THE FRAMEWORK OF GOOD ADMINISTRATION: PROTECTING INDIVIDUAL INTERESTS AND CONTROLLING PUBLIC POWER

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ABSTRACT

This thesis puts forward a framework of good administration in judicial review that encompasses two limbs. The first limb safeguards a claimant's individual interests while the second limb allows the claimant to assert the collective interest of the public in the control of public power. The objective is to provide courts and commentators with a holistic and structured framework which is capable of guiding and informing their approach to procedural issues of standing and waiver, administrative discretion and remedies in judicial review.

In order to enhance the protection afforded to these interests under this two-pronged framework, this thesis adopts a more nuanced approach towards the public and private divide and explores whether judicious conceptual borrowing is capable of offering new answers to difficult issues. For instance, to obtain guidance on how procedural issues of standing and waiver should be addressed under the framework, this thesis undertakes an examination of how these issues are addressed in systems dealing wholly with public wrongs like criminal law and how they are dealt with in private law.

This thesis also considers how the protection afforded to legitimate expectations, which constitute important individual interests under the first limb of the framework, may be enhanced by adapting contractual and estoppel principles. This thesis then examines how a modified fiduciary approach may offer additional protection for the public interest in the control of public power under the second limb of the framework. To demonstrate that conceptual borrowing is capable of functioning as a two-street, this thesis also considers how public law concepts may enhance the control of contractual discretion. The final substantive chapter of this thesis explores how the private law notion of damages may elevate the protection afforded to the interests under both limbs of the framework.

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CHAPTER ONE

INTRODUCTION

'Public law is not at base about rights, even though abuses of power may and often invade private rights; it is about wrongs – that is to say misuses of public power…'

[Sedley J, *R v Somerset CC ex parte Dixon*[1]*].*

Sedley J's observation raises important questions about the purpose(s) of public law, as it implies that the protection of private rights and the prevention of the misuse of public power are two separate goals. The question as to whether public law is primarily concerned with private rights or the control of public power, lies at the heart of rights-based and bifurcation theories of public law. It will be argued here that a more realistic understanding of judicial review than that offered by rights-based and bifurcation theorists is that it is concerned with both protecting individual interests and ensuring that public power is exercised in the public interest.

To that end, this thesis formulates a framework of good administration in judicial review that encompasses two limbs. The first limb safeguards a claimant's individual interests while the second limb allows the claimant to assert the collective interest of the public in the control of public power. The objective is to provide courts and commentators with a holistic and structured framework which is capable of guiding and informing their approach to procedural issues of standing and waiver, administrative discretion and remedies in judicial review.

In order to enhance the protection afforded to these interests under this two-pronged framework, this thesis adopts a more nuanced approach towards the public and

[1] [1998] Env LR 111 (QB) 121.

private divide and explores whether guidance may be derived from techniques and principles from other areas of law. It hopes to show that judicious conceptual borrowing is capable of promoting legal development and offering new answers to difficult issues.

This introductory chapter is structured into four parts. Part One examines the limitations of holding that judicial review is primarily concerned with protecting private rights and correcting public wrongs. Part Two clarifies certain aspects of the framework of good administration that is proposed by this thesis and it explains how a double-pronged framework of good administration reflects the twin objectives of judicial review, namely the protection of individual interests and the control of public power in the public interest. Part Three then explores some of the objections that may be levelled against this thesis' use of concepts from across the public/private divide, and it examines some of the problems with adopting an overly rigid approach to this divide. The final part of this chapter sets out the structure for the remainder of this thesis.

1. Private Rights vs. Public Wrongs: The Difficulties with Adopting a Hard-line Approach

A. Definitional Issues surrounding Private Rights and Public Wrongs

This sub-section discusses the various limitations of holding that judicial review is primarily concerned with protecting private rights or correcting public wrongs. However, before examining the flaws of these approaches in detail, this sub-section considers certain definitional issues surrounding the terms 'private rights' and 'public wrongs' and explains why in formulating the framework of good administration, this thesis has chosen to focus on individual interests and the control of public power.

A model of judicial review that is premised upon the protection of private rights has to offer some guidance as to the type of interests that fall within the ambit of 'private rights. This is particularly difficult given the absence of a unitary conception of rights in the public law context. As Varuhas observes, '*the term "right" could refer to a range of different phenomena and may have very different meanings in different contexts*'[2]. For instance, the concept of 'rights' has been used in the public law jurisprudence to refer to rights encapsulated in human rights instruments[3] such as the Human Rights Act 1998 ('the HRA'), rights and/or constitutional principles protected under the common law[4] and rights that impose positive duties upon the state[5].

It may also be possible to adopt a broad interpretation of private rights that encompasses other forms of individual interests. Take for instance, Hickman and King, who have both argued against the adoption of proportionality as a general head of review[6]. While both commentators agree that proportionality should be applied in 'rights' cases[7], they also identified categories of non-rights cases that should be subject to the proportionality test as they require more judicial scrutiny. For Hickman, the proportionality test should be confined to cases where there has been an infringement of a Convention right, where a substantive legitimate expectation has been established, where there is discrimination on a protected ground and where a public authority has imposed a penalty[8]. King on the other

[2] Jason Varuhas, 'The Reformation of English Administrative Law? "Rights", Rhetoric' and Reality' [2013] 72 CLJ 369, 396.
[3] For instance, Taggart's bifurcation model of public law rests on a conception of rights that includes rights in a statutory bill of rights and rights recognized by the common law: Michael Taggart, 'Proportionality, Deference, *Wednesbury'* [2008] NZLR 423, 465-466.
[4] Taggart ibid; Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn MacMillan and Co 1915) 191.
[5] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008).
[6] Tom Hickman, 'Problems for Proportionality' [2010] NZLR 303; Jeff King, 'Proportionality: A Halfway House' [2010] NZLR 327.
[7] Hickman refers specifically to rights protected under the HRA, devolution legislation and EU law, while King uses the broader term 'fundamental interests': Hickman ibid 308, King ibid 328.
[8] Hickman (n 6) 308.

hand, suggests that the proportionality test should be applied in cases involving fundamental interests (such as those protected in international human rights, refugee, and humanitarian law) or cases which challenge a pattern of administrative action that has been recognised by the courts as creating conspicuous administrative unfairness (as in the case of substantive legitimate expectations)[9].

The approach taken by Hickman and King reinforces the fact that there are other forms of interests that may warrant the adoption of a more claimant-centred analysis. It is for this reason that the first limb of the framework of good administration focuses broadly on the protection of individual interests. This category is open-ended, non-exhaustive and encompasses claimant-centric interests. Statutory rights, common law rights, positive rights and legitimate expectations are all capable of falling within the ambit of 'individual interests'. Notwithstanding the breadth of this particular category, Chapter Three focuses specifically on substantive legitimate expectations and how the protection afforded to these interests may benefit from careful conceptual borrowing.

Having discussed some of the issues surrounding the definition of private rights, it is worth turning our attention to the concept of public wrongs. It has been said that 'public wrongs' constitute a *'violation of the public rights and duties, due to the whole community'*[10]. This broad definition encompasses breaches of public duties by public officials and criminal acts committed by individuals. Indeed, Chapter Two contrasts the way that certain procedural issues are addressed under a system dealing primarily with 'public wrongs' such as criminal law, with the way that they are handled in judicial review.

[9] King (n 6) 328.
[10] William Blackstone and Ruth Paley, *Commentaries on the Laws of England: Book IV* (OUP 2016) 3.

It is argued that judicial review is concerned in part with a particular species of public wrongs, namely the misuse of public power[11]. The conception of 'public wrongs' as the misuse or abuse of public power encompasses a wide range of administrative failure and breaches of public duties by public authorities. Moreover, it has been observed that abuse of power '*has become, or is fast becoming, the root concept which governs and conditions our general principles of public law*'[12]. The second limb of the framework of good administration reflects the need to weed out actual and potential instances of abuse of power and it captures the public's interest in the proper exercise of public power.

It is important to emphasise that this thesis eschews any hard-line distinction between the two limbs of the framework of good administration. It recognises that the protection of individual interests is shaped to some extent by the need to ensure the proper exercise of public power, and that the proper exercise of public power entails that individual interests are adequately safeguarded. The absence of a hard-line distinction between the two limbs of the framework of good administration enables a flexible approach to be taken in relation to the 'individual interests' criterion. It obviates the necessity of providing an exhaustive definition of the interests that fall within this category, given that the second limb enables misuses of public power to be challenged even when no individual interests are affected.

The above discussion has briefly examined certain definitional issues surrounding the concepts of private rights and public wrongs. The absence of a unitary conception of rights and the failure of commentators to clarify how they are using the term 'rights', is particularly problematic under either a private rights or public wrongs model of judicial review, as the categorisation of relevant interests may affect the level of scrutiny afforded

[11] This is the definition of wrongs adopted by Sedley J, cited at the outset of this chapter: *Dixon* [1998] Env LR 111 (QB) 121.
[12] *R v Secretary of State for Education and Employment ex parte Begbie* [2000] 1 WLR 1115 (CA) 1129 (per Laws LJ).

in a particular case, as well as the available remedies and procedures. The following sub-sections uses a number of judicial review cases to further illustrate the problems with rights-based and bifurcation theories of public law. These cases, which are discussed in detail in subsequent chapters of this thesis, are as follows:

(a) *Dixon*, where a concerned citizen sought to challenge the legality of a local council's grant of planning permission that would enable a company to extend its mining operations and would likely impact the natural environment.

(b) *R v North and East Devon HA ex parte Coughlan* [13], where the local health authority decided to close down Mardon House, a care home facility in which the severely disabled applicant resided, due to its changing policies on nursing and the cost of maintaining such a facility. The applicant alleged that the authority had breached her substantive legitimate expectation by resiling from a promise that it had made to her, namely that she would have a 'home for life' if she agreed to move to Mardon House.

(c) *R v Gloucestershire County Council ex parte Barry*[14] where an elderly, infirm applicant brought proceedings against his local council for withdrawing laundry and cleaning services that were previously provided, as the council could no longer afford to pay for such services due to financial cost-cutting measures adopted by the central government.

A. The Private Rights Approach

Poole has usefully set out a number of propositions that capture the paradigm features of classic rights-based theories of public law[15]. According to these propositions, only individuals can be bearers of rights, fundamental rights constitute a species of higher order law, the primary purpose of public law is to protect the rights of citizens, judicial review is

[13] [2001] QB 213 (CA).
[14] [1997] AC 584 (HL).
[15] Thomas Poole, 'Legitimacy, Rights and Judicial Review' [2005] 25 OJLS 697, 699-700.

necessary in order to enforce this higher body of law and rights should serve as the main juridical tools through which to structure the process of argument[16]. As many of these elements are present in Allan's rights-based theory of public law, this sub-section focusses specifically on his theory and its application in three cases, namely *Dixon*, *Coughlan* and *Barry*.

Allan argues that the modern law of judicial review might '*plausibly be interpreted as a scheme for protecting the rights of citizens in public law'*[17] and that '[t]*o some degree, the principles regulating administrative powers may be viewed as principles securing individual rights*'[18]. According to Allan, the scope of judicial enforcement should be limited to cases where individual rights have been infringed, and where there is need for judicial resolution of general questions of constitutional authority[19]. He suggests that the emphasis should be on rights rather than duties, as this '*reflects the true grounds of the legitimacy of judicial review: judicial intervention in the administrative process is chiefly intended to protect the principles of due process and equality at the heart of the rule of law*'[20]. Allan warns that when courts enforce duties whose breach causes no harm to identifiable individuals, their jurisdiction overlaps with existing political mechanisms for holding agencies accountable to the public, and '[*j]udicial review may quickly become a substitute for the ordinary political process*'[21].

It is useful at this juncture to consider how Allan's theory might be applied in the three cases mentioned above, starting with the case of *Dixon*. *Dixon* is discussed in more detail

[16] Ibid.
[17] TRS Allan, 'Dworkin and Dicey: The Rule of Law As Integrity' [1988] 8 OJLS 266, 273.
[18] Ibid.
[19] Allan (n 17) 275; Trevor R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003) 172; Joanna Miles, 'Standing in a Multi-Layered Constitution' in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003) 408.
[20] Allan, *Constitutional Justice* (n 19) 195.
[21] Ibid.

in Chapter Two. For now, it suffices to note that the applicant was no landowner, and had no private right or interest that would have been harmed if planning permission had been granted. It is likely therefore that the applicant in *Dixon* would have been denied standing under Allan's model. This reveals a potential flaw of rights-based conceptions of judicial review; limiting the scope of judicial review to cases where individual rights are infringed may prevent concerned citizens from drawing the court's attention to potential misuses of power, when they are not personally affected by it.

The application of Allan's theory to *Coughlan* is less straightforward as it is not immediately clear if this case involves the kind of interest that would justify judicial intervention under Allan's model. As discussed earlier, there are different conceptions of rights and if interpreted broadly, 'rights' may encompass interests such as substantive legitimate expectations. Allan's theory focuses primarily on procedural rights of due process[22]. He does not provide a detailed list of the rights or interests that should be protected under public law, but he defines public law rights as rights that avail only against public authorities and which require that decisions, affecting a citizen's interests are made within the limits of the relevant power[23]. Allan also notes that the identification of individual rights will frequently be dependent on a close analysis of the relevant statutory scheme[24].

While Allan does not explicitly group legitimate expectations under the label of individual rights, it is likely that he would support judicial intervention in a case like *Coughlan*. According to Allan, the purpose of judicial review is to operate as '*a safeguard*

[22] Poole (n 15) 700.
[23] Allan (n 17) 274.
[24] ibid 273.

for the rights and interests of those most directly affected by government action'[25], and the claimant in *Coughlan,* unlike the applicant in *Dixon*, was personally and directly affected by the health authority's decision to close her home. Furthermore, in later writings, Allan held that it would be unfair to frustrate the expectations of a person who has acted in reliance on the continuation of a public authority's practice or stated intentions[26].

The questions surrounding the applicability of Allan's theory to *Coughlan* do however demonstrate the problem with arguing that judicial review should be restricted to cases where individual rights and interests are affected. Such an argument requires a detailed outline of the types of interests and rights that justifies judicial intervention. This flaw is further highlighted when one attempts to apply Allan's theory to the case of *Barry*. This case, which is explored in more detail in Chapter Four, concerns the proper interpretation of the Chronically Sick and Disabled Persons Act 1970 ('the CSDA'); a statute which '*uniquely purported to provide welfare rights to the disabled*'[27]. It is not entirely clear whether the applicant's interest in *Barry* falls within the ambit of Allan's theory. Allan draws a distinction between negative rights against state interference and positive rights to '*certain standards of educational or health provision, or to a clean or safe environment*'[28], arguing that:

> *Choices about positive rights are necessarily political, suggesting a contrast between the 'morality of duty' enforced by law and the 'morality of aspiration' that informs the democratic process. In the sphere of political choices over resources and facilities designed to enhance opportunities for human flourishing and self-fulfillment, 'Parliament is necessarily and rightly supreme*[29].

[25] Trevor R.S. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 213.
[26] Trevor R.S. Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP 2013) 109.
[27] Elizabeth Palmer, 'Resource Allocation, Welfare Rights – Mapping the Boundaries of Judicial Control in Public Administrative Law' [2000] 20 OJLS 63, 79.
[28] Allan (n 19) 280.
[29] Ibid.

While it seems clear that Allan would categorize the applicant's interest in *Barry* as a positive right, he offers little clarity as to the court's role in protecting such a right. Weinrib suggests that Allan's attribution of positive rights to the morality of aspiration eviscerates their status as rights, insofar as rights impose duties, the violation of which constitutes a wrong[30]. He argues that if positive rights were located within the morality of aspiration, a person who has not been provided with healthcare for instance, would have no basis for making the claim that '*the state had thereby wronged them, whether by failing to enact a legislative scheme that vindicates the relevant positive right or by enacting a scheme that was inadequate to fulfil the right*'[31]. By linking positive rights to the morality of aspiration and emphasizing the political nature of positive rights, Allan seemingly restricts the courts' ability to intervene and protect the interests of individuals seeking for access to resources.

