public Prosecutions v Jones* [1999] 2 AC 240, 259B (ECHR applied where common law uncertain and developing); *R v Secretary of State for the Home Department, ex p McQuillan* [1995] 4 All ER 400, 422f-j (ECHR standards "march with those of the common law"); *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131H-132A (Lord Hoffmann: "much of the Convention reflects the common law: see *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 551. That is why the United Kingdom government felt able in 1950 to accede to the Convention without domestic legislative change. So the adoption of the text as part of domestic law [by the Human Rights Act 1998] is unlikely to involve radical change in our notions of fundamental human rights").
(C) INTERNATIONAL LAW AND COURT FUNCTIONS. <6.3.14>; *Bulale v Secretary of State for the Home Department* [2008] EWCA Civ 806 [2009] QB 536 at [24] ("as organs of the state the appellate authorities are bound to exercise their powers to ensure the state's compliance with its international obligations"); *R (Mohamed) v Secretary of State for Foreign*

53 Lord Lester QC [1996] JR 21; James Maurici [1996] JR 29.

and Commonwealth Affairs (No.1) [2008] EWHC 2048 (Admin) [2009] 1 WLR 2579 at [142]-[143] (international law relevant to Court's discretion as to whether to order disclosure by reference to common law duty).

35.3.4 **Customary international law (CIL) and the POL.**
(A) INTERNATIONAL OBLIGATIONS: BEYOND TREATIES. <35.3.2> (compatibility with "international obligations").
(B) CIL OBLIGATIONS FORM PART OF DOMESTIC LAW. *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 at 557-558 (Lord Denning MR: "the rules of international law are incorporated into English law automatically"); *R v Lyons* [2002] UKHL 44 [2003] 1 AC 976 at [39] (recognising that an obligation may arise at common law as an "established feature of customary international law, but here "ancillary to a treaty obligation" so reliance on customary international law an impermissible "attempt to give direct domestic effect to an international treaty"); <6.3.15> (customary international law and common law).
(C) UNLESS CIL OBLIGATION ABROGATED BY PARLIAMENT. *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 at 557-558 (rules of international law incorporated into English law automatically: "unless they are in conflict with an Act of Parliament"), applied in *Mutua v Foreign and Commonwealth Office* [2011] EWHC 1913 (QB) at [82] (McCombe J); *A v Secretary of State for the Home Department* [2005] UKHL 71 [2006] 2 AC 221 (identifying prohibition on torture-induced evidence, not displaced by clear statutory words) at [96] (provision for use of torture "would have to be expressly provided in primary legislation"), [114] ("Nothing short of an express provision will do, to which Parliament has unequivocally committed itself").
(D) MODE OF INVOCATION: AN OPEN QUESTION. *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No.1)* [2008] EWHC 2048 (Admin) [2009] 1 WLR 2579 at [184] (DC leaving open the question whether and how a CIL duty would enter the common law) *In re McKerr* [2004] UKHL 12 [2004] 1 WLR 807 at [52] ("The impact of evolving customary international law on our domestic legal system is a subject of increasing importance"); *R v Lyons* [2002] UKHL 44 [2003] 1 AC 976 at [39] (direct reliance on customary international law as a freestanding obligation, where ancillary to treaty, would be an impermissible "attempt to give direct domestic effect to an international treaty");.

35.3.5 **International law and statutory abrogation: clear words.** <6.3.6> (international law and legislative ambiguity); <6.3.7> (international law and clear statute); *R v Asfaw* [2008] UKHL 31 [2008] 1 AC 1061 at [29] (need for "an enactment in terms unambiguously inconsistent with [the international law] obligation"); *R v Lyons* [2002] UKHL 44 [2003] 1 AC 976 at [14] (international law obligation yielding to "an express and applicable provision of domestic statutory law"); *EN (Serbia) v Secretary of State for the Home Department* [2009] EWCA Civ 630 [2010] QB 633 at [60] ("If ... Parliament has enacted a statute that is unambiguously in conflict with the Refugee Convention, then subject to any other statutory or equivalent authority the courts must enforce the statute: because ... the sovereign power of the Queen in Parliament extends to breaking treaties"); *Assange v Swedish Prosecution Authority* [2012] UKSC 22 [2012] 2 WLR 1275 at [10], [99], [119] (Act enacted to give effect to EU Framework Agreement and not sufficiently clear that Parliament intended a different meaning).