However, in his later work, Allan accords greater importance to positive rights. In developing the notion of 'liberty as independence' that underpins his conception of the rule of law, Allan argues that it may be necessary to recognize positive rights as no one could consent to laws that would '*consign them to a condition of dependence on others'*[32]. Allan has also suggested elsewhere that while judges are unable to enforce positive rights in the absence of a legislative scheme, once such rights are embodied in legislation, '*it is only a small step for courts to require that existing statutory schemes should meet a standard of reasonableness as regards the protection of the common welfare*'[33].

These statements of Allan seem to support judicial intervention in *Barry*. As mentioned above, the case concerns the interpretation of the CSDA and S2(1) of this act is '*framed in*

[30] Jacob Weinrib, 'Maitland's Challenge for Administrative Legal Theory' [2021] 84 MLR 207, 219.
[31] Ibid.
[32] Allan (n 26) 129.
[33] TRS Allan 'In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law' [2009] 22 Canadian Journal of Law and Jurisprudence 187, 201.

terms of a mandatory duty to deliver services to the disabled'[34]. It could be argued that the CSDA is designed to confer welfare rights upon disabled individuals, by providing them with services that will enhance their capacity to live independently. As these so-called positive, welfare rights for the disabled are secured via statute, Allan would likely regard judicial intervention in *Barry* as legitimate.

Unfortunately, Allan's theory fails to offer sufficient guidance on how to navigate the conflict between the local authority's duty to disabled individuals under the CSDA and its duty to local residents, who may be impacted if the authority is forced to reduce other public services to meet its obligations under the CSDA. In placing the emphasis on rights rather than duties, Allan undermines the importance of public authorities using their discretionary power to fulfil objectives that are in the public interest. Indeed, rights-based theories of public law often treat rights as '*metaphorical trump card*[s]'[35] that are capable of preventing the '*government…from doing a certain thing, even if* [it] *would be in society's general interest*'[36]. Moreover, although Allan emphasizes the importance of positive rights when developing his conception of 'liberty as independence', Weinrib rightly observes that Allan '*says nothing about positive rights*'[37] or '*the role that administrative agencies must play in their realisation'*[38] in his discussion of the nature of administrative law, causing his '*political theory* [to stand] *disconnected from his administrative theory*'[39]. Thus, Allan's theory still contains a degree of ambiguity surrounding the proper status of positive rights.

Allan's model highlights the difficulties with adopting a rights-based approach to judicial review. Firstly, there is a danger that rights-based theories of public law entail the

[34] Palmer (n 27) 79.
[35] R.A. Primus, The American Language of Rights (Cambridge University Press 1999) 11-12; Poole (n 15) 699.
[36] Ibid.
[37] Weinrib (n 30) 219.
[38] Ibid.
[39] Ibid.

adoption of a narrow conception of standing that prevents public authorities from being held accountable for misuses of power where no individual interests are affected. As Chapter Two will elaborate, there are serious rule of law implications that follow the adoption of such a restrictive approach to standing. Secondly, as evidenced by Allan's theory, there can be some uncertainty surrounding the type of rights and interests that warrant judicial protection. Finally, an undue emphasis on individual rights and interests may fetter a public authority's ability to exercise its power in the public interest.

B. The Public Wrongs Approach

There is another school of thought which takes the view that judicial review is primarily focused on preventing the misuse of public power, rather than protecting private rights. This is evidenced by Sedley J's judgment in *Dixon* (discussed above) in which he held that at its core, public law was about wrongs rather than rights. Similarly, Lord Woolf has argued extra-judicially that judicial review is primarily concerned with enforcing public duties on behalf of the public, and is only concerned with vindicating individual interests, as part of the process of ensuring that public bodies do not act unlawfully[40].

The notion that judicial review is primarily concerned with public wrongs is central to the bifurcation proposals put forward by Taggart and Varuhas. Initially, Taggart was doubtful of the value of bifurcating public law into human rights law and general administrative law, as he saw '*no advantage in maintaining an administrative law rump, cut off from developments in human rights law*'[41]. However, he changed his mind in his later work, stating that he '*come*[s] *down on the side of bifurcation*'[42]. Taggart suggests

[40] Sir Harry Woolf, *Protection of the Public: A New Challenge (Hamlyn Lecture Series)* (Stevens & Sons 1990) 34.
[41] Michael Taggart, 'Reinventing Administrative Law' in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003) 311, 334 fn 144.
[42] Taggart (n 3) 478.

that '*Wednesbury unreasonableness in its traditional sense of a residual "safety net"*'[43] should be retained for review involving public wrongs, while the proportionality standard of review should be applied in cases involving rights.

As stated earlier, this thesis uses the term 'public wrongs' to refer to the misuse or abuse of public power. Taggart defines public wrongs differently, noting that it encompasses loosely cases '*where fundamental rights are not directly implicated and a court is applying the grounds of administrative law to see if the decision-making has committed material legal error'*[44]. He argues that applying proportionality or variable rationality review in such cases would entail a significant shift in discretionary power away from the delegates of statutory power to judges, for which he believes there is no compelling normative justification[45].

Whilst Taggart's bifurcation thesis is primarily concerned with the proper roles to be accorded to the proportionality and *Wednesbury* grounds of review, Varuhas' proposal highlights the impact of bifurcation beyond substantive review. Varuhas argues that the law under the HRA and judicial review[46] are distinct fields, as the function of human rights law is to '*vindicate fundamental individual, personal interests*'[47], while the function of judicial review is to ensure that public power is exercised properly in the public interest. As such, Varuhas takes the view that the law is already bifurcated and that the normative debate against bifurcation is misconceived.

Varuhas goes on to argue that the function of human rights law is analogous to that of torts actionable per se, which he states have '*long afforded strong protection to similarly*

[43] ibid 425.
[44] ibid 469.
[45] ibid 479.
[46] Varuhas uses the term CLR in his work, which stands for the common law of judicial review.
[47] Jason NE Varuhas, *'*Against Unification*'* in Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review* (Hart Publishing 2015) 95.

basic interests in liberty, physical integrity and property through positive, individual rights'[48]. He points *inter alia,* to the narrow standing rules adopted in both areas of law and the final determinative authority that the judiciary exercises over substantive questions that arise in relation to human rights claims[49]. Varuhas also highlights other aspects of human rights claims that demonstrate the individualistic focus of human rights law and its primary function of protecting fundamental interests. These include the availability of damages under the HRA, the narrow discretion to refuse relief in human rights cases and the fact that defences for human rights claims are usually construed narrowly with the onus of justification placed upon the defendant authority.

According to Varuhas, the above features of human rights claims stand in sharp contrast to key aspects of judicial review, such as the liberal standing rules, the court's wide remedial discretion, the absence of a damages remedy, the various procedural safeguards instituted to protect authorities from unmeritorious claims, and the fact that the burden lies on the applicant to demonstrate unlawfulness[50]. He suggests that these aspects of judicial review underline the public interest focus of the law, and demonstrate that the principal function of common law review is to ensure that public power is exercised properly in the public interest. Varuhas asserts that although individual rights and interests often will be protected by the operation of judicial review, protection of the individual is a subsidiary concern for the primary concern of judicial review is public wrongs, specifically '*breaches of duties owed to the public as a whole or to sections of the public, for the benefit of the public*'[51]. In this sense, Varuhas' definition of public wrongs coheres with the definition

[48] ibid 101
[49] ibid 95-101
[50] ibid 101-108
[51] ibid 108

adopted in this thesis, as breaches of duties owed to the public might be regarded as the misuse of public power.

In order to determine whether these theories offer a realistic understanding of the interests and objectives at stake in judicial review, this sub-section considers how they may be applied to the cases of *Dixon*, *Coughlan* and *Barry*. Turning first to *Dixon*, it is evident that Sedley J's views on the objectives of public law enabled him to adopt a more liberal approach to standing. Sedley J stated that the applicant was neither a busybody nor a troublemaker and noted that as a citizen, the applicant was entitled to draw the court's attention to a potential illegality in the grant of planning permission that was bound to have an impact on the natural environment[52]. This suggestion that citizens as a whole have an interest in addressing unlawful administrative action is echoed by Varuhas, who argues that the liberal standing rules in judicial review are justified as they reflect the fact that judicial review '*protects something we all have a legitimate interest in: the proper exercise of public power in the public interest*'[53].

Varuhas highlights a key strength of the public wrongs model: it encapsulates the public's interest in holding public authorities accountable for misuses of power. This concern with addressing abuses of public power also explains why judicial review developed so rapidly in the post-war period. Lord Mustill attributes this expansion of judicial review to the fact that Parliamentary remedies sometimes fell short of '*what was needed to bring the performance of the executive into line with the law*'[54]. He stated:

> *To avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead*

[52] *Dixon* [1998] Env LR 111, 121
[53] Varuhas (n 47) 102
[54] *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 AC 513 (HL) 567

ground in a manner, and in areas of public life, which could not have been foreseen 30 years ago.[55]

However, a problem with Taggart and Varuhas' models of judicial review is that it relies on a strict dichotomy between 'rights' and 'public wrongs'. As discussed above, this can cause uncertainty as there is no unitary conception of rights. Moreover, an excessively narrow construction of rights may exclude important individual interests. Take for instance the applicant's substantive legitimate expectation in *Coughlan*. While commentators such as Hickman and King recognize that substantive legitimate expectations merit greater judicial scrutiny[56], Taggart's bifurcation model suggests that the applicant's substantive legitimate expectation falls under the category of public wrongs as it is not a fundamental right[57]. Substantive legitimate expectations appear to fall under the 'public wrongs' category of Varuhas' model as well. When clarifying the terms of the bifurcation debate, Varuhas stated that the debate concerns two sub-fields of public law, namely the law under the HRA and the common law of judicial review[58]. As the doctrine of substantive legitimate expectations does not fall under the HRA, it presumably falls under the common law of judicial review, which Varuhas argues is primarily concerned with public wrongs.

It is also unlikely that substantive legitimate expectations fit within the '*orthodox Hohfeldian conception of rights as claim-rights*'[59] that Varuhas utilizes. Varuhas expounds upon Hohfeld's framework of rights, stating that '*being endowed with a legal right consists of being legally protected against another's interference or against another's withholding of assistance or remuneration, in regard to some action or state of affair*s'[60]. He believes that a legal right is specific to one person, and is held against another specific person, that

[55] ibid
[56] Above pages 3-4
[57] For Taggart's definition of fundamental rights, see (n 3)
[58] Varuhas (n 47) 92
[59] Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 15
[60] ibid 16

individual being subject to the correlative duty. Varuhas makes no reference to substantive legitimate expectations in his discussion of rights, and provides little indication that they are capable of being classified as rights in the *Hohfeldian* sense. Indeed, given the uncertainty surrounding substantive legitimate expectations and the different contexts in which they arise, it is difficult to make a blanket statement that an individual has a legal right to be protected against a public authority withholding a substantive benefit and that the authority is under a correlative duty not to withhold this benefit.

The above discussion indicates that the applicant's interest in *Coughlan* falls outside the 'rights' category of both Taggart and Varuhas' models of public law and is seemingly subject to less stringent scrutiny. This is problematic as there are important normative reasons grounded in trust for adopting a more claimant-centred approach in *Coughlan*[61]. As argued in Chapter Three, the local authority's promise of a 'home for life' to Ms. Coughlan, not only invited her to repose trust in its assurances, but also secured her cooperation in moving to Mardon House.

Unfortunately, Taggart's bifurcation theory fails to recognize the importance of the applicant's interest. As Taggart argues that *Wednesbury* unreasonableness in its traditional sense should be retained for cases that do not involve fundamental rights, it is likely that the applicant would be denied substantive relief. It is difficult to assert that the local authority's decision to depart from the applicant's promise was *Wednesbury* unreasonable as the local authority had argued that maintaining Mardon House had become '*prohibitively expensive and* [would lead] *to the diversion of excessive resources from other services*'[62]. It is also worth highlighting that the focus of review under a 'public wrongs' model is on

[61] Discussed in detail in Chapter Three.
[62] Philip Sales and Karen Steyn, 'Legitimate Expectations in English Public Law: An Analysis' [2004] PL 564,591; Mark Elliott and Robert Thomas, *Public Law* (4th edn OUP 2020) 548.

public officials and ensuring that public power is exercised in the public interest[63]. This defendant-centred analysis means that the applicant's interest is a subsidiary concern that is relatively easily outweighed by public interest considerations.

It would be reasonable to assume that the applicant's interest in *Coughlan* would be subject to less stringent scrutiny under Varuhas' theory given that substantive legitimate expectations do not fit within the *Hohfeldian* conception of rights that he has adopted. However, Varuhas' work on substantive legitimate expectations appears to support stronger protection for promise-based legitimate expectations than would be available under his bifurcation model of public law[64]. Varuhas argues that the normative imperative for full enforcement of legitimate expectations is far stronger in a case where an authority has made an express promise to an individual, because the authority has '*positively and personally assured the claimant that it will act in a particular way into the future*'[65].

Varuhas casts doubt on the suitability of the *Wednesbury* test in cases like *Coughlan*, noting that the concern in promise cases is not that the authority acts rationally in pursuing public goals[66]. He also observes that the inquiry into whether the authority was justified in frustrating a promise-based legitimate expectation is an objective question for the judiciary rather than one filtered through a *Wednesbury* lens. This element of the legitimate expectations inquiry mirrors a feature of human rights claims discussed in Varuhas' bifurcation theory, namely that the judiciary exercises final determinative authority over substantive questions. However, Varuhas refrains from explicitly stating that

[63] Varuhas (n 47) 108.
[64] Jason NE Varuhas, 'In Search of a Doctrine: Mapping the Law of Legitimate Expectations' in Matthew Groves and Greg Weeks (eds) *Legitimate Expectations in the Common Law World* (Hart Publishing 2017) 17-52. See also Chapter Three.
[65] ibid 51.
[66] ibid 41.

promise-based legitimate expectations should be regarded as rights or that they should be excluded from the ambit of common law review.

The applicant's claim in *Coughlan* reveals the flaws with Varuhas' overly restrictive interpretation of judicial review's objectives. The 'public wrongs' conception of judicial review automatically relegates individual interests to subsidiary concerns if they fall outside a particular construction of 'rights'. Maintaining a strict dichotomy between 'private rights' and 'public wrongs' may stultify the development of judicial review techniques and principles that are geared towards protecting individual interests.

Another problem with adopting a hard-line bifurcation of public law is that it rests on the presumption that the interests of individuals can be easily separated from the public interest aims of legislation. This is an objection levelled by Craig, who argues that while all statutes that accord power to public bodies are designed to serve the public interest, the limits placed upon such power have always been designed to protect the interests of individuals as well as to foster the public interest. According to Craig, the protection of the individual's interests has always been central to judicial review, and '*the principal public interest underlying the legislation is not severable from the interests of the individuals, whether welfare claimants, asylum seekers or license applicants, that the legislation is intended to serve*'[67]. The veracity of Craig's objection is evidenced by the case of *Barry*, which as mentioned above, concerns the proper interpretation of the CSDA. The CSDA is designed to serve a particular segment of the public, specifically disabled individuals. As such, the proper exercise of the power conferred by the CSDA involves ensuring that disabled individuals, like the applicant in *Barry,* are provided with the necessary services to enable them to live independently. It is therefore difficult to see how the public interest

[67] Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press 2015) 264

aims of the CSDA can be viewed in isolation from the interests of the individual applicant in *Barry*.

This sub-section has discussed various theories concerning the bifurcation of public law and has shown that there are certain difficulties with holding that judicial review is primarily concerned with preventing the misuse of power. This conception of judicial review is premised upon an unsatisfactory distinction between individual rights and public wrongs. An overly narrow construction of rights may leave important individual interests without sufficient protection. Moreover, individual interests are not always easily severable from the public interest aims of legislation. The proper exercise of public power may require the protection of individual interests, and such interests should not be dismissed as mere subsidiary concerns.

2. A Framework of Good Administration

Part One outlined several difficulties with adopting either a rights-based interpretation or a 'public wrongs' conception of judicial review. Rights-based theories prevent the courts from holding public bodies accountable for misuses of power where no individual has been adversely affected. The 'public wrongs' approach fails to provide sufficient protection to interests that fall outside a particular construction of 'rights' and does not recognize that individual interests cannot always be separated from the public interest goals of legislation. Both approaches ultimately evince an unduly narrow view of the objectives of judicial review, in so far as they suggest that judicial review is primarily concerned with either protecting private rights or correcting public wrongs. In reality, judicial review is concerned with *both* protecting individual interests and correcting public wrongs. Thus, this thesis proposes adopting a double-pronged framework of good administration, in which the first limb is designed to protect a claimant's individual interests, while the second

is concerned with enabling a claimant to vindicate the collective interests of the public in the control of public power.

A. Good Administration in the Wide Sense vs Good Administration in the Juridical Sense

The concept of good administration has been used in a number of different ways in public law literature. Broadly, good administration is concerned with what the executive ought to do ('good administration in the wide sense') and as such, it extends beyond the sphere of judicial review. For instance, the Parliamentary and Health Service Ombudsman ('PHSO') published a document entitled 'Principles of Good Administration', in an effort to '*help public bodies in the Ombudsman's jurisdiction provide a first-class public service to their customers*'[68]. These principles emphasize the need for public bodies to be open and accountable, customer-focused and to seek continuous improvement[69]. In developing these principles, the PHSO document covers issues such as treating people with respect, apologizing when appropriate, and obtaining feedback to improve services. As Nason points out, the PHSO principles of good administration encompass matters that would be difficult to '*enshrine in judicially enforceable administrative law'*[70] as they are more concerned with the overall organization of administration, rather than the rights and entitlements of individual citizens.

However, good administration can also be understood as a juridical concept ('good administration in the juridical sense'). Galligan appears to have been one of the earliest commentators to discuss principles of good administration in the context of judicial

[68] Parliamentary and Health Service Ombudsman, *Principles of Good Administration* (2009) 3
[69] ibid 4-11
[70] Sarah Nason, 'European Principles of Good Administration and UK Administrative Justice' [2020] 26 EPL 391, 402.

review[71]. According to Galligan, a key task for judicial review '*is to maintain principles of good administration to be followed by public authorities in making decisions'*[72]. Galligan stated that these principles could be divided broadly into principles requiring certain procedures to be adopted (such as natural justice) and principles which placed constraints on the reasoning process (for example, the no-fettering rules, irrelevant considerations and reasonableness).

One could interpret Galligan's argument as meaning that principles of good administration are interchangeable with grounds of judicial review. Indeed, Daly notes that most writers have treated principles of good administration as co-extensive with the existing grounds of judicial review[73]. However, good administration has also been treated as an abstract concept capable of shaping certain aspects of the review process. For instance, when discussing the issue of remedial discretion, Sir John Donaldson MR held that judges should approach their *'duties with a proper awareness of the needs of public administration*'[74]. He goes on to state that good public administration is concerned with substance over form, the speed of the decision, proper consideration of the public interest and the legitimate interests of individual citizens, decisiveness and finality[75]. Similarly, in *Credit Suisse v Allerdale Borough Council*[76], Hobhouse LJ highlighted the court's wide discretion in granting remedies, stating that the court could take into account many considerations, including the needs of good administration[77].

[71] Paul Daly, 'Administrative Law: A Values-based Approach' in John Bell, Mark Elliott, Jason Varuhas, Phillip Murray (eds) *Public Law Adjudication in Common Law Systems* (Hart Publishing 2016) 27 (fn 29); D.J. Galligan, 'Judicial Review and the Textbook Writers' [1982] 2 OJLS 257
[72] Galligan ibid 261
[73] Daly (n 71) 27 (fn 29). He cites as example: Dawn Oliver, 'Is the Ultra Vires Principle the Basis of Judicial Review?' (1987) PL 543, 543.
[74] *R v Monopolies and Mergers Commission ex parte Argyll Group* [1986] 1 WLR 763 (CA) 774
[75] ibid 774-775.
[76] [1997] QB 306 (CA)
[77] ibid 355

The concept of good administration has also been used to explain or justify other grounds of review. For instance, Laws LJ has suggested that the doctrine of legitimate expectations is founded on the principle of good administration, namely that public bodies ought to deal straightforwardly and consistently with the public[78]. It is doubtful whether this particular conceptualization of good administration is helpful, given that Laws LJ neither elaborates on the content of this principle nor considers how it may affect the relevant test for the doctrine of legitimate expectations.

EU law offers further illustration as to how good administration might be used as a juridical concept. Good administration in the EU law context has been described in rather generic terms, as an ''*umbrella' concept containing rights, rules, and principles guiding administrative procedures'*[79]. Principles of good administration are protected as general principles of the EU, while Article 41 of the Charter of Fundamental Rights ('CFR') safeguards the right to good administration. There are however differences between good administration as a general principle of law recognized by the European Court of Justice and as a fundamental right defined in Article 41 CFR[80]. Hofmann and Mihaescu argue that the material scope of Article 41 is narrower as it appears to cover single case decision-making[81], while the principles of good administration seem to apply more broadly to '*executive 'rule making' in the form of the creation of non-legislative acts*'[82]. They also

[78] *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 [68]; *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 [30] [51]
[79] Herwig C.H. Hofmann, 'General Principles of EU Law and EU Administrative Law' in Catharine Barnard and Steve Peers (eds) *European Union Law* (3rd edn OUP 2020) 228
[80] Herwig C.H. Hofmann and Bucura C. Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case' [2013] 9 European Constitutional Law Review 73, 83
[81] Hofmann and Mihaescu reach this conclusion based on the specific rights enumerated by Article 41(2), which are presumably meant to illustrate good administration, such as an individual's right to be heard before an administration takes a measure that would adversely affect her, an individual's right to access her file and the obligation to give reasons for administrative decisions: Hofmann and Mihaescu ibid 86-87.
[82] Hofmann and Mihaescu (n 80) 87. However, while 'executive' rule-making may be considered part of administrative law from the perspective of EU law or US law, UK common law does not concern itself with rule-making as such.

observe that while good administration as a general principle of law is applicable to all member states' action that fall within the scope of EU law, the institutional scope of Article 41 is limited to institutions, bodies and agencies of the Union.

Ultimately, the above discussion shows that there are a number of ways in which good administration may be conceptualized as a juridical principle(s). It is worth noting however that good administration in the juridical sense is intrinsically connected with good administration in the wider sense discussed above. Judicial determinations on what constitutes good administration will likely influence the executive's future conduct, even if it is simply in order to avoid legal liability. This point is illustrated by the Judge Over Your Shoulder pamphlet (discussed in more detail in Chapter Four) published by the government for the use of administrators in the civil service to '*inform and improve the quality of administrative decision-making*'[83] and to help administrators understand '*the potential legal risks of* [their] *actions*'[84].

The pamphlet acknowledges that '[t]*he need to reduce law to a set of standard rules means that administrative law is not identical with the principles of good administration*'[85], but it observes that '*understanding the requirements of good administration often gives a good idea of what administrative law will say on the same point*'[86]. This further highlights the connection between good administration in the juridical sense and good administration in the wider sense, as it suggests that the precepts of good administration formulated by the

[83] Government Legal Department, *The Judge Over Your Shoulder – A Guide to Good Decision Making* (2018) 5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/JOYS-OCT-2018.pdf > Accessed 13 January 2021
[84] ibid 4
[85] ibid 31
[86] ibid

executive may frequently (though not always) cover the same ground as juridical principles of good administration.

Having briefly explored these two ways of understanding good administration, it is important to highlight that the proposed framework of good administration is designed to operate as a juridical tool that is capable of guiding the approach to be taken towards procedural issues of standing and waiver, administrative discretion and remedies in judicial review. As such, the notion of good administration in this thesis is primarily used in the juridical sense. However, given the connection between good administration in its wider sense and juridical sense, Chapter Four of this thesis also considers how the second limb of the framework of good administration may affect the way that public bodies carry out their public duties.

B. The Protection of Private Interests and The Control of Public Power

The above discussion shows that there are a number of different ways in which the notion of good administration may be utilized as a juridical principle(s). This thesis uses the phrase 'good administration' as a framework concept that encapsulates the twin goals of judicial review: the protection of individual interests and the proper exercise of public power in the public interest.

There are two reasons why the first limb of the framework of good administration is concerned with protecting individual interests rather than individual rights. Firstly, as discussed above, the 'rights' classification can be construed narrowly and may exclude important individual interests like legitimate expectations. Secondly, much academic ink has already been spilt examining why human rights cases warrant more intensive scrutiny. It is hoped that the first limb of the framework of good administration will facilitate further

examination of the type of interests in judicial review that might merit the adoption of a more claimant-centred approach.

Some might question this thesis' conception of good administration due to the primacy accorded to the protection of individual interests. Indeed, there are various constructions of good administration that emphasize the importance of effectiveness, speed and good public policy[87] and which suggest that the protection of individual interests is not a primary concern. Daly for instance, argues that the '*value of the principles of good administration…is that of effective policy-making and implementation'*[88]. He appears to view the protection of individual interests and the promotion of individual dignity as the primary concerns of the rule of law rather than good administration:

> *Protection of individual interests can sometimes be good policy, but this will not inevitably be so, and the increasing importance accorded to individual dignity and autonomy by administrative law suggests a need to distinguish between the rule of law and the principles of good administration*[89].

While Varuhas does not provide a detailed definition of good administration, he clearly views principles of good administration as an essential facet of the proper exercise of public power. Thus, he argues that the '*primary function of* [judicial review] *is to ensure public powers are exercised properly – that is, in accordance with axiomatic ideas of good administration – and in the public interest*'[90]. In this sense, Varuhas' understanding of good administration coheres with the second prong of the proposed framework of good administration, which is similarly concerned with the proper exercise of power.

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[87] *R v Monopolies and Mergers Commission ex parte Argyll Group* [1986] 1 WLR 763 (CA) 774 (per Sir John Donaldson MR)
[88] Daly (n 71) 28
[89] ibid 29
[90] Varuhas (n 47) 101

However, Varuhas' conception of good administration seems to treat the protection of individual interests as a subsidiary concern. For instance, he observes that good administrative practice is concerned with ensuring that the decision-maker turns her mind to and considers all relevant considerations, *one* of which is prejudice to basic interests[91]. In his discussion of the anxious scrutiny cases, Varuhas suggests that good administration is primarily concerned with the manner of the exercise of power, rather than securing actual protection of an individual's interest[92]. He cites the following passage from Sir John Donaldson MR's judgment in *R v Monopolies and Mergers Commission ex parte Argyll Group*:

> *Good public administration requires a proper consideration of the legitimate interests of individual citizens…But in judging the relevance of an interest, however legitimate, regard has to be had to the purpose of the administrative process concerned*[93].

However, a juridical concept of good administration that fails to reflect the importance of individual interests is incapable of facilitating the twin objectives of judicial review discussed above. Galligan, who as mentioned above, equates principles of good administration with the grounds of judicial review, emphasizes that these principles are concerned both with protecting individuals and with upholding notions of public interest[94]. He argues that '[t]*he conflict between individual interests and the public interest should be a central area of analysis* '[95]. It is argued that the adoption of a two-pronged framework of good administration along the lines proposed in this thesis will facilitate a more nuanced analysis of this conflict. In addition, it will help us understand how the two components of

[91] ibid 110.
[92] ibid 110-111.
[93] [1986] 1 WLR 763 (CA) 774; Varuhas (n 47) 111.
[94] Galligan (n 71) 266-267.
[95] ibid 267.

good administration, namely the protection of individual interests and the proper exercise of public power, may influence and shape each other.

3. The Public/Private Divide: Using Private Law Principles to Enhance the Protection Provided by the Framework of Good Administration

As mentioned at the outset of this chapter, in formulating this framework of good administration, this thesis explores the possibility of adopting a more nuanced outlook towards the public/private divide which facilitates valuable and judicious conceptual borrowing. By freeing itself from the conceptual shackles of bifurcation, this thesis has effectively enabled access to both public and private spheres to better inform the law. This thesis aims to show that a balanced framework of good administration may be produced by maintaining a less stringent dichotomy between public and private law, and by analyzing the interrelation of individual interests and the collective interest of the public in the exercise of power in judicial review. Thus, subsequent chapters of this thesis explore how private law principles may be usefully modified and adapted to the public law context so as to offer greater protection to the interests protected under the framework of good administration.

Some might balk at this thesis' proposal of applying and modifying private law principles in the context of judicial review. It might be argued that there are distinct normative differences between public and private law that warrant the adoption of different procedures and principles. In order to address this objection, this sub-section considers briefly the existence and merits of maintaining a distinction between public and private law. While the existence of a distinction of some form between public and private law is not disputed, it is argued that maintaining a rigid dichotomy between the two areas of law is neither desirable nor reflective of the close ways in which public and private law intersects.

The merits of maintaining a divide between public and private law has been the subject of much academic debate[96]. The perception that there is no distinct field of law known as 'public law' in England can be traced back to Dicey, who maintained that strict equality before the law entailed that everyone, including public officials are '*…subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'*[97]. Dicey was especially critical of the French *droit administratif*, which he believed provided '*special protection or privileges to the servants of the stat*e'[98], and rested on ideas that were completely foreign to English law, namely that the relation of individuals to the state is governed by different principles from those rules of private law governing the rights of private individuals[99].

However, judicial developments following key procedural reforms introduced in the late 1970s and early 1980s, cast doubt on the validity on Dicey's view that '[t]*he words "administrative law"...are unknown to English judges and counsel*'[100]. These reforms provided for a consolidated judicial review procedure through which applications for prerogative orders had to be made, and enabled declarations and injunctions to be claimed alongside these prerogative orders[101]. The House of Lords in *O'Reilly v Mackman*[102] considered that this reformed judicial review procedure necessitated the adoption of a

[96] Dicey (n 4); Nicholas Bamforth, 'The Public Law-Private Law Distinction: A Comparative and Philosophical Approach in Peter Leyland and Terry Woods (eds) *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone 1997); Dawn Oliver, *Common Values and the Public-Private Divide* (Butterworths 1999); Mark Freedland, 'The Evolving Approach To The Public/Private Distinction in English Law' in Mark Freedland and Jean-Bernard Auby (eds) *The Public Law/Private Law Divide: Une entente assez cordiale?* (Hart Publishing 2006); Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edition Cambridge University Press 2009); Varuhas (n 59) Chapter 4.
[97] Dicey ibid 189.
[98] Dicey (n 496) 324 (fn 1). It should be noted that Dicey's negative construction of the *droit administratif* has been subject to criticism: See Freedland (n 96) 96.
[99] Dicey (n 496) 383.
[100] ibid 326. That is not to say that prior to the 1970s, there was complete acceptance of the notion that English law had no distinct body of law known as administrative law. See for instance: William A. Robson*, Justice and Administrative Law: A Study of the British Constitution* (Macmillan 1928).
[101] Rules of the Supreme Court (Amendment No 3) (SI 1977/1955) rule 5; Rules of the Supreme Court (Amendment No 4) (SI 1980/2000) rules 2-7; Supreme Court Act 1981, sections 29-31.
[102] [1983] 2 AC 237 (HL).

principle of strict procedural exclusivity, meaning that it would generally be considered an abuse of the court's process for a litigant '*seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action*'[103]. This decision has been heavily criticized and subsequent cases have adopted a more generous interpretation of the exclusivity principle[104], effectively enabling litigants to opt out of the judicial review procedure unless it constitutes an abuse of process[105]. However, *O'Reilly v Mackman* effectively cemented the existence of a procedural divide between public and private law and could be said to have spurred the development of a more '*systematic articulation of the substantive principles of public law*'[106].