35.3.6 **Undomesticated international instruments: no direct effect.** <6.3.8>; *R v Lyons* [2002] UKHL 44 [2003] 1 AC 976 at [39] (customary international law obligation relied on "ancillary to a treaty obligation", so reliance as a direct obligation an impermissible "attempt to give direct domestic effect to an international treaty").

35.4 **The principle of legality and statutorily-endorsed abrogation.** The principle of legality (POL) operates with a principle, and a premise, but also with a proviso. The *proviso* is that public authority power cannot be exercised in a way which abrogates a protected common law value *at least unless Parliament has specifically required or empowered the abrogation.* This recognises Parliamentary supremacy, itself a protected value at common law. It requires Parliament squarely to confront the implications of abrogating fundamental common law values. Statutorily-prescribed abrogation may be necessary, if a protected

value is to be threatened, but that does not make it sufficient. There is room for the proviso to operate contextually: in different ways, for different protected values. A first category of case is where statutory abrogation by "necessary implication" can suffice. A second category is where clear and express statutory language suffices, but nothing short of that will do. But a constitutional principle of legality can go further, in defending fundamental constitutional values. It can discover a category of case warranting the force of those "possible" interpretations seen under the HRA and EU law, to fit protected values with unambiguous legislation, through reading-down and reading-in. It could find the language and design of a statute so uncompromisingly destructive of a constitutional value, that loyalty to the rule of law would demand its disapplication. The paradigm: if Parliament expressly abrogated judicial review, it would be inviting the invocation of a principle of constitutionality.

35.4.1 **The POL and statutorily-endorsed abrogation.** *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131E-G (Lord Hoffmann: "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words ... In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document"); *R v Forsyth* [2011] UKSC 9 [2011] 2 AC 69 at [10] (Hansard used in applying the principle of legality, to ensure "nothing said ... to suggest that the executive power being conferred was intended to permit fundamental human rights to be overridden"); *Bank Mellat v Her Majesty's Treasury (No.2)* [2011] EWCA Civ 1 [2012] QB 101 at [62] (no "scope for the application of a common law right to make representations" under this statutory scheme); *Ahmed v HM Treasury* [2010] UKSC 2 [2010] 2 AC 534 (quashing of Orders under the principle of legality, primary legislation being needed for these curtailments of fundamental rights), at [157] (Lord Phillips: "Nobody should conclude that the result of these appeals constitutes judicial interference with the will of Parliament. On the contrary it upholds the supremacy of Parliament in deciding whether or not measures should be imposed that affect the fundamental rights of those in this country"); <7.1> (Parliamentary supremacy).

35.4.2 **The POL and HRA s.3 compared.** <9.4.7>; *Ahmed v HM Treasury* [2010] UKSC 2 [2010] 2 AC 534 at [112] (Lord Phillips, expressing the view that the case-law "has extended the reach of section 3 of the HRA beyond that of the principle of legality"), [117] ("I do not consider that the principle of legality permits a court to disregard an unambiguous expression of Parliament's intention. To this extent its reach is less than that of section 3 of the HRA"); *W (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 898 at [46] (not possible under the POL to "read down" unambiguous words, to secure common law fairness, as would be possible under HRA s.3); cf. *R (Noone) v Governor of Drake Hall Prison* [2010] UKSC 30 [2010] 1 WLR 1743 (purposive interpretation "possible", including reading in words, to avoid absurd consequences).