These developments make it difficult to embrace the Diceyan view that there is no distinct field of law known as public law in England. Indeed, even those who question the merits of the public/private divide, concede that '*used descriptively, the public-private divide has to be accepted*'[107]. As Bamforth points out, there are certain functions that are generally entrusted to the state rather than to private citizens, such as '*devising frameworks for education, social security and policing*'[108]. The UK central government also possesses prerogative powers that cannot be exercised by private citizens, including the power to declare war and issue passports[109]. Furthermore, different rules are applicable when the defendant is a public authority rather than a private individual. This is evidenced, for instance, by the adoption of broad standing rules in judicial review, the development of

[103] ibid 285 (per Lord Diplock).
[104] *Roy v Kensington and Chelsea and Westminster FPC* [1992]1 AC 624 (HL); *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 (CA).
[105] *Mercury Communications Ltd v Director General Telecommunications* [1996] 1 WLR 48 (HL); *R (Valentines Homes & Construction Ltd) v Revenue and Customs* Commissioners [2010] EWCA Civ 345.
[106] Freedland (n 96) 97, citing as evidence for this proposition, Lord Diplock's trilogy of illegality, irrationality and procedural impropriety in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) 410-411.
[107] Harlow and Rawlings (n 96) 22.
[108] Bamforth (n 96) 140-141.
[109] Mark Elliott and Robert Thomas, *Public Law* (4th Edition OUP 2020)170.

various grounds of review, and the courts' wide remedial discretion. Thus, this thesis acknowledges that there are some pertinent differences between public and private law, and as such, it does not dispute the existence of a public/private divide of some form.

There is, however, no good reason to maintain a rigid distinction between these two areas of law, or to use the public/private distinction to inhibit valuable conceptual borrowing. Maintaining a hardline distinction between public and private law ignores the fact that the relationship between the public and private spheres has become increasingly multi-faceted over the years. Numerous commentators have discussed how government policies instituted around the 1980s and 1990s, placed the public-private distinction under significant strain[110]. Palmer for instance, states that the 'hiving off' of traditional governmental functions through policies such as privatization and outsourcing under the Private Finance Initiative (PFI) led to a blurring of the public-private distinction[111].

Similarly, Freedland states that '*the perception of a straightforwardly public sphere properly governed by public law…*[became] *a more contested and diminished one*'[112] towards the end of the 20th century. He notes that this is unsurprising given that there was during the 1990s, a '*fundamental disposition…to think of private contracting as a central mechanism, indeed a central conceptual framework, for an increasing proportion of governmental activity*'[113]. He suggests that this is exemplified by Part II of the Deregulation and Contracting Out Act 1994, which facilitated the delegation of governmental functions to private contractors with minimal regulation.

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[110] See for instance: Gillian S. Morris and Sandra Fredman, 'The Costs of Exclusivity: Public and Private Re-examined' [1994] PL 69; M. Freedland, 'Public Law and Private Finance: Placing the Private Finance Initiative in a Public Law Frame' [1998] PL 288; Freedland (n 96); Harlow and Rawlings (n 96) Chapter Two; Varuhas (n 59) Chapter Four.
[111] Stephanie Palmer, 'Public, Private and the Human Rights Act 1998: An Ideological Divide' [2007] CLJ 559.
[112] Freedland (n 96) 99.
[113] Freedland ibid 98.

The undesirability of maintaining a rigid dichotomy between public and private law is further evidenced by the problems caused by the *O'Reilly* procedural exclusivity principle. In particular, the courts have struggled to formulate a test that adequately addresses whether a case raises issues that are solely public or private[114]. The courts have adopted numerous approaches, such as focusing on the source of the body's power[115], considering the nature and functions of the body[116], and examining whether the power is '*governmental in nature*'[117]. None of these tests or requirements proved satisfactory[118], for as Morris and Fredman rightly point out, the main problem with the '*rigid public-private law divide established by O'Reilly'*[119] is that '*the conceptual apparatus of "public" and "private" is not sufficiently developed to sustain a rigid distinction'*[120].

The ambiguity surrounding the conceptual term 'public' is also reflected in the jurisprudence on Section 6 of the HRA. Section 6(1) makes it unlawful for a public authority to act incompatibly with a Convention right. While the HRA does not provide an explicit definition of 'public authority', Section 6(3)(b) stipulates that this term includes '*any person certain of whose functions are functions of a public nature*'. The courts have struggled to formulate a principled, coherent approach when interpreting this provision[121], further highlighting that 'public' is a contested concept[122]. Palmer argues that the increasing contractualisation of government and consequent change in the way that public

[114] For a discussion of these problems, see John Alder, 'Hunting the Chimera – the end of *O'Reilly v Mackman*?' (1993) 13 Legal Studies 183; Morris and Fredman (n 110).
[115] *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152 (CA).
[116] *R v Panel on Take-Overs and Mergers, ex p Datafin* [1987] 2 WLR 699 (CA).
[117] *R. v. Disciplinary Committee of the Jockey Club, ex p. Aga Khan* [1993] 1 WLR 909 (CA) 931 (per Hoffman LJ); *R. v. Chief Rabbi of the United Hebrew Congregations and the Commonwealth, ex p. Wachmann* [1992] 1 WLR 1036 (QB).
[118] For a discussion of why these tests proved unworkable, see Alder (n 114); Morris and Fredman (n 110)
[119] Morris and Fredman (n 110) 70.
[120] ibid 81.
[121] Paul Craig 'Contracting Out, the Human Rights Act and the Scope of Judicial Review' [2002] LQR 551; Palmer (n 111).
[122] Palmer (n 111); Varuhas (n 59) 179.

services are delivered, has led to '*sharply divergent views among the judiciary about which functions are those of a public nature for the purposes of the Human Rights Act*'[123], as exemplified by the House of Lords' decision in *YL v Birmingham City Council*[124].

In *YL*, the appellant was a resident of a private care home, her placement in the home having been arranged and substantially paid for by the local council pursuant to its duties under the National Assistance Act 1948. When the care home gave notice to terminate the appellant's right to reside in the home, the appellant argued that the care home fell within the ambit of Section 6(3)(b) of the HRA, and that it had breached her rights under Article 8 of the ECHR. The House of Lords was sharply split (3 to 2) on the question of whether the care home was a public authority. The majority drew a dubious distinction between the local council's statutory duty to arrange for care and accommodation and the actual provision of care by a private company with which the local council contracted on a commercial basis. It was held that the latter was not an inherently public function.

Lord Bingham and Baroness Hale delivered powerful dissenting judgments that rejected the distinction drawn by the majority as '*artificial and legalistic*'[125] and which emphasized the responsibility undertaken by the state of ensuring that the assessed community care needs of those encompassed within the legislation are met. Lord Bingham argued that '[t]*he intention of Parliament is that residential care should be provided, but the means of doing so is treated as, in itself, unimportant. By one means or another the function of providing residential care is one which must be performed'*[126]. As Palmer astutely points out, the division between the judges reflects '*different understandings of the*

[123] Palmer ibid 559.
[124] [2008] 1 AC 95.
[125] ibid [66] (per Baroness Hale).
[126] ibid [16].

operation of the Human Rights Act, the public-private distinction, and…competing ideological stances'[127].

The changing nature of government as well as the difficulties surrounding the application of the procedural exclusivity rule and the public functions test under the HRA suggest that we should be wary of placing undue reliance upon a rigid dichotomy between public and private law. Indeed, Freedland notes that the public/private divide '*should be maintained with varying degrees of flexibility and porousness'*[128]. By acknowledging that a more nuanced and flexible approach should be taken towards the public/private divide, this thesis does not discount the fact that there are (as discussed above) clear-cut instances of public bodies exercising uniquely public powers, that are adequately regulated by existing grounds of judicial review. Rather, it recognizes that there may also be '*situations* [which] *call for thoughtful specific answers and not the mechanical application of the totemic word public*'[129].

There is a danger that adhering too strictly to the divide may hinder legal development, '*hid*[ing] *clear connections between fields of public and private law*'[130] and '*encourag*[ing] *reductionist accounts'*[131] of these two areas of law. Thus, Varuhas argues that '*no one concept or dichotomy can be dispositive of specific questions arising across the vast, varied terrain of public law and private law'*[132]. He suggests that a better approach is to consider all aspects of a legal issue, taking account of all relevant factors including the nature of the field of doctrine within which it arises. Indeed, although eschewing Varuhas' specific approach of bifurcation, this more general approach is one that this thesis has endeavored

[127] Palmer (n 111) 559.
[128] Freedland (n 96) 107.
[129] Harlow and Rawlings (n 96) 21. This quote is also cited by Varuhas: Varuhas (n 59) 187.
[130] Varuhas (n 59) 187-188.
[131] ibid 188.
[132] Ibid.

to adopt. Thus, when examining whether or not principles from a different area of law may offer guidance to a legal problem, this thesis considers whether there are good reasons for importing these principles and also whether they need to be modified to address the concerns of the specific area of law in which they are being applied.

4. Structure of the Remainder of this Thesis

As explained at the outset of this chapter, this thesis investigates whether it is possible to formulate a framework of good administration in judicial review that encompasses two limbs; one which safeguards a claimant's individual interests and another which allows the claimant to assert the collective interest of the public in the control of public power. In formulating this framework, this thesis adopts a more nuanced approach to the public-private divide to facilitate judicious conceptual borrowing.

Chapter Two of this thesis picks up on some of the claims discussed in this introduction, and shows through an examination of the law on standing and waiver, why it is a mistake to conceptualize judicial review as a system that is predominantly concerned with either private rights or public wrongs. To that end, this chapter examines how issues of standing and waiver are approached in a purely 'public wrongs' system like criminal law, and how such issues are addressed in private law. This comparison shows that judicial review fits neither the 'public wrongs' nor the 'private rights' model completely, but contains elements of both models. This chapter puts forward several reform proposals on the law on standing and waiver, that is premised on the understanding that judicial review is concerned with protecting both individual interests and the public interest in the control of public power.

Chapter Three turns its attention to the first prong of the framework of good administration, and examines how important individual interests such as legitimate expectations may benefit from conceptual borrowing. The chapter explores the natural

justice and estoppel roots of the doctrine of legitimate expectations, and argues that the doctrine of legitimate expectations is concerned with protecting the trust reposed in the representations of public authorities. It also examines how principles of contract and estoppel may be modified to restructure the doctrine.

Chapter Four turns its attention to the collective interest of the public in controlling public power under the second limb of the framework of good administration. It explores the possibility of using fiduciary principles to enhance the protection afforded to this important interest. In particular, it considers how a modified fiduciary approach is capable of ensuring that those tasked with discretionary power are held to high standards of conduct, and how such an approach will not only help enhance the culture of justification in judicial review, but will improve the decision-making processes of public bodies.

Having explored how appropriate conceptual borrowing from private law may enhance the protection afforded to the interests under both limbs of the framework of good administration, Chapter Five seeks to show through an examination of the contractual discretion case law that conceptual borrowing is also capable of functioning as a two-way street. It considers the normative justifications for controlling contractual discretionary power, and it examines how public law concepts may be useful in tackling potential abuses of power in this context. To that end, this chapter puts forward a framework for the adoption of variable standards of review and relevancy review in the contractual discretion cases.

Chapter Six, which is the final substantive chapter of this thesis, considers how the private law notion of damages may elevate the protection of interests under the framework of good administration. This chapter argues that a fault-based model of liability will help safeguard the interests under the second limb of the framework of good administration. However, it also recognizes that a fault-based model of liability may not sufficiently protect

interests falling under the first limb of the framework. Thus, this chapter explores how different models of damages should be utilized in cases involving human rights and legitimate expectations.

The concluding chapter draws together and summarizes the arguments from the preceding chapters.

CHAPTER TWO

STANDING AND WAIVER: INSIGHTS GLEANED FROM CRIMINAL LAW AND PRIVATE LAW

The previous chapter outlined some of the problems with adopting either a 'private rights' or 'public wrongs' model of judicial review. This chapter builds on those arguments, by showing through an examination of the law on standing and waiver, why it is a mistake to conceptualize judicial review as a system that is predominantly concerned with either private rights or public wrongs. To that end, this chapter examines how issues of standing and waiver are approached in a purely 'public wrongs' system like criminal law, and how such issues are addressed in private law. This comparison shows that judicial review fits neither the 'public wrongs' nor the 'private rights' model completely, but contains elements of both models. Any reform of the law on standing and waiver must be premised on the understanding that judicial review is concerned with protecting both individual interests and the public interest in the control of public power, as encapsulated by the framework of good administration.

1. Standing: Whose Claim is It Anyway?

The doctrine of standing is concerned with the question of who can invoke the judicial process[1]. As the following sub-sections will demonstrate, the approach taken towards standing is largely dictated by whether the relevant area of law is concerned with public wrongs or private rights. The first sub-section examines how criminal law, which deals primarily with 'public wrongs' addresses the question of who is entitled to institute criminal prosecutions, while the second sub-section considers how private law approaches

[1] Peter Cane, 'Standing, Representation and the Environment' in Ian Loveland (ed) *A Special Relationship? American Influences on Public Law in the UK* (Clarendon Press 1995) 123.

the question of standing. The remaining sub-sections explore the problems with adopting either model in judicial review, and suggests several ways in which the law on standing might be reformed to enhance the protection of individual interests and the control of public power that constitute the two limbs of the framework of good administration.

A. Prosecutions in Criminal Law

The notion that crimes constitute public wrongs is encapsulated in the distinction that Blackstone draws between private and public wrongs:

> *private wrongs…are an infringement…of the civil rights which belongs to individuals, considered merely as individuals; public wrongs, or crimes…are a…violation of the public rights and duties, due to the whole community...*[2]

Duff and Marshall explain that although the wrong which attracts criminal liability is the wrong that a wrongdoer does to her victim, '*it is a wrong in which we share as fellow members of the political community to which wrongdoer and victim belong'*.[3] They take the view that as a crime is a public wrong, it is only appropriate that the public prosecute the crime collectively through the state[4]. According to this view, there are no rules on standing as such in criminal law, as only the state is entitled to institute criminal proceedings against an individual.

Indeed, the majority of prosecutions are brought by the Crown Prosecution Service ('CPS'), who have the discretion to determine whether to initiate or continue with a prosecution. When determining whether or not to prosecute a case, prosecutors are required to apply a two-stage test known as the Full Code test[5]. If the prosecutor is satisfied

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[2] William Blackstone and Ruth Paley, *Commentaries on the Laws of England: Book IV* (OUP 2016) 3. The introductory chapter of this thesis also briefly discusses this definition of 'public wrongs'.
[3] R A Duff and S E Marshall, 'Public and Private Wrongs' in James Chalmers, Fiona Leverick and Lindsay Farmer (eds) *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press 2010) 70, 72.
[4] Ibid.
[5] The Code for the Crown Prosecutors (Crown Prosecution Service 2018) 7-11.

that there is sufficient evidence to provide a realistic prospect of conviction against the suspect, a prosecution will usually take place unless the prosecutor considers that there are public interest factors tending against prosecution[6]. The fact that prosecutors are bound to determine whether a prosecution is required in the public interest rather than the victim's, suggests that Duff and Marshall are right to hold that in this sense at least, it is the public that is entitled to hold the defendant to account in a criminal trial as it is the public that the defendant has wronged[7].

While the majority of prosecutions are brought by the Crown Prosecution Service, it is also possible for a citizen or a corporation to bring a private prosecution for any criminal offence. Until the late 19th century, prosecutions were brought almost exclusively by victims of the alleged crimes (or their kinsmen)[8]. In his treatise on the history of English criminal law, Stephen observed:

> *Every private person has exactly the same right to institute any criminal prosecution as the Attorney-General or any one else. A private person may not only prosecute any one for high treason or a seditious conspiracy, but A may prosecute B for a libel upon C, for an assault upon D, or a fraud upon E, although A may have no sort of interest in the matter, and C, D, and E, may be altogether averse to the prosecution*[9].

Stephen's view that any person may bring a private prosecution regardless of whether they have any connection with the alleged offence, is borne out by Section 6(1) of the Prosecution of Offences Act 1985, which permits '*any person*' to institute and conduct '*any criminal proceedings to which the* [Director of Public Prosecution's] *duty to take over the conduct of proceedings does not apply'*. Nothing in the wording of the statute suggests that the right to bring private prosecutions is limited to a particular class of individuals.

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[6] ibid para 4.4 and 4.8.
[7] Duff and Marshall (n 3) 72.
[8] *R (Gujra) v Crown Prosecution Service* [2013] 1 AC 484 (SC) 491.
[9] James Fitzjames Stephen, *A History of the Criminal Law in England: Volume One* (Macmillan 1883) 495.

Thus, in *R (Ewing) v Davis*[10], Mitting J held that the district judge had erred in holding that a third-party private prosecutor was required to show that the prosecution of an offence constituted a public interest and benefit. He recognized that Mr. Ewing was entitled to bring a private prosecution against the defendant, even though he had no personal interest in the proceedings and was even subject to a vexatious litigant order in respect of civil proceedings under S42 of the Senior Courts Act 1981. Similarly, in *R v Zinga*[11], the Court of Appeal held that a private prosecutor was entitled to bring confiscation proceedings under the Proceeds of Crime Act 2002, even though the private prosecutor in question was a commercial organization with no financial or personal interest in the outcome of the proceedings.

Although the establishment of a system of public organization has largely obviated the need for individuals to institute private prosecutions, Lord Wilberforce in *Gouriet v Union of Post Office Workers*[12] held that the historical right of an individual to bring a private prosecution '*remains a valuable constitutional safeguard against inertia or partiality on the part of authority*'[13]. Indeed, in recent years, '*dwindling, austerity-hit resources*'[14] have resulted in inertia on the part of state prosecutors like the Serious Fraud Office[15]. Their inability to effectively prosecute instances of alleged fraud have sparked an increase in the number of prosecutions brought by victims with funds to spare[16].

It is also important to note that while '*a private prosecutor will almost by definition have a personal interest in the outcome of the* case'[17], her personal interest is always

[10] [2007] 1 WLR 3223 (QB).
[11] [2014] 1 WLR 2228 (CA).
[12] [1978] AC 435 (HL).
[13] ibid 477.
[14] Jane Croft, 'Private Prosecutions Grow as State Bodies Retreat in Face of Dwindling Resources' *Financial Times* (London, July 27 2014).
[15] Croft ibid; Anthony Arlidge, *Arlidge and Parry on Fraud* (Sweet & Maxwell 5th edition 2016) 30-003.
[16] Croft (n 14).
[17] Richard Buxton, 'The Private Prosecutor as a Minister of Justice' [2009] 6 Crim L Rev 427, 427.

subordinate to and confined by the public interest. Thus, the courts have emphasized that lawyers conducting private prosecutions must have '*regard for the public interest and duty to act as a Minister of Justice…in preference to the interests of the client who has instructed them'*[18]. Furthermore, although an individual is entitled to initiate a prosecution, the Director of Public Prosecutor retains the discretion to take over the conduct of the prosecution at any point, whether it is to continue the prosecution or to stop it[19].

The above suggests that there is no distinctive standing doctrine in criminal law. Although any citizen is entitled to initiate a criminal prosecution, the fact that the Director of Public Prosecutor retains the discretion to discontinue a prosecution at any point reinforces the notion that the complainant's interests in criminal law will always be circumscribed by the public interest.

B. The Private Law Approach to Standing

At first glance, it appears as though there are no distinct rules on standing in private law either. Cane argues that standing '*is not normally a requirement'*[20] for bringing a private law claim against a public body, and he observes that '*private law has nothing to say about standing*'[21]. However, he concedes that both public and private law are faced with the same need to limit the class of persons who may invoke the court's jurisdiction. Indeed, as Goudkamp points out, the courts have frequently considered whether or not claimants have standing in private law cases[22].

There are a number of principles within private law that restrict the ability to bring a legal suit to those who are able to demonstrate that they have a personal interest at stake.

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[18] *R v Zinga* [2014] 1 WLR 2228 (CA) [61] (per Lord Thomas).
[19] S6(2) of the Prosecution of Offences Act 1985.
[20] Peter Cane, *Administrative Law* (5th edn OUP 2011) 281.
[21] Peter Cane, 'The Function of Standing Rules in Administrative Law' [1980] PL 303, 305.
[22] James Goudkamp, *Tort Law Defences* (Hart Publishing 2013) 30. See in particular, the cases cited at fn 3.

For instance, the privity of contract doctrine '*normally confines standing in contractual matters to the parties to the relevant contract*'[23]. The duty of care in negligence is used '*to define the boundaries of liability for damage caused by negligent conduct*'[24], and in defining these boundaries, this concept also limits the class of individuals recognized as having legally enforceable claims. While these different principles restrict the number of potential claimants, they '*are not seen as separate from the rules that define the relevant wrong, but as part of the definition of the wrong*'[25].

Private law claims concerning either a public statutory duty or an infringement of a public good generally require the claimant to satisfy an element within the cause of action itself, which demonstrates that she has been affected in a way that is distinct from the general public. For instance, in a breach of statutory duty claim, the claimant has to demonstrate that the duty was owed to the claimant as an individual and not the public at large[26], while an individual claiming damages for public nuisance has to prove that that she has sustained particular damage over and beyond the general inconvenience suffered by the public[27]. It is clear that in private law, the only person entitled to bring a legal claim is the right-holder or the person who has suffered loss, while in criminal law, it is the public as a collective entity that is entitled to hold the defendant accountable for a public wrong.

C. The Doctrine of Standing in Judicial Review

The approach taken towards standing in judicial review falls somewhere between the two models discussed above. S31(3) of the Senior Courts Act 1981 ('the 1981 Act') states that

[23] *Peer International Corp v Termidor Publishers Ltd* [2006] EWHC 2883 (Ch) [31] (per Lindsay J).
[24] Peter Cane, *Atiyah's Accidents, Compensation and the Law* (8th edition Cambridge University Press 2013) 69.
[25] Cane (n 20) 282.
[26] *X (Minors) v Bedfordshire City Council* [1995] 2 AC 633 (HL) 731.
[27] *Benjamin v Storr* (1874) LR 9 CP 400; *Gravesham Borough Council and Another v British Railways Board* [1978] Ch 379 (CH) 398.

a court may only grant leave to make an application for judicial review where '*it considers that the applicant has a sufficient interest in the matter to which the application relates*'. As the following sub-sections will show, the courts' fluctuating interpretations of sufficient interest demonstrate the difficulty of conceptualizing judicial review as being predominantly concerned with either private rights or public wrongs.

(i) The Approach to Standing Prior to 1978

Prior to the push for reform in the 1970s, the rules on standing in judicial review varied depending on the type of remedy applied for[28]. Three grounds of standing appeared in the cases, namely the possession of a private legal right, the suffering of special damage and being a person aggrieved[29]. The courts appear to have adopted a stricter approach to standing in relation to applications for injunctions and declarations, perhaps because these remedies originated in private law[30]. A claimant making an application for an injunction[31] or a declaration[32] was required to demonstrate either that her private legal right has been infringed or that she has suffered special damage[33]. Where the applicant was unable to fulfill either criterion, the Attorney-General could claim an injunction to secure compliance with the law on behalf of the public[34]. However, the House of Lords in *Gouriet v Union of Post Office Workers* held that only the Attorney-General could sue on behalf of the public for the assertion of public rights as *'no citizen can of his own initiative sue in our courts on his own behalf save to assert and protect his own private rights'*[35].

[28] Carol Harlow, 'Public Law and Popular Justice' [2002] 65 MLR 1, 4.
[29] Cane (n 21) 305.
[30] Law Commission *Remedies in Administrative Law* Working Paper No 40 (1971) para [23].
[31] *Boyce v Paddington Borough Council* [1903] 1 Ch 109; Cane (n 21) 305.
[32] *Gouriet v Union of Post Office Workers* [1978] AC 435; Cane ibid.
[33] Cane (n 21) ibid.
[34] Law Commission (n 30) para [44].
[35] [1978] AC 435, 508 (Lord Edmund-Davies).

This narrow construction of standing coheres with what Harlow calls the classical model of judicial review. According to Harlow, this model of judicial review, which operated in the UK until the 1970s, is highly individualistic in nature, interest and remedy-oriented, with restricted grounds of review[36]. This model appears therefore to share striking similarities with the individualistic concerns of private law. It is important however to note that while there is certainly a line of cases which suggested that the claimant needed to establish some form of interest before being able to proceed[37], it is also possible to detect a strain in the case law which adopted a broader approach towards standing[38].

Thus, it has been observed that the protection of private interests was only a secondary function of the prerogative writ of prohibition[39] and that it is possible for a stranger to the suit to obtain a prohibition order[40]. Brett J in *Worthington v Jeffries*[41] held that the authorities showed that '*the ground of decision, in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is, whether the royal prerogative has been encroached upon…*'[42]. This suggests that an applicant seeking a prohibition is in some sense approaching the court on behalf of the public interest. There is also evidence of a broader approach to standing in the case law on mandamus, where the courts have in some cases, construed 'right' broadly, and granted standing where no contractual or tortious right have been affected[43]. Similarly,

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[36] Carol Harlow, 'A Special Relationship? American influences on Judicial Review in England' in Ian Loveland (ed) *A Special Relationship? American Influences on Public Law in the UK* (Clarendon Press 1995) 79, 83-86.
[37] On certiorari, see *R v Bradford-On-Avon Urban DC ex p Boulton* [1964] 1 WLR 1136 (QB); *R v Russell, Ex p. Beaverbrook Newspapers Ltd* [1969] 1 QB 342 (QB). On prohibition, see *Forster v Forster and Berridge* (1863) 4 B. & S. 187; *R v Twiss* (1869) LR 4 QB 407. On mandamus, see *R v Lewisham Union* [1897] 1 QB 498; *R v Industrial Court Ex p ASSET* [1965] 1 QB 377. On injunctions and declarations, see notes following fn 32 and 33. I am grateful to Paul Craig for drawing my attention to these authorities.
[38] Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) paras 25-003 to 25-007.
[39] Sir Harry Woolf, Jeffrey L Jowell, Catherine M Donelly, Ivan Hare, *De Smith's Judicial Review* (8th edn, Sweet & Maxwell 2018), para 15-019.
[40] *Worthington v Jeffries* (1875) LR 10 CP 379; *R v Speyer* [1916] 1 KB 595.
[41] (1875) LR 10 CP 379.
[42] ibid 382.
[43] Craig (n 38) 25-005. See in particular, cases cited at footnote 16.

even though a stricter approach was adopted in relation to declarations and injunctions, *'*[n]*ot all cases required a private law right, in the sense of a cause of action in contract or tort, before the plaintiff could proceed'*[44].

The above discussion shows that prior to the reforms in the 1970s, the rules on standing were narrow and varied depending on the specific remedy applied for. The fact that the courts emphasized the importance of the applicant demonstrating a private right or 'special damage' suggests the existence of a more individualistic approach to standing, similar to that adopted in private law. However, even within this so-called classical model of judicial review, there was evidence of a broader approach which recognized the importance of citizens bringing claims on behalf of the public interest.

(ii) The Narrow Approach to Standing in Cases Involving the Human Rights Act 1998

The following sub-section will explore the liberalisation of standing rules in judicial review. Before exploring this issue however, it is important to recognize that claims brought under the Human Rights Act 1998 ('the HRA') are subject to a narrower standing test. S7(1) of the HRA states that a person who claims that a public authority has acted unlawfully may only bring proceedings against the authority under the HRA, if she is or would be a victim of the unlawful act. To satisfy the victim criterion, the applicant will normally need to show that she is in some way directly affected by the public authority's act[45]. This 'victim' test evinces a similar concern as private law in permitting only right-holders to enforce legal claims[46].

[44] Craig (n 38) para 25-007. See in particular, the cases cited at footnote 24.
[45] Joanna Miles, 'Standing under the Human Rights Act 1998: Theories of Rights Enforcement and the Nature of Public Law Adjudication' [2000] 59 CLJ 133,137.
[46] Jason Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 83.

The consequence of adopting this narrow approach to standing, is that no one else may institute proceedings against a public authority for a right's violation if the victim chooses not to enforce her right. As Miles notes, this approach is premised on the notion that no wrong has been perpetrated except against the victim, and therefore no one else is entitled to complain[47]. This stands in sharp contrast with the approach taken in criminal law, in which a crime is considered a public wrong, even if the victim is the only person who suffers from the wrongdoer's actions. This reluctance to allow non-right holders to institute legal proceedings under the HRA mirrors the private law approach, which aims at discouraging litigation in which the claimant has no direct personal interest. However, as Feldman points out, it is questionable whether this narrow individualistic test on standing coheres with the collectivist aspect of many Convention rights, and the fact that even where a right is being asserted individualistically, it must nearly always be balanced against the public interest[48].

(iii) The Liberalisation of Standing Rules in Judicial Review

The push for wider standing rules in the 1970s led to the introduction of a uniform test of standing, namely the 'sufficient interest' test, which the courts have interpreted broadly. The case of *R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Business Ltd* [49] ('the *Fleet Street Casuals* case') is often cited as evidence of a more liberal approach towards standing. Although the House of Lords denied the Federation standing in this case, the judges acknowledged that '*a direct financial or legal interest is not now required'*[50] to demonstrate sufficiency of interest. Lord Diplock even went as far as to hold that it would be a '*grave lacuna in our system of public law*

[47] Miles (n 45) 148.
[48] David Feldman, 'The Human Rights Act 1998 and Constitutional Principles' [1999] 19 LS 165, 174-176.
[49] [1982] AC 617.
[50] ibid 646 (Lord Fraser).

if…a single public-spirited tax-payer, were prevented…from bringing the matter to the attention of the court to vindicate the rule of law'[51].

Lord Fraser however held that it would be '*extravagant to suggest'*[52] that every taxpayer who believes that the Inland Revenue were giving an unlawful preference to another taxpayer would be entitled to bring a judicial review claim. He suggested that such a taxpayer would only be able to succeed in establishing a sufficient interest where there is '*some exceptionally grave or widespread illegality*'[53]. As Lord Fraser points out, the fact that the test on standing is framed in terms of '*sufficient interest'*, suggests that not every claimant is entitled to bring a claim of judicial review[54]. Even so, there has been an undeniable shift from an interest-focused approach to standing to one concerned with remedying public wrongs.

This is evidenced by Sedley J's judgment in *R v Somerset County Council Ex p Dixon*[55]. As discussed in Chapter One, the applicant sought to challenge the council's grant of conditional planning permission to the second respondent, allowing them to extend their limestone operations. Although the applicant did not possess any personal interest that would have been threatened by the operations, Sedley J held that '*there will be, in public life, a certain number of cases of apparent abuse of power in which any individual, simply as a citizen, has a sufficient interest to bring the matter before the court'*[56]. He rejected the argument that the applicant had to demonstrate a special private interest at the leave stage,

[51] ibid 644.
[52] ibid 647.
[53] Ibid.
[54] ibid 645.
[55] [1998] Env LR 111 (QB).
[56] ibid 117.

arguing that it was misconceived because '[p]*ublic law is not at base about rights…it is about wrongs - that is to say misuses of power*'[57].

As discussed in Chapter One, Sedley J's willingness to embrace a more liberal system of standing that focuses on misuses of power, coheres with Lord Mustill's observations on the development of administrative law in *R v Secretary of State for the Home Department ex parte Fire Brigades Union*[58]. Lord Mustill observed that in recent years the use of parliamentary remedies has fallen short of what is required to ensure that the executive acts in accordance with the law. The courts therefore had to step in to '*avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers'*[59]. It is unsurprising that as judicial review evolved into a system concerned with remedying deficits in Parliamentary protection, the courts have moved beyond a purely interest-orientated approach to standing to one that facilitates the remedying of wrongs. This explains why when considering whether the World Development Movement had standing to challenge the Secretary of State's provision of foreign aid, Rose LJ held that the question is whether '*the applicant can show some substantial default or abuse*, *and not whether his personal rights or interests are involved'*[60].