35.4.3 **The POL: statutory abrogation needing clear express words.** *A v Secretary of State for the Home Department* [2005] UKHL 71 [2006] 2 AC 221 (common law abhorrence of torture and torture-induced evidence incapable of being overridden by necessary implication), [96] (provision for use of torture "would have to be expressly provided in primary legislation"), [114] ("This is not a matter that can be left to implication. Nothing short of an express provision will do, to which Parliament has unequivocally committed itself"); *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420 [2012] 3 All ER 551 at [73] (Toulson LJ: "although the sovereignty of Parliament means that the responsibility of the courts for determining the scope of the open justice principle may be affected by an Act

42.2.2 **Defendant's onus and justification.**
(A) FUNDAMENTAL RIGHTS. <37.1.10> (proportionality/ HRA onus on defendant); *Eshugbayi Eleko v Government of Nigeria* [1931] AC 662, 670 ("no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice"), applied in *Boddington v British Transport Police* [1999] 2 AC 143, 173F; *R v Secretary of State for the Home Department, ex p Khawaja* [1984] AC 74, 112B ("in cases where the exercise of executive discretion interferes with liberty or property rights ... the burden of justifying the legality of the decision [is] ... upon the executive"); *R (Watkins-Singh) v Aberdare Girls High School Governors* [2008] EWHC 1865 (Admin) [2008] 3 FCR 203 at [74] & [90] (defendant's onus as to justification of indirect discrimination); *R (Isiko) v Secretary of State for the Home Department* [2001] UKHRR 385 at [31] (the decision-maker must "demonstrate ... that his proposed action does not in truth interfere with the right"); *R v Secretary of State for the Home Department, ex p Norney* (1995) 7 Admin LR 861, 872G (in order to be lawful, policy infringing human rights "needs to be supported by cogent and compelling reasons"); *R (L) v Manchester City Council* [2001] EWHC Admin 707 (2002) 5 CCLR 268 at [92] ("Once an interference or failure to meet a positive obligation is shown, the burden of proof shifts to the defendant to show relevant and sufficient reason for its conduct. So it is for [the defendant] to prove justification"); *Chesterfield Properties Plc v Secretary of State for the Environment* [1998] JPL 568, 579 (Laws J: "Where an administrative decision abrogates or diminishes a constitutional or fundamental right, *Wednesbury* requires that the decision-maker provide a substantial justification in the public interest for doing so"), 580 ("it must ... be demonstrated that [the decision-maker] has concluded that there exists a substantial public interest or interests outweighing the [claimant]'s rights"); *R v A Local Authority, ex p LM* [2000] 1 FLR 612, 626B (defendants' evidence "comes anywhere near demonstrating a pressing need"); *R v Oldham Justices, ex p Cawley* [1997] QB 1, 19B (in practice, judicial review like habeas corpus as to onus); *Abdul Sheikh v Secretary of State for the Home Department* [2001] INLR 98 at [8]-[9] (whether habeas corpus or judicial review, detainer having to show legal justification for detention); *R v Secretary of State for the Home Department, ex p Bugdaycay* [1987] AC 514, 537H-538A (court's "special responsibility", and sufficient that not clear that Secretary of State "took into account or adequately resolved" relevant matters); *R v Radio Authority, ex p Bull* [1998] QB 294 (treating onus as remaining on claimant, although decision restricting freedom of communication); *R v Secretary of State for Transport, ex p de Rothschild* [1989] 1 All ER 933 (where compulsory purchase order, no formal onus but need that "sufficient reasons are adduced affirmatively to justify it on its merits"); *R v Stoke-on-Trent Crown Court, ex p Marsden* [1999] COD 114 (decisions affecting liberty needing material to show that the decision was based on good and sufficient cause); *R v Lord Saville, ex p A* 17th June 1999 unrep. ("In effect the burden is on those who seek to uphold the decision"); *R (Suryananda) v Welsh Ministers* [2007] EWCA Civ 893 at [69] ("the burden of establishing a justifiable interference with the rights under Article 9(1) lay on the Minister").
(B) SUBSTANTIVE LEGITIMATE EXPECTATION. *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32 [2012] 1 AC 1 at [37] ("The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest").