Indeed, the courts have recognized that it is open to a citizen to bring a judicial review claim on behalf of the public interest ('citizen standing')[61]. For instance, in *R v Secretary of State for Foreign and Commonwealth Affairs ex p Lord Rees-Mogg*[62], the Divisional Court accepted that a member of the House of Lords was entitled to challenge

[57] ibid 121.
[58] [1995] 2 AC 513 (HL).
[59] ibid 567.
[60] *R v Secretary of State for Foreign and Commonwealth affairs ex parte World Development Movement Ltd (*'the *WDM* case*)* [1995] 1 WLR 386 (QB) 395. Rose LJ was citing Professor Wade in: William Wade and Christopher Forsyth, *Administrative Law* (7th edn Clarendon Press 1994).
[61] According to Cane, 'citizen standing' is a type of representative standing, in which the claimant purports to represent the 'public interest' rather than the interests of any particular individual: Cane (n 20) 285.
[62] [1994] QB 552.

the Foreign Secretary's decision to ratify the Maastricht treaty, because '*of his sincere concern for constitutional issues*'[63]. Similarly, in *Walton v The Scottish Ministers*[64], the Supreme Court held that an individual protestor had standing to challenge orders made by the Scottish Ministers to allow the construction of a western peripheral route. The recognition of citizen standing in *Walton* and Sedley J's observations in *Dixon*, suggests that judicial review is moving closer to an approach of standing that is solely concerned with public wrongs. However, there are several indications that judicial review has not embraced as open a system as that in criminal law.

Firstly, the legislative provisions introduced by the Criminal Justice and Courts Act 2015 ('the 2015 Act') have the cumulative effect of restricting applications of judicial review. S84(2) of the 2015 Act has amended the 1981 Act, enabling the court to consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred[65], and requiring the court to consider this question if asked by the defendant[66]. If it appears to the court to be highly likely that the outcome would not have been substantially different if the conduct had not occurred, the court must refuse to grant relief[67] unless it considers appropriate to do so for reasons of exceptional public interest[68]. Similar provisions preventing the court from granting relief where the court considers that the outcome for the applicant would not have been substantially different were also introduced.[69]

Although they do not technically affect the rules on standing, the effect of these provisions is to shift the attention from whether a wrong has been committed, to whether

[63] ibid 562.
[64] [2012] UKSC 44.
[65] S31(3C) (a) Senior Courts Act 1981.
[66] ibid S31(3C)(b).
[67] ibid S31(3D).
[68] ibid S31(3E).
[69]ibid S31(2A) and S31(2B).

the claimant has been impacted by the public authority's conduct. This jeopardizes the protection of the public interest under the second limb of the framework of good administration, for it prevents public authorities from being held accountable where it can be shown that the alleged misuse of power would have made no substantial difference to any individual claimant. The hurdles imposed on the court's ability to award relief to a claimant are also likely to discourage potential claimants from bringing the courts' attention to possible illegalities.

Secondly, while the courts have been prepared to recognize citizen standing in a number of cases, they have been hesitant to embrace a completely open-door policy on standing. Lord Reed has argued that it is necessary to adopt a contextual approach to standing that is based on a concept of interests[70]. Rather than holding that every citizen is entitled to challenge misuse of power, the courts have instead focused on examining whether there are factors which justify the grant of standing to the applicant where she has not been directly affected. Rose LJ in *WDM* identified a number of factors in this regard including the merits of the challenge, the importance of vindicating the rule of law, the importance of the issue raised, the likely absence of any responsible challenger, the nature of the breach of duty, and the prominent role of the applicant in giving advice, guidance and assistance with regard to aid[71]. The case of *R v Inspectorate of Pollution, ex p Greenpeace (No 2)*[72] also highlights the importance of the applicant's expertise and the absence of any responsible challenger to the question of standing. Otton J pointed out the efficacy of allowing Greenpeace with its resources to put forward a well-informed

[70] *AXA General Insurance v HM Advocate* [2011] UKSC 46 [170].
[71] [1995] 1 WLR 386 (QB) 395.
[72] [1994] 4 All ER 329 (QB).

challenge that would be more likely to assist the courts than an application by an individual claimant[73].

Another relevant factor is the inability of other applicants to bring a judicial review claim. Thus, Woolf LJ accepted that the Child Poverty Action Group had standing to challenge delays in processing claims for supplementary benefit as the application raised important issues in social welfare law and were not ones which individual claimants were expected to bring[74]. The courts have also emphasized the need for the applicant to be 'genuinely concerned' about the matters raised in the application. Thus, in *Greenpeace (No 2)*, Otton J observed that Greenpeace was a responsible body with a genuine concern for the environment[75], while Lord Reed in *Walton* held that the applicant, who had made representations to the Ministers and taken part in a local inquiry, had '*demonstrated a genuine concern* '[76] about the legality of a development that would have a significant impact on the environment. Relatedly, the courts have also held that busybodies should be prevented from bringing judicial review applications[77].

An applicant may however be denied standing even if she is not a busybody and is genuinely concerned about the issues raised in the judicial review application. In *R (DSD and Others) v The Parole Board of England and Wales*[78], the Divisional Court held that the Mayor of London was not entitled to bring judicial proceedings against the Parole Board for its decision to direct the release of John Warboys, who had been convicted for sexual offences committed in the course of his work as a cab driver in London. While recognizing the sincerity of the mayor's concerns and conceding that he was not a mere

[73] ibid 350.
[74] *R v Secretary of State for Social Services ex p Child Poverty Action Group* [1990] 2 QB 540, 546.
[75] [1994] 4 All ER 329, 350.
[76] [2012] UKSC 44 [88].
[77] *Fleet Street Casuals* [1982] AC 617, 646.
[78] [2019] QB 285.

busybody, the court held that none of the functions of the Mayor's office were related to the workings of the Parole Board and that the Mayor was in no different position from any other member of the public. Observing that the test for standing was '*discretionary and not hard-edged*'[79], the court distinguished the case at hand from *Rees-Mogg,* where no one else would have been granted standing if the court held that the claimant did not have standing. In the present case, Warboys' victims had also brought a judicial review application, and were '*obviously better placed challengers'*[80]. It is clear therefore that the liberalisation of standing rules has yet to result in the adoption of a completely open system on standing.

D. A Choice Between Two Models?

(i) Should Judicial Review Adopt a Private-Rights Model of Standing?

Those who take the view that the function of public law is to protect individual rights, such as Allan[81], argue that standing should be confined to cases in which an individual's interests have been affected. Allan warns that an expansive doctrine of standing might cause judicial review to become a substitute for the ordinary political process, invoked by well-organized pressure groups[82]. Harlow expresses a similar fear, and warns of the symbiotic relationship developing between courts and campaigning groups[83], citing *WDM* as an example of how the courts can legitimate political lobbying of campaigning groups. Equally, it could be argued that respecting an individual's personal autonomy entails recognizing that she is the only one who is entitled to complain of a wrong perpetrated against herself. Enabling a third party to institute proceedings in relation to the violation of the rights of another, could be seen as paternalistic as it may undermine a victim's ability to decide upon a course of

[79] ibid [111].
[80] Ibid.
[81] Trevor R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003) Chapter One discusses Allan's approach in some length.
[82] Allan ibid 195.
[83] Harlow (n 28) 17-18.

conduct that facilitates her personal development. As discussed below, this is one of the oft-cited concerns about the lack of standing in criminal law.

However, it is important not to exaggerate these concerns. Firstly, there are other doctrines in judicial review which are capable of addressing the problem of the courts intervening in political matters. For instance, the court in *Rees-Mogg* accepted that the claimant had standing but held that the court had no jurisdiction to consider the government's ratification of the treaty as it established a common foreign and security policy[84]. Secondly, a study conducted by Sunkin and Bondy reveals that in a sample of 502 final hearing decisions heard between July 2010 and February 2012, interest groups and charities constituted only three percent of the claimants[85]. Thus, the assertion that interest groups would overwhelm the judicial review is an exaggeration.

Thirdly, the violation of an individual's interests may also be contrary to the public interest in the proper control of executive power under the second limb of the framework of good administration. To apply the concept of privity in this context is to essentially privatize the dispute between victims and rights-violators[86] and to insulate unlawful acts from challenge where the affected individual chooses not to bring a judicial review claim. Furthermore, there are problems with accepting the argument that respecting personal autonomy entails adopting a narrow approach to standing. It is often the case that lack of information, resources and support[87] are more likely to discourage potential claimants from challenging a decision that adversely affects their interests rather than any meaningful

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[84] [1994] QB 552. This point was also made by Hare: see Ivan Hare, 'The Law of Standing in Public Interest Adjudication' in M. Adenas and Duncan Fairgrieve (eds) *Judicial Review in International Perspective: Liber Amicorum for Lord Slynn Volume II* (Kluwer Law International 2000) 301, 305. The more modern approach would be to deal with this issue through the concept of deference.

[85] Varda Bondy and Maurice Sunkin, "How Many JRs are Too Many? An Evidence Based Response to 'Judicial Review: Proposals for Further Reform'" (*UK Constitution Law Association*, October 25 2013) <https://ukconstitutionallaw.org/2013/10/25> accessed 2 November 2021.

[86] Miles (n 45) 148.

[87] Low Commission, *Getting it Right in Social Welfare Law* (March 2015) 8.

exercise of personal autonomy. Finally, this narrow approach to standing might mean that an individual will be incapable of bringing a claim for standing where she is unable to show that she has been affected in a manner that is distinct from the public at large. This is problematic because the '*rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no one was able to bring proceedings to challenge it*'[88].

(ii) Should all barriers to standing be removed?

The above discussion demonstrates the problems with adopting an unduly narrow conception of standing. This sub-section will now consider whether we should remove the 'sufficient interest' requirement altogether and adopt an approach that is solely concerned with correcting public wrongs, as in criminal law. Although criminal law allows any person to institute criminal proceedings, there are still safeguards in place to ensure that prosecutions are dropped where it is not in the public interest. Thus, abandoning the '*sufficient interest*' requirement will not mean that the courts will have to hear every single judicial review application.

However, there are still problems with abolishing the doctrine of standing and applying a public interest caveat. Firstly, this approach does not accord proper consideration to the individual's interests. The danger with adopting a system akin to that in criminal law, is that it completely undermines the individual's interests in favour of the public interest. While there has been a push for the recognition of victim's rights in recent years[89], the nature of the criminal trial is such that victims are treated as peripheral

[88] *Walton v Scottish Ministers* [2012] UKSC 44 [94] (per Lord Reed).
[89] See for instance Jonathan Doak, *Victims' rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing 2008).

witnesses, and are deprived of their ability to participate in criminal trials[90]. Sometimes the pursuit of criminal prosecutions might directly contradict the victim's desires[91]. It is questionable whether we should import this problematic element into judicial review.

Furthermore, there are benefits with adopting an interest-oriented approach in relation to misuses of public power. Chapter 4 of this thesis argues that consideration of the relevant interests affected by the exercise of public power should be encouraged as it enhances the public decision-making process. Moreover, it is important to recognize that while both criminal law and judicial review deal with 'public wrongs' to a certain extent, the 'public wrong' in judicial review is distinct as the 'wrong' lies in the misuse of public power. As such, these two types of public wrongs should not be treated in exactly the same way.

E. Proposal for Reform

The above sub-sections have explored the problems with adopting either a 'private rights' or a 'public wrongs' model of standing. As judicial review is concerned with both individual interests and the collective interest of the public in the control of public power, it is imperative that the courts' approach to standing acknowledges the importance of both of these interests. In analyzing the 'sufficient interest' criterion, the court should distinguish between two types of claims, namely claims brought with the intent of protecting the personal interests of an individual(s) and claims which are concerned with safeguarding the public interest. An individual who is able to show that she has been directly affected by a public body's actions will usually have little problem convincing the court that she

[90] Sarah Moynihan, 'The Voiceless Victim: A Critical Analysis of the Impact of Enhanced Victim Participation in the Criminal Justice Process' [2015] Irish Student Review 25, 25.
[91] Individuals who sustain injuries as a result of sado-masochistic encounters may not want their sexual partners to be prosecuted: *R v Brown* [1994] 1 AC 212.

has 'sufficient interest' in bringing an application. Where an applicant's interests have not been directly affected, the courts should adopt the following approach.

(i) *Is the applicant representing an individual(s) with a personal interest in the claim*?

The court should first consider whether the applicant is seeking to represent a person(s) with a personal interest in the claim. In other words, is it a case of 'surrogate standing'[92]? If the applicant is acting in this capacity, the court should then consider whether the applicant has obtained the consent of the individuals she is seeking to represent[93]. Where no consent has been obtained, the court should proceed to consider whether the claim was brought on behalf of those who are unable to assert their own interests and in circumstances in which it is not possible to obtain their consent. An example of such a case is *R v Secretary of State for Social Services ex parte Child Poverty Action Group*[94]. It would be unreasonable to expect welfare claimants to expend their limited resources to challenge delays in processing claims, and it may not be possible for their consent to be obtained.

(ii) *Is the applicant purporting to act on behalf of the public interest*?

If the applicant is purporting to act on behalf of the public interest, the court should only grant standing if the applicant is able to satisfy two conditions. Firstly, the applicant should show that the application raises an issue of public importance. Where an alleged unlawful act by a public authority raises an issue of public importance, there is no reason why it would be contrary to the rule of law for the courts to review the potential illegality.

[92] Surrogate standing is one of the three types of representative standing outlined by Cane: Cane (n 1) 144-145.
[93] Cane states that surrogate actions brought on behalf of those who are capable of instituting an action themselves, should only be allowed with the consent of the represented: ibid 145.
[94] [1990] 2 QB 540.

Secondly, the applicant has to demonstrate that she is genuinely concerned in the issues raised by the application. This requirement is concerned with preventing an applicant from bringing a claim actuated by an ulterior motive or improper purpose. As Dyson LJ states, it would be an abuse of process to permit a claimant to bring a claim in such circumstances[95]. The courts have been particularly alert to this problem in public procurement cases. For instance, in *Chandler,* the court held that the applicant, who sought to challenge a decision to establish an academy school, did not have standing because she was attempting to use the procurement regime for an alternative motive, namely because she was opposed to academy schools[96]. It would be contrary to the public interest for an applicant to be permitted to bring claims for her own ulterior political motives where it may impede the development of public projects. In such cases, the applicant cannot be said to be vindicating the public interest under the second prong of the framework of good administration.

By engaging in the above process of enquiry, the courts might be able to avoid some of the problems associated with broad standing rules. Firstly, the proposed approach accords respect to the personal autonomy of individuals directly affected by an administrative body's actions by recognizing the importance of providing them with the choice of determining whether or not to proceed with legal proceedings. It is for this reason that the court has to determine whether consent has been obtained. However, the proposed approach also recognizes that there may be some individuals who, due to lack of knowledge of their rights or lack of resources, are unable to exercise this freedom of choice. As such,

[95] *R (Feakins) v Secretary of State for the Environment, Food and Rural Affair* [2004] 1 WLR 1761 (CA) [23].
[96] *Chandler v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011.

it allows an applicant to bring a judicial review claim where the applicant is simply seeking to protect the interests and rights of those who are unable to assert them.

Secondly, this process prevents a wholesale move to an approach which is purely centered on the conduct of the administrative authority and on correcting public wrongs. This is not to say that an approach which focuses on correcting public wrongs is undesirable; indeed, it is instrumental in holding the government accountable for its actions. Nonetheless, there is a danger that an approach which is wholly concerned with correcting public wrongs might inadvertently undermine the citizens' interests. The proposed approach helps safeguard individual interests that fall under the first limb of the framework of good administration.

Other commentators have recognized the importance of clarifying the types of interests at stake in public interest challenges. As mentioned above, Cane draws a distinction between three types of representative standing, namely associational, surrogate and citizen standing. This sub-section is only concerned with Cane's views on associational and citizen standing. With respect to associational standing, where the applicant purports to represent the interests of the members of its association, Cane argues that it is necessary for the association to establish a democratic stake otherwise it would be impossible to hold that the association properly represents the interests of those for whom it purports to act. As for citizen standing, Cane argues that this form of standing may be recognized in principle, provided that a theory of fundamental rights and interests is developed.