42.2.3 **Grant of permission means response called for.** *R (I) v Secretary of State for the Home Department* [2010] EWCA Civ 727 at [50] (Munby LJ: "Whatever may be the position at an earlier stage, once permission has been granted to apply for judicial review there is an obligation on the Secretary of State to make proper disclosure"); *R v Civil Service Appeal Board, ex p Cunningham* [1991] 4 All ER 310, 315j (Lord Donaldson MR: "the fact that [permission] has been granted calls for some reply from the [defendant]"); *R v Lancashire County Council, ex p*

Huddleston [1986] 2 All ER 941, 945b ("if and when the [claimant] can satisfy a judge of the public law court that the facts disclosed by her are sufficient to entitle her to apply for judicial review ... [t]hen it becomes the duty of the [defendant] to make full and fair disclosure"); *R v Lambeth London Borough Council, ex p Mahmood* The Times 23rd February 1994; *R v Huntingdon Magistrates' Court, ex p Percy* [1994] COD 323 and *R v Aldershot Justices, ex p Rushmoor Borough Council* [1996] COD 21 (order for costs against defendants because of failure to take grant of permission sufficiently seriously).

42.2.4 **Inferences against defendants.**
(A) GENERAL. <62.2.8> (inferences from unreasoned decisions); *R v Manchester Metropolitan University, ex p Nolan* [1994] ELR 380, 391H (inferring that certain material was not before board of examiners); *R v Governors of the Hasmonean High School, ex p N & E* [1994] ELR 343, 355A-B, 350B-C, 352D; *R v Warwickshire County Council, ex p Collymore* [1995] ELR 217, 227D-H (inference that policy inflexibly applied); *R v Brent London Borough Council, ex p Bariise* (1999) 31 HLR 50, 58 (where something "so startling that one would not expect it to pass without individual comment, the Court may be justified in drawing the inference that it has not received any or sufficient consideration").
(B) FAILURE OF CANDOUR/DISCLOSURE. *R (I) v Secretary of State for the Home Department* [2010] EWCA Civ 727 at [55] (Munby LJ: "This is far from being the first occasion when the judges have had to complain about deficiencies in the Secretary of State's response to claims such as the one which is before us. If, despite all this, the court is again left having to draw inferences in such a situation, then the Secretary of State should anticipate that the inferences drawn may well be adverse to him"); *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 at [53] (Laws LJ: "If the court has not been given a true and comprehensive account, but has had to tease the truth out of late [disclosure], it may be appropriate to draw inferences against the Secretary of State upon points that remain obscure").

42.2.5 **Defendant's onus/burden: other contexts.**
(A) "DEPARTURE" CONTEXTS. <62.2.9>.
(B) SEVERABILITY. <43.1.8>.
(C) MATERIALITY/PREJUDICE/FUTILITY. <4.5.1>.
(D) MATTERS CALLING FOR AN EXPLANATION. *Manning v Sharma* [2009] UKPC 37 (judicial review for breach of statutory duty to publish information as soon as practicable) at [14] (applying the principle *res ipsa loquitur*, the unexplained failure meant it was "surely ... up to the authority to show some good reason why it had not been practicable to publish"); *Engineers & Managers Association v Advisory Conciliation & Arbitration Service* [1980] 1 WLR 302, 310F ("such extraordinary delay as occurred here called for a clear and convincing explanation"); *R v Dorking Justices, ex p Harrington* [1984] AC 743, 749D-E ("no explanation has been vouchsafed of the reasons for what can only be regarded as this remarkable action"; "in the absence of some explanation - none is readily apparent - it is clear that their action was both wrong and unjudicial"); *R v Islington London Borough Council, ex p Rixon* [1997] ELR 66 (up to defendant to demonstrate good reason for any failure to comply with statutory guidance); *R v Chief Constable of Devon and Cornwall, ex p Hay* [1996] 2 All ER 711, 725g-h ("the only person who can describe his process of reasoning is the chief constable himself, and I do not consider that he has satisfactorily done so").
(E) OTHER. *R (Lichfield Securities Ltd) v Lichfield District Council* [2001] EWCA Civ 304 [2001] 3 PLR 33 at [26] (Sedley LJ: "it is for [the] public authority to make out any case that the remedy for its own unfairness lay in the [claimant's] hands"); *R v Highbury Corner Magistrates' Court, ex p Tawfick* [1994] COD 106 (defendant failing to show good grounds justifying impugned decision); *R v Camden London Borough Council, ex p Adair* (1997) 29 HLR 236 (no direct evidence that defendant's homelessness unit having made inquiries of district housing office); *R v Liverpool City Magistrates Court, ex p Banwell* [1998] COD 144 (judicial review granted where possible to read the decision-letter as reflecting a permissible approach, but not the only interpretation); *R v North West Lancashire Health Authority, ex p A* [2000] 1 WLR 977, 999E (in adopting the policy, authority not having "demonstrated that degree of rational consideration that can reasonably be expected of it"); *R v Flintshire County*

Council, ex p Armstrong-Braun [2001] EWCA Civ 345 [2001] LGR 344 at [67] ("[The] evidence falls far short of demonstrating that … proper considerations were before members").

42.2.6 **Defendant's onus: standard of proof.** *R v Secretary of State for the Home Department, ex p Khawaja* [1984] AC 74, 114B-C (applying "the civil standard flexibly applied" in a case where "the burden lies on the executive to justify the exercise of a power of detention").

42.2.7 **Historical origins: the rule nisi/"show cause" procedure.** *Local Government Board v Arlidge* [1915] AC 120, 139 (Lord Parmoor: "The [claimant] obtained a rule nisi in the High Court of Justice, calling upon the Local Government Board to show cause why a writ of certiorari should not be issued … This rule was discharged on argument"); *Metropolitan Borough of Stepney v John Walker & Sons Ltd* [1934] AC 365, 388 (Lord Wright: "the [claimants] applied for, and were granted, a rule nisi calling upon the [defendant] to show cause why a writ of mandamus should not issue. A Divisional Court before which the matter came … ordered the rule to be discharged").

Court, ex p Hall [1993] COD 140 (poll-tax default committal harsh and oppressive and as such lacking in proportionality); *R v Highbury Corner Justices, ex p Uchendu* The Times 28th January 1994 (penalty not imposed with due regard to the principle of proportionality in sentencing); *R v London Metal Exchange Ltd, ex p Albatros Warehousing BV* 31st March 2000 unrep. at [54]-[57] (whether fine grossly disproportionate); *R v Secretary of State for the Home Department, ex p Benwell* [1985] QB 554, 569A (Hodgson J: "in an extreme case an administrative or quasi-judicial penalty can be successfully attacked on the ground that it was so disproportionate to the offence as to be perverse"); *R v Ramsgate Magistrates' Court and Thanet District Council, ex p Haddow* (1993) 5 Admin LR 359, 363B (whether decision "so widely disproportionate that no reasonable bench of justices could arrive at it"); *R v Secretary of State for the Home Department, ex p Chapman* The Times 25th October 1994 (discretionary lifer's tariff far exceeding any equivalent fixed-term sentence so that no reasonable Home Secretary could have allowed it to stand); *R (A) v Head Teacher of P School* [2001] EWHC Admin 721 [2002] ELR 244 at [41] (pupil-exclusion "manifestly unreasonable and disproportionate").

58.3.3 **Common law proportionality: protecting basic (constitutional) rights.** <7.4.1> (constitutional rights); <P35> (the common law principle of legality); <35.1.3> (principle of legality as common law proportionality); <32.3> (anxious scrutiny: common law principles of justification); *R (Quila) v Secretary of State for the Home Department* [2010] EWCA Civ 1482 [2011] 3 All ER 81 (CA) at [34] (Sedley LJ, explaining that in *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26 [2001] 2 AC 532 "the House of Lords, on the eve of the coming into force of the Human Rights Act 1998, took the opportunity to make it clear that proportionality was already required by the common law where an executive measure would interfere with a fundamental individual right ... Their Lordships unanimously held that the rule involved a disproportionate invasion of a prisoner's fundamental right to free communication with his lawyers and so could not stand"), [36] ("What is ... clear ... is that proportionality, although it may well overlap in particular cases with irrationality and even tend to subsume it, now has a life of its own in public law") (SC is [2011] UKSC 45 [2012] 1 AC 621); *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26 [2001] 2 AC 532 at [21] (Lord Bingham, explaining that the "degree of intrusion ... greater than is justified by the objectives the policy is intended to serve, and so violates the common law rights of prisoners"), [23] ("I have reached the conclusions so far expressed on an orthodox application of common law principles derived from the authorities and an orthodox domestic approach to judicial review"); *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131H-132A (Lord Hoffmann, explaining that since "much of the Convention reflects the common law", "the adoption of the text as part of domestic law [by the Human Rights Act 1998] is unlikely to involve radical change in our notions of fundamental human rights"); *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, 751E-F (Lord Templeman: "the courts cannot escape from asking themselves whether a reasonable Secretary of State, on the material before him, could reasonably conclude that the interference with freedom of expression which he determined to impose was justifiable. In terms of the [European] Convention [on Human Rights], as construed by the European Court, the interference with freedom of expression must be necessary and proportionate to the damage which the restriction is designed to prevent"); *R v Secretary of State for the Home Department, ex p Pegg* [1995] COD 84 (Steyn LJ, leaving open whether proportionality available as a self-standing ground in cases involving liberty); *R v Secretary of State for the Home Department, ex p McQuillan* [1995] 4 All ER 400, 423a (Sedley J, raising the question whether common law anxious scrutiny "in itself is a doctrine of proportionality" and commenting that "if it is, the House of Lords has long since contemplated its arrival with equanimity"); *R v Lord Saville of Newdigate, ex p A* [2000] 1 WLR 1855 at [37] ("it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations. In other words it is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification"); *R v Secretary of State for the Home Department, ex p Turgut* [2001] 1 All ER 719 (Simon Brown LJ, commenting that judicial review needing to test whether measure "answers a pressing social need or is proportionate to the aims