There are several problems with applying Cane's theory of representative standing. Firstly, he does not explain how an association might meet the 'democratic stake' requirement. Harlow points out the impracticality of Cane's proposal, noting that the courts

have no machinery for ascertaining democratic stake[97]. Furthermore, Cane concedes that he is unable to provide an exhaustive catalogue of the type of fundamental rights or interests which would justify a citizen being awarded standing[98]. As such, he is unable to advance our understanding as to when a particular claimant is entitled to bring a judicial review claim.

Furthermore, the lines between the three types of representative standing proposed by Cane are easily blurred. Hilson and Cram observe that although organizations like CPAG and the World Development Movement are primarily surrogate groups representing the interests of others, they can also be categorized as associational groups because they have members who they represent[99]. If we were to recognize that individuals are entitled to bring a judicial review claim to either protect their own interests or to vindicate the collective interest of the public in the control of discretionary power, there would be no need to resort to Cane's categories of representative standing.

F. Preliminary Conclusion on Standing

A brief examination of the approach taken to standing in criminal law and in private law suggests that judicial review should adopt a hybrid of both models. Adopting the private law approach to standing would effectively isolate unlawful acts from challenge where the claimant is unable to show that her personal interests have been adversely affected, and it would impede the courts' ability to protect the public interest in the control of public power under the second limb of the framework of good administration. However, adopting an approach similar to that of criminal law is problematic as it may undermine the importance of individual interests and individual autonomy. The problems with adopting either a

[97] Harlow (n 28) 5.
[98] Cane (n 1) 142.
[99] Chris Hilson and Ian Cram, 'Judicial Review and Environmental Law – Is there a Coherent View of Standing?' [1996] 16 LS 1, 2.

purely 'private rights' or 'public wrongs' model on standing, demonstrate the flaws of holding that judicial review is predominantly concerned with either private rights or public wrongs.

2. Waiver

Part Two examines how the doctrine of waiver is approached in a system dealing primarily with public wrongs like criminal law, and how it is applied in the context of private law rights as well as fundamental rights. It argues that the protection of the interests under both limbs of the framework of good administration requires a more nuanced approach to the doctrine of waiver than is displayed in either criminal or private law. To that end, it explores how the doctrine of waiver in judicial review may be modified and tightened to ensure that it is capable of protecting such interests.

A. The Doctrine of Waiver in Criminal Law

Generally, the doctrine of waiver is concerned with the '*intentional relinquishment of a known right*'[100]. In criminal law, the doctrine of waiver has been applied in relation to a defendant's procedural rights. For instance, the courts have recognized the ability of a defendant to waive her right to be present at her own trial and to be legally represented[101]. However, the courts have displayed less enthusiasm in extending the concept of waiver to public wrongs. This is exemplified by the case of *R v Brown*[102], in which a group of men were convicted for engaging in private consensual sadomasochistic activities. The House of Lords refused to extend the defence of consent to cases where actual bodily harm is inflicted during the course of sadomasochistic encounters. According to Lord Templeman, the question of whether the defence of consent should be extended to such encounters could

[100] *Johnson v. Zerbst* (1938) 304 U.S. 458, 464
[101] *R v Jones (Anthony William)* [2003] 1 AC 1
[102] [1994] 1 AC 212

only be decided by considerations of policy and public interest, and he found that society was entitled to protect itself from the '*cult of violence'*[103] caused by sadomasochism.

According to Stevens, the majority of the Law Lords found that a crime had been committed *'not because the men had wronged one another*… [but because] *the conduct constituted a wrong to society itself*'[104]. The majority reached this conclusion after examining a line of authority which held that consent was not a defence in cases involving dueling and fighting. Thus, in *R v Coney*[105], Stephen J held that consent was not a defence to personal injury where '*the injury is of such a nature…that its infliction is injurious to the public as well as to the person injured'*[106]. Hawkins J makes this point more forcefully, arguing that a person '*may compromise his own civil rights, but he cannot compromise the public interests'*[107]. These cases demonstrate that in criminal law, there is a limit to the amount of harm a person can consent to, and this limit is informed by the public interest.

Ultimately, the reason why the appellants' behaviour was criminalized in *R v Brown*, was because the court refused to recognize that the harm occasioned by their private sadomasochistic encounters amounted to a private wrong capable of being waived, but rather chose to categorize it as a public wrong[108]. Whether it relates to prosecutions or to the doctrine of waiver, the position in criminal law is clear: as far as public wrongs are concerned, the individual's interests are always subordinate to that of the public.

B. Waiver of Rights

[103] ibid 237.
[104] Robert Stevens, 'Private Rights and Public Wrongs' in Matthew Dyson (ed) *Unravelling Tort and Crime* (Cambridge University Press 2014) 117.
[105] [1882] 8 QBD 534.
[106] ibid 549.
[107] ibid 553.
[108] Stevens (n 104) 117.

Given that the concept of waiver applies to a variety of rights, this section will consider very briefly how it is applied in relation to private law rights and fundamental rights.

(i) Private Law

The main type of waiver that arises in contract law is waiver by election[109]. In *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India*[110], Lord Goff held that in order for there to be a valid waiver, there must be an unequivocal representation and knowledge of the relevant facts which show that a choice has to be made between two inconsistent courses of action. Wilken and Ghaily note that although there is authority to suggest that silence, delay or a failure to act can constitute an unequivocal representation for the purposes of waiver[111], these cases were decided on estoppel principles and a better view of the law is that absent unusual facts, silence, delay or failure to act cannot constitute a valid waiver[112]. Indeed, the court in *Enron (Thrace) Exploration and Production BV v Clapp*[113], held that silence can rarely make a case of waiver.

When determining whether there has been an 'unequivocal election' on the part of the applicant, the courts have applied an objective test. In *Insurance Corporation of the Channel Islands ltd v The Royal Hotel*[114], Mance J held that when determining whether a person's conduct '*amounts to an unequivocal communication of a choice to affirm*'[115] there has to be an '*objective assessment of the impact of the relevant conduct on a reasonable person in the position of the other party to the contract*[116]. Thus, the question of whether

[109] Sean Wilken and Karim Ghaly, *The Law of Waiver, Variation, and Estoppel* (OUP 2012) para 3.14
[110] [1990] 1 Lloyd's Rep 391
[111] Wilken Ghaily (n 110) para 4.10
[112] ibid.
[113] [2004] EWHC 1612 [60].
[114] [1997] Lloyd's Rep IR 151
[115] ibid 163
[116] ibid

there has been a waiver by election depends on whether there has been an '*objective manifestation of a choice*'[117].

It is clear therefore that the doctrine of waiver in private law is premised upon the notion that private parties should have the freedom to decide whether or not to relinquish their rights, and where they have done so, they should be held to their decision. The doctrine of waiver is far less contentious here than in criminal law, as there is usually little question of the public interest being affected by an individual's decision to waive her rights.

(ii) Fundamental Rights

The law does not only recognize the ability of individuals to waive their rights in private law. For instance, the European Court of Human Rights ('ECtHR') has upheld the waiver of the right of access to a court under Article 6 of the ECHR[118]. The ECtHR has indicated that some of the rights safeguarded by the Convention might by their nature '*exclude a waiver of the entitlement to exercise them'*[119], but it has yet to provide an exhaustive list of the rights which cannot be waived[120].

The requirements of the doctrine of waiver in this context mirror to some extent those in private law. Lord Hope provides a general definition of waiver in *Millar v Dickson*[121], stating that in most litigious situations, waiver is used to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which is open to that party to claim or raise. Thus, whether the waiver concerns a Convention right or a right arising out of a binding contract, it has to be informed and

[117] Ibid.
[118] *Deweer v Belgium A 35* (1980) 2 EHRR 439 [49].
[119] *Albert and Le Compte v Belgium* (1983) EctHR 7299/75 and 7496/76 [35].
[120] Sébastien Van Drooghenbroeck, 'Conflict and Consent' in Stijin Smet and Eva Brems (eds) *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford University Press 2017) 61.
[121] [2002] 1 WLR 1615.

unequivocal. Sub-section D will examine how these requirements have been applied in the context of judicial bias and Article 6 of the European Convention on Human Rights ('ECHR').

C. Should the Doctrine of Waiver Be Applied in Judicial Review?

If public law is primarily concerned with public wrongs, then there is arguably little room for the doctrine of waiver in judicial review. Section A showed how the courts relied on policy considerations and the public interest to reject the application of consent in cases involving dueling, fighting and sadomasochism. This suggests that where public wrongs are concerned, public interest trumps individual choice. Similarly, in judicial review, some judges and commentators have resorted to public policy considerations to explain why an individual is not entitled to waive the apprehension of judicial bias. They argue that the doctrine of waiver undermines the public policy justification underpinning the rule of bias in judicial review, namely that to maintain public confidence in the judicial process, justice must manifestly be seen to be done[122].

Kirby P argues that that the entitlement of a party to an impartial judge is '*not simply a private right which may be waived. It inheres in the public as well as to the individual litigant'*[123]. He warns that a potential danger with allowing a litigant to waive the reasonable apprehension of bias of a judge who is '*the hypothetical representative of the community'*[124], is that it results in the appellate court ignoring the complaint, even though the community's confidence in the impartiality of the judicial system is damaged. Malleson on the other hand, warns that the absolute right of the parties to waive disqualification

[122] See Kate Malleson, 'Safeguarding Judicial Impartiality' [2002] 22 LS 53; Bridgette Toy-Cronin, 'Waiver of the Rule Against Bias' [2002] 9 Auckland University Law Review 850; James Goudkamp 'The Rule Against Bias and the Doctrine of Waiver' [2007] 26 CJQ 310.
[123] *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, 373.
[124] *Gotkas v Government Insurance Office of New South Wales* (1993) 31 NSWLR 684, 687.

effectively places the decision about what might shake public confidence in the integrity of the administration of justice with the parties, rather than the courts[125].

The dangers identified by Kirby P and Malleson arguably arise whenever litigants waive breaches of procedural norms. In *R (Hill) v Institute of Chartered Accountants in England and Wales*[126], Longmore J was reluctant to classify the case as an instance of waived breach, holding that it was '*odd to say that the tribunal acted in breach of the rule of natural justice when all parties agreed to the course that was taken'*[127]. However, it could be argued that Longmore J failed to recognize that the integrity of the judicial process is an issue of public importance that depends on the adherence to procedural safeguards. There is a danger that the application of waiver in judicial review might undermine the interests under the second limb of the framework of good administration. Would the courts be able to address abuses of powers if an individual claimant is able to sanction such abuse? The value of adopting the criminal law approach to public wrongs is that it prevents the public interest from being compromised based upon the consent of a single person.

The above arguments assume that there are no difficulties with identifying a public wrong or with distinguishing between situations which involve personal rights and those that concern public wrongs. However, as evidenced by *Brown*, these are far from easy questions to resolve. It is by no means clear that the House of Lords in *Brown* were in a position to characterize consensual private sexual activities as public wrongs based on their own notions of morality. Similarly, it is questionable whether the mere apprehension of bias on the part of a judge can be properly characterized as a misuse of public power.

[125] Malleson (n 122) 58.
[126] [2014] 1 WLR 86 (CA).
[127] ibid [30].

Relatedly, it is questionable whether the public interest will inevitably be damaged by individuals waiving a perceived public wrong. In relation to *Brown*, it is debatable whether the state's limited resources are best served by investigating and prosecuting individuals for their private sexual activities. As far as bias is concerned, it is difficult to see how the public interest in maintaining the appearance of justice would be detrimentally impacted by a '*doctrine which refuses a party to litigation the opportunity to resile from a position he has taken*'[128]. Indeed, the public policy justification for the rule of bias may require safeguards that ensure that parties to a litigation are prevented from taking advantage of technical rules. In *Locabail (UK) Ltd v Bayfield Properties Ltd*[129], the Court of Appeal suggests that the rule against bias may result in unfairness unless it is supplemented by the doctrine of waiver, as it would provide one litigant with a second chance of obtaining a successful outcome. Thus, the court refused to enable a claimant to '*have the best of both worlds*'[130] when she only complained about bias when she realized that she had lost.

When applied properly, the doctrine of waiver can be used to enhance the protection of both individualistic and collective interests under the framework of good administration. Firstly, the doctrine may enhance the autonomy of individuals by allowing them to make their own decisions concerning their rights[131]. For instance, in the context of bias, it allows a litigant who is pressed for time and who has limited resources, to make a choice as to whether she should make a recusal application and incur the costs of an adjournment[132]. Furthermore, as Lord Hope argues, the legal system would be unduly hampered if the right

[128] *Vakauta v Kelly* [1989] 167 CLR 568, 588 (per Toohey J).
[129] [2000] QB 451 (CA).
[130] ibid [69].
[131] Matthew Groves, 'Waiver of the Rule Against Bias' [2009] 35 Mon LR 315, 322.
[132] Malleson uses a similar example to argue that the interests of the party who waives her right may run contrary to the appearance of justice: Malleson (n 122) 58.

to a public hearing by an independent and impartial tribunal were to be incapable in any case of being waived[133]. The public interest in a properly functioning judicial system may support the application of the doctrine of waiver where the doctrine facilitates the efficient administration of justice.

D. The Application of Waiver in Judicial Review and Possible Avenues for Reform

The previous section has suggested that there is room for the doctrine of waiver in judicial review provided that it is applied judiciously. This section briefly examines how the courts have applied the requirements of knowledge, voluntariness and unequivocal conduct set out in *Millar*, and explores how the application of these requirements may be modified to prevent the doctrine of waiver from jeopardizing the interests protected under the framework of good administration.

(i) The Voluntariness Requirement

The requirement of voluntariness is aimed primarily at ensuring that the litigant has not been pressured into making her decision. This requirement is particularly important given the vulnerability of claimants in the public law context. As Goudkamp notes, the requirement of voluntariness not only entails the absence of overt forms of compulsion, but also the exclusion of '*subtle and even well-intentioned*'[134] coercion. In *Smith v Kvaernar Cementation Foundations Ltd*[135], the claimant was urged by his barrister not to raise an objection of bias in relation to the judicial recorder who was the head of the chambers shared by the lawyers of both parties. The court held that the claimant had not waived his right to object, holding that the barrister's vigorous recommendation made it difficult for the claimant to opt for an adjournment which meant that he was not '*given a fair*

[133] *Millar v Dickson* [2002] 1 WLR 1615 [53].
[134] Goudkamp (n 122) 315.
[135] [2007] 1 WLR 370 (CA).

opportunity to reach an unpressured decision'[136]. As the doctrine of waiver is often asserted against the litigant alleging a potential illegality, the courts should be vigilant in ensuring that no undue pressure has been exerted on her.

(ii) Knowledge

In *Locabail*, the court held that any waiver of a litigant's right to object to a judge hearing her case, must be clear and unequivocal and made with facts relevant to the decision whether to waive or not[137]. A waiver will only be upheld if the litigant has full knowledge of her rights and of the consequences of her waiving such rights. Thus, in *DP v Governing Body of Radley College*[138], the Upper Tribunal held that the litigant in person was not free to waive his right to object to the constitution of a tribunal as he was not explicitly asked if he objected to the tribunal's constitution and was not even aware that he was entitled to object. Similarly, in *Jones v DAS Legal Expenses*[139], the court noted that where a judge is faced with a situation of apparent bias, she should explain the options available to the parties, namely that they either consent to the judge hearing the case and consequently waive their right to object, or they can apply to the judge to recuse herself.

However, a different approach was adopted by the majority in *Jones (Anthony William*), where the defendant had been convicted after a trial in which he was absent and unrepresented. The majority took the view that the defendant's decision to abscond '*could reasonably be thought to show such complete indifference to what might happen in his absence as to support the finding of waiver'*[140]. This is problematic because as Lord Rodger states in his dissenting judgment, such an inference could only be justified if the court was

[136] ibid [29]
[137] [2000] QB 451 [15]
[138] [2011] UKUT 66
[139] [2003] EWCA Civ 1071
[140] [2003] 1 AC 1 [15] (per Lord Bingham)

satisfied that the defendant not only *knew* that the trial would take place in his absence but also knew that it *could* take place even though he was not there and even though he was not represented[141].