pursued"); *R v Governor of Frankland Prison, ex p Russell* [2000] 1 WLR 2027 (policy restricting prisoners to one meal a day falling foul of test whereby "there must be established a self-evident and pressing need for [the] power and the interference must be the minimum necessary to fulfil that need", because arbitrary and unjustified); *Kataria v Essex Strategic Health Authority* [2004] EWHC 641 (Admin) [2004] 3 All ER 572 at [74]-[75] (treating proportionality as a doctrine applicable only where decision interferes with fundamental right), [76] (little difference between reasonableness and proportionality); *R (Medway Council) v Secretary of State for Transport* [2002] EWHC 2516 (Admin) at [47] (Maurice Kay J: "the greater intensity of review which is required by the proportionality test does not arise in domestic law where there is no engagement of a Convention right and no fundamental right is in play. The test remains *Wednesbury*").

58.3.4 **Common law variable level of intensity.** *R (KM) v Cambridgeshire County Council* [2012] UKSC 23 at [36] (Lord Wilson: "in community care cases the intensity of review will depend on the profundity of the impact of the determination. By reference to that yardstick, the necessary intensity of review in a case of this sort is high"); <31.5.3> (reasonableness as a flexi-principle); <57.1.3> (unreasonableness as a variable standard).

58.3.5 **Proportionality more intense/sophisticated than anxious scrutiny.** <32.3> (anxious scrutiny); *E v Chief Constable of the Royal Ulster Constabulary* [2008] UKHL 66 [2009] 1 AC 536 at [54] (*Smith* test "insufficiently intense" for HRA proportionality); *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26 [2001] 2 AC 532 at [27] (Lord Steyn, referring to proportionality principles as "more precise and more sophisticated than the traditional grounds of review"; describing "three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights [in the light of *Smith and Grady v United Kingdom* (1999) 29 EHRR 493]"); *R (Wilkinson) v Responsible Medical Officer Broadmoor Hospital* [2001] EWCA Civ 1545 [2002] 1 WLR 419 at [27] (HRA proportionality not the same as the *Smith* test), also at [53] and [83]; <58.2.1> (proportionality compared with reasonableness).

58.3.6 **Common law rights: no prescriptive instrument of codified rights.** *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131G-132B (Lord Hoffmann, referring to the change whereby "the principles of fundamental human rights which exist at common law will be supplemented by a specific text, namely the European Convention on Human Rights and Fundamental Freedoms"); *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 at [39]-[40] (Lord Phillips MR, explaining why common law test of justification "requires modification where a decision is reviewed that was required, pursuant to the 1998 Act, to comply with the Convention. In such circumstances the Court can no longer uphold the decision on the general ground that there was 'substantial justification' for interference with human rights. Interference with human rights can only be justified to the extent permitted by the Convention itself").

58.3.7 **Common law suitability.** <P37> (proportionality template); *R (British Civilian Internees - Far Eastern Region) v Secretary of State for Defence* [2003] EWCA Civ 473 [2003] QB 1397 at [40] ("The measures designed to further the objective must be rationally connected to it"), applied in *Ganga v Commissioner of Police* [2011] UKPC 28 at [21], [28] (points-based system "rationally connected" to the statutory criteria); *R (Gurung) v Secretary of State for the Home Department* [2012] EWHC 1629 (Admin) at [31] (whether policy unlawful on grounds "that it does not rationally reflect its underlying purpose"); *R (Law Society) v Legal Services Commission* [2010] EWHC 2550 (Admin) at [107] ("the process adopted could not rationally achieve the aim for which it was designed"); *R (Wandsworth London Borough Council) v Schools Adjudicator* [2003] EWHC 2969 (Admin) [2004] ELR 274 (Schools Adjudicator's decision imposing reduced intakes of high-ability children unreasonable), [73] (Goldring J:

"the remedy chosen was not rationally capable of correcting the unfairness"); *R (Essex County Council) v Secretary of State for Education* [2012] EWHC 1460 (Admin) at [38] (criteria adopted were "rationally connected to the object to be achieved"); *R (British Civilian Internees - Far Eastern Region) v Secretary of State for Defence* [2003] EWCA Civ 473 [2003] QB 1397 at [40] ("Just as in satisfying the requirements of proportionality, so too in meeting the *Wednesbury* test, the measures designed to further the objective must be rationally connected to it"); *R v Islington London Borough Council, ex p Reilly* (1999) 31 HLR 651 (housing policy unreasonable because "incapable of producing a fair assessment of [claimants'] respective housing needs").

58.3.8 **Common law necessity/least intrusive alternative.** *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60 [2009] 1 AC 756 at [38] (question is not whether no alternative course was open to the decision-maker, but whether decision was within the lawful bounds of discretion); *Dad v General Dental Council* [2000] 1 WLR 1538, 1543A (professional conduct committee required to balance the nature and gravity of the offences and their bearing on the appellant's fitness to practise against the need for the imposition of the penalty and its consequences; should have explored whether possibility of rehabilitation by postponing the effect of the order); *R v London (North) Industrial Tribunal, ex p Associated Newspapers Ltd* [1998] ICR 1212 (reporting restriction orders required to extend so far and no further than what was necessary); *R (W) v Governors of B School* [2001] LGR 561 (CA) at [29] (statutory scheme as to reinstatement of pupil to implement decision of panel having the effect that: "the governors are required to act proportionately to any threat of industrial action. That is, they should consider what is the *least* derogation from the pupil's full reintegration into the school that must be conceded so as to secure the protection of the other pupils' interests ... What constitutes such minimal derogation is for their primary judgment; the court exercises a secondary judgment on judicial review") (HL is *R (L (A Minor)) v Governors of J School* [2003] UKHL 9 [2003] 2 AC 633); *R (Yumsak) v Enfield London Borough Council* [2002] EWHC 280 (Admin) [2003] HLR 1 at [32] (asylum housing dispersal decision unreasonable where "no evidence that there was no suitable and cost-effective alternative temporary accommodation in or closer to Enfield"); *R (Watford Grammar School for Girls) v Adjudicator for Schools* [2003] EWHC 2480 (Admin) [2004] ELR 40 at [82] (Collins J, finding that schools adjudicator should have "appreciated that there were other possible ways of achieving the result which he considered to be desirable"), [85] (thus, he "fail[ed] to have regard to material considerations"); *R v O'Kane and Clarke, ex p Northern Bank Ltd* [1996] STC 1249, 1269f-g (response unnecessary: "if there were thought to be a need for protection I see no reason why this could not be achieved by the method suggested by the [claimant]").

58.3.9 **General relevance of relationship to purpose/aim.** *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20 [2011] 1 AC 437 at [44]-[45] (describing the planning principle whereby planning conditions "must fairly and reasonable relate to the permitted development"); *R (Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23 [2011] 1 WLR 1299 at [12] (immigration detention must only be for period reasonable for the purpose of effecting removal); *Health and Safety Executive v Wolverhampton City Council* [2012] UKSC 34 at [25] (Lord Carnwath: "As custodian of public funds, the authority not only may, but generally must, have regard to the cost to the public of its actions, at least to the extent of considering in any case whether the cost is proportionate to the aim to be achieved, and taking into account of any more economic ways of achieving the same objective").

58.4 **Proportionality and scrutiny of evidence/reasoning.**[49] The template of proportionality poses questions which a public body really ought to address for itself. Where it has done so, that discipline will assist it in demonstrating justification, and earning the latitude which the public body will look to be afforded by the Court. Where it has not done so, that in itself will not be fatal. Ultimately, what will count for most is the practical outcome rather than the reasoning process.

[49] Richard Gordon QC [2006] JR 136; Mohammad Mazher Idriss [2006] JR 239; Christopher Knight [2007] JR 221.

P62 Reasons. Public Bodies are often required to give reasons, and always required to make the reasons they do give adequate.

62.1 Importance of reasons
62.2 Judicial review for failure to give reasons
62.3 Adequacy of reasons
62.4 Timing of reasons
62.5 Remedy for lack/insufficiency of reasons

62.1 **Importance of reasons.** Administrative law recognises the strong principled basis for requiring public authorities adequately to explain why they acted. The discipline of express reasoning assists the claimant, the Court and the defendant body itself. The conventional approach holds that there is no general duty, but there are a vast number of incrementally-recognised exceptional cases where a duty arises. The alternative view, waiting to be fully embraced, is that there is in truth a general duty, but with a moderate number of incrementally-recognised exceptional cases where no duty arises.

62.1.1 **No general common law duty.** *R (Lunn) v Revenue & Customs Commissioners* [2011] EWHC 240 (Admin) [2011] STC 1028 at [55] (Kenneth Parker J: "There is no general duty to give reasons ... However, the courts have recognised many circumstances in which procedural fairness requires that reasons should be afforded to a person affected by an adverse decision"); *R (Birmingham City Council) v Birmingham Crown Court* [2009] EWHC 3329 (Admin) [2010] 1 WLR 1287 at [46] (Beatson J: "Although English law may be inching towards a general duty to give reasons ... it has not yet got to the stage where there is such a duty"); *Stefan v General Medical Council* [1999] 1 WLR 1293, 1300G ("the established position of the common law [is] that there is no general duty, universally imposed on all decision-makers"); *R (Hasan) v Secretary of State for Trade and Industry* [2008] EWCA Civ 1311 [2009] 3 All ER 539 at [8] (no general duty to give reasons); *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, 564E-F ("the law does not at present recognise a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied"); *Rey v Government of Switzerland* [1999] 1 AC 54, 66B-C (Lord Steyn); *R v Kensington and Chelsea Royal London Borough Council, ex p Grillo* (1996) 28 HLR 94, 105 (at present no "general obligation on administrative authorities to give reasons for their decisions"); JUSTICE Report, *Administration Under Law* (1971) at p.23 ("No single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions").

62.1.2 **Momentum towards a general duty.**[93] *North Range Shipping Ltd v Seatrans Shipping Corp* [2002] EWCA Civ 405 [2002] 1 WLR 2397 at [15] ("the trend of the law has been towards an increased recognition of the duty to give reasons"); *Stefan v General Medical Council* [1999] 1 WLR 1293, 1301A-B ("There is certainly a strong argument for the view that what were once seen as exceptions to a rule may now be becoming examples of the norm, and the cases where reasons are not required may be taking on the appearance of exceptions"), 1300G ("The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current developments towards an increased openness in matters of government and administration. But the trend is proceeding on a case by case basis"); *R v Kensington and Chelsea Royal London Borough Council, ex p Grillo* (1996) 28 HLR 94, 105 (Neill LJ: "There may come a time when English law does impose a general obligation on administrative authorities to give reasons for their decisions"); *R (Wooder) v Feggetter* [2002] EWCA Civ 554 [2003] QB 219 at [39] (Sedley LJ, referring to academic analysis as demonstrating "the distance still to be travelled in this

[93] Thomas de la Mare [1996] JR 88; David Toube [1997] JR 68.