The courts have however drawn the line at imputing knowledge of the law to a litigant. In *Millar*, the question was whether the appellants had waived their right to be tried by an independent and impartial tribunal when they raised no objection to the temporary sheriffs before whom they appeared. The High Court of Justiciary held that the defendants' solicitors should have known of the possibility of objecting to the temporary sheriffs due to the incorporation of Convention rights after May 20 1999 by the HRA. The Privy Council rejected this approach, holding that '*ignorance of the law will not excuse unlawful conduct; but it cannot suffice to found a plea of waiver*'[142].

The courts' recognition that ignorance of the law cannot constitute a valid waiver, and their insistence that the individual has to have knowledge of the essential facts relating to the waiver are important safeguards in ensuring that the individual's interests are protected. However, the approach adopted by the majority in *Jones (Anthony Williams)* is unduly burdensome for a defendant. The courts should refrain from inferring knowledge from the litigant's conduct. Rather, they should focus on whether the litigant had subjective knowledge of the facts surrounding her entitlement to waive her rights.

(iii) An Unequivocal Election

An unequivocal election can sometimes take the form of an express agreement as in the case of *Hill*, where the claimant's advocate agreed that a member of the tribunal could absent himself for part of the hearing. However, the courts have been willing to infer a

[141] ibid [51]
[142] [2002] 1 WLR 1615 [34]

waiver in the absence of any explicit agreement. Thus, in *Jones (Anthony Williams),* the court held that the defendant's decision to abscond justified the inference that he had waived his right to defend himself.

The courts have even gone as far as recognizing that silence or inaction by party may give rise to a waiver of her procedural rights. Thus, in *R (DM Digital Television Limited) v The Office of Communication*s[143] , Stuart-Smith J stated that there was no reason in principle why waiver should not be inferred from silence provided that the '*silence is voluntary, informed and unequivocal'*[144]. Delay in raising an objection in the case of judicial bias, particularly where the litigant is legally represented may also constitute a clear and unequivocal waiver[145]. It is true that in many cases, it may not be possible to obtain an express agreement from the litigant concerning the waiver of her rights. Rather than maintaining a haphazard approach to inferring an 'unequivocal election' from the litigant's conduct, it is argued that the courts should apply the objective test used in private law and consider whether there has been an objective manifestation of choice on the litigant's part to waive her rights.

Adopting this test will help ensure that there is a measure of consistency in the way that courts infer waiver from a litigant's conduct. Furthermore, in the context of the rule against bias, the application of an objective test for waiver would cohere with the fair-minded and informed observer test for apprehension of bias[146]. However, this test should not be elided with the requirement that an individual should have subjective knowledge of the essential facts relating to the waiver. In *Jones (Anthony Williams)*, the court should have first established that the defendant knew that if he absconded, a trial would and could

[143] [2014] EWHC 961.
[144] ibid [43].
[145] *JSC Bank v Ablyazov and others* [2013] 1 WLR 1845 [91].
[146] *Porter v Magill* [2001] UKHL 67.

be held in his absence. Only if the court was satisfied that this was the case, could it go on to consider whether an observer would consider the defendant's action in absconding to be an indication of his decision for the trial to be conducted in his absence.

The courts' willingness to hold that silence or inaction is capable of constituting a valid waiver of procedural safeguards is problematic. Indeed, the courts have adopted a stricter approach to this requirement in private law, where as mentioned above, the general position is that silence or inaction is incapable of constituting a valid waiver barring unusual facts. There is no reason why a less stringent approach is warranted in judicial review, particularly as a lax approach to waiver may undermine the importance of the procedural safeguards provided. It is therefore argued that silence or inaction should not be capable of constituting a valid waiver in judicial review.

(iv) The Insertion of a Public Interest Requirement

Section C warned of the danger of adopting an overly individualistic approach to the doctrine of waiver, which neglects any consideration of the public interest. It is therefore vital for the courts to be able to reject the application of waiver where it would be harmful to the goals of judicial review. Interestingly, the European Court of Human Rights in *Håkansson and Sturesson v Sweden*[147], held that a waiver of Article 6(1) '*must not run counter to any important public interest*'[148]. Lord Bingham cited this particular passage in *Millar* yet somewhat surprisingly neglected to include this requirement in his definition of waiver. It is argued however that the courts should be required to consider in every case, whether the application of the doctrine of waiver will undermine an important public interest.

[147] [1991] 13 EHRR 1
[148] ibid [66]

Requiring the courts to consider whether or not the waiver in question is incompatible with the public interest, will help mitigate Malleson's concern that the doctrine of waiver leaves important decisions concerning the integrity of the judicial system with private parties. The addition of this requirement will enable the courts to intervene in cases where the public interest in the proper exercise of public power requires it to do so. For instance, it provides the court with the discretion to reject an otherwise valid waiver in a case which has attracted publicity, and where the court is concerned that that the public's perception of the appearance of justice may be adversely affected by any breaches of procedural norms.

E. Preliminary Conclusions on Waiver

As in the case of standing, a more nuanced approach to the doctrine of waiver is needed than in either criminal law or private law, due to the fact that judicial review is concerned with protecting both individual interests and with correcting public wrongs. While there is room for the application of the doctrine of waiver in judicial review, the previous section argued that the requirements had to be tightened and it has suggested that guidance may be derived from private law which provides a clear test in relation to the 'unequivocal election' requirement. This will offer greater protection to the personal interests protected under the first limb of the framework of good administration. However, it is also essential that safeguards are in place to prevent the doctrine of waiver from being used in a way that might jeopardize the public interest under the second limb of the framework of good administration. For this reason, it is suggested that a public interest element be added to the ingredients of the doctrine of waiver, enabling the courts to intervene when required.

3. Conclusion

This chapter has shown through an examination of the law on standing and waiver in criminal and private law, why it is a mistake to shoehorn judicial review into either a purely 'private rights' or 'public wrongs' model. If judicial review is concerned primarily with private rights, it would have to adopt a very narrow conception of standing that enables only right-holders to invoke the court's jurisdiction. Individuals would also be able to freely waive their rights, and the court's primary concern would be to protect individual choice. Adopting this overly individualistic model of judicial review would effectively insulate certain unlawful acts from challenge, and it may result in a situation where individuals are capable of sanctioning misuses of power. However, if judicial review aligned itself with a system dealing wholly with public wrongs, such as criminal law, there is a danger that individual interests would be completely eclipsed by the public interest. Such an approach would circumscribe an individual's autonomy in deciding whether or not to bring a judicial review claim, and it would also result in an uncompromising approach to the doctrine of waiver.

This examination of the law on standing and waiver demonstrates the need for judicial review to adopt a more nuanced approach to the protection of private interests and the public interest in the control of public power. The suggestions of reform set out in this chapter are designed to ensure that the interests under both limbs of the framework for good administration are appropriately protected.

CHAPTER THREE

LEGITIMATE EXPECTATIONS: INSIGHTS GLEANED FROM CONTRACT AND ESTOPPEL

Having explored in the previous chapter how procedural issues such as standing and waiver would be approached under the framework of good administration, this chapter examines how individual interests, specifically legitimate expectations, should be protected under this framework. This chapter focuses on legitimate expectations as they exemplify the type of interests which fall outside the rights category but which warrant additional judicial protection. It explores how the protection afforded to legitimate expectations may be enhanced by engaging in judicious conceptual borrowing. In particular, it argues that when appropriately modified, principles of contract and estoppel are capable of offering the doctrine of legitimate expectations some much needed clarity and structure. The adoption of a more coherent and structured line of inquiry in legitimate expectations cases will in turn facilitate a deeper and more nuanced understanding of the way that the two limbs of the framework of good administration interact.

This chapter is structured into five parts. The first part explores the natural justice and estoppel origins of the doctrine of legitimate expectations. It argues that while the doctrine of legitimate expectations has largely outgrown its natural justice origins, the estoppel roots of the doctrine reveal the potential benefits of conceptual borrowing and highlights the doctrine's concern with holding public authorities to their representations. The second part of this chapter explores the normative rationale of the doctrine in more detail, arguing that the doctrine is concerned with protecting the trust reposed in the representations of public authorities. The chapter then goes on to examine some of the problems with the current legitimate expectations case law, including the lack of clarity surrounding the ambit of the

doctrine, the improper approaches taken in relation to conceptual borrowing and the lack of a consistent application of the requirements of the doctrine. The penultimate part of this chapter considers how the doctrine of legitimate expectations may be restructured by modifying certain contractual and estoppel principles in Promise Cases and certain policy cases. The final part of this chapter considers how the courts should strike a proper balance between the interests of an applicant asserting a legitimate expectation with that of the public under the framework of good administration.

1. The Conceptual Origins of the Doctrine of Legitimate Expectations

The precise content and contours of the doctrine of legitimate expectations has been the subject of much academic debate. The doctrine's applicability in a wide range of factual scenarios coupled with the lack of clarity surrounding its requirements has sparked legitimate fears of the doctrine collapsing into an '*inchoate justification for judicial intervention*'[1]. The absence of a clear normative basis for the doctrine has often been identified as the cause of the ambiguity surrounding the doctrine. Consequently, much academic ink has been spilt in postulating suitable normative rationales for the doctrine[2]. Varuhas casts doubts on these theories, arguing that '*it is difficult to theorise a doctrine when it is unclear what that doctrine is*'[3].

In order to gain a clearer picture of what the doctrine of legitimate expectations is and its normative basis, it is necessary to return to the roots of the doctrine. Ganz has observed that the doctrine of legitimate expectations has *'grown from two separate roots, natural*

[1] Christopher Forsyth, 'Legitimate Expectations Revisited' [2011] 16 JR 429, 429
[2] Soren J Schønberg, *Legitimate Expectations in Administrative Law* (Oxford 2000) Chapter One; Paul Reynolds, 'Legitimate Expectations and the Protection of Trust in Public Officials' [2011] PL 330; Rebecca Williams, 'The Multiple Doctrines of Legitimate Expectations' [2016] 132 LQR 639
[3] Jason Varuhas, 'In Search of a Doctrine: Mapping the Law of Legitimate Expectations' in Mathew Groves and Greg Weeks (eds) *Legitimate Expectations in The Common Law World* (Hart Publishing 2017) 19

justice or fairness and estoppel, but the stems have become entwined to such an extent that it is impossible to disentangle them'[4]. The following sub-sections will examine how the doctrine of legitimate expectations has been parented by these two different routes, and how this has influenced the doctrine's development.

A. The Natural Justice Origins of the Doctrine

The modern origins of the phrase 'legitimate expectations' can be traced back to Lord Denning's judgment in *Schmidt v Secretary of State for Home Affairs*[5]. The case concerned the Home Secretary's decision to refuse the applications of two students to extend their stay after the expiry of their permits. Lord Denning held that whether an administrative body is bound to give a person affected by their decision the opportunity to make representations '*depends on whether he has some right or interest, or…some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.*'[6] The court held that the applicants did not have a right to make representations before the decision was made. Lord Denning did not explain what a legitimate expectation is, beyond suggesting that it was comparable to a type of right or interest, which triggers the procedural safeguard of a hearing. It is worth noting that his comments on legitimate expectations were obiter dicta, and that the concept of legitimate expectations was not raised in argument before the court[7].

Lord Fraser in *Attorney General of Hong Kong v Ng Yuen Shiu*[8] considered *Schmidt* and observed that while lacking in precision, the phrase 'legitimate expectation' in this

[4] Gabriele Ganz, 'Legitimate Expectation: A Confusion of Concepts' in Carol Harlow (ed), *Public Law and Politics* (Sweet & Maxwell 1986) 145, 159.
[5] [1969] 2 Ch 149 (CA).
[6] ibid 170.
[7] Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Hart Publishing 2000) 47.
[8] [1983] 2 AC 629 (Privy Council).

context aptly expressed the principle that '*a person is entitled to a fair hearing before a decision adversely affecting his interests is made by a public official*'[9]. In *Ng Yuen Shiu*, the government of Hong Kong introduced a new policy of repatriating illegal immigrants but maintained that each illegal entrant from Macao (such as the respondent) would be interviewed and the case would be treated on its merits. Unfortunately, the respondent was not given the opportunity to make representations. In quashing the removal order made against the respondent, Lord Fraser stated that when a public authority promised to follow a certain procedure, '*it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty*'[10].

Schmidt and *Ng Yuen Shiu* suggest that the doctrine of legitimate expectations can be invoked to enable an individual to access procedural safeguards. This aspect of the doctrine was explored further in *Council of Civil Service Unions v Minister for the Civil Service*[11] ('the *GCHQ* case'*)*. In this case, the appellants challenged the Minister's decision to change the terms and conditions of service of staff at Government Communications Headquarters ('GCHQ') through the mechanism of an Order in Council, so that they would no longer be able to be members of national trade unions. There was no consultation with the trade unions which represented the GCHQ staff despite a long practice of doing so.

The majority of the judges recognized that legitimate expectations arose on behalf of the appellants, but held that national security requirements outweighed the requirements of fairness. The doctrine of legitimate expectations was not treated as a distinct ground of review, but was considered to fall under the procedural propriety ground. Lord Diplock

[9] ibid 636
[10] ibid 638
[11] [1985] AC 374

held that where a decision has deprived a person of her legitimate expectation, '"*procedural impropriety" will normally provide the only ground on which the decision is open to judicial review*'[12]. Lord Roskill also stated that the 'principle' of legitimate expectations is '*firmly entrenched'*[13] in administrative law and is '*closely connected with "a right to be heard"*'[14].

Lord Diplock's judgment in particular highlights the important role that the doctrine of legitimate expectations played in developing the law on procedural fairness. The previous chapter demonstrated how prior to the reforms implemented in the 1970s, the rules on standing were generally narrow, with the courts emphasizing the importance of the applicant demonstrating the existence of a private right. Varuhas similarly observes that up until the 1970s and 1980s, '*a duty of procedural fairness…could only possibly arise where an administrative decision affected an individual's legal rights*'[15], meaning that the triggers of duties of fairness were relatively narrow. However, in *GCHQ*, Lord Diplock stated that to challenge a decision through judicial review, the decision must have affected applicant either:

> *(a) by altering rights or obligations of* [the applicant] *which are enforceable by or against him in private law; or*
> *(b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.*[16]

[12] [1985] AC 374, 411
[13] ibid 415
[14] ibid
[15] Varuhas (n 3) 34
[16] [1985] AC 374, 408

Lord Diplock's recognition of the fact that an applicant may be able to challenge a decision via judicial review when she possesses a legitimate expectation rather than a legal right, serves as an illustration of how the doctrine of legitimate expectations was used to '*broaden the triggers for duties of fairness to arise and by implication standing rules on review'*[17]. He also offers more insight on what a legitimate expectation is, by linking the doctrine of legitimate expectations to the withdrawal of a benefit that an applicant had previously been permitted to enjoy.

It would appear from the above cases that the doctrine of legitimate expectations is a purely public law construct, one embedded firmly within the law of procedural fairness. It is difficult to see how any form of conceptual borrowing from private law would aid the doctrine's role in triggering the application of duties of fairness. However, it is also questionable whether the doctrine of legitimate expectations is still needed to fulfill this function today. Varuhas notes that the standing rules and triggers for ordinary duties of fairness have broadened[18] since *GCHQ*. Indeed, the courts have recognized that a mere interest is capable of generating procedural obligations. Procedural protection has been provided in licensing and immigration cases, even though the applicants lack any form of substantive entitlement in law[19].

Currently, there is little need to resort to the doctrine of legitimate expectations to obtain procedural protection in cases where a benefit has been withdrawn or where an individual has been adversely affected by an administrative decision. As Varuhas argues,

[17] ibid 35.
[18] ibid 36-37. Varuhas notes that deprivation of a continuing benefit such as housing or welfare could give rise to obligations of fairness regardless of whether the claimant possessed a legitimate expectation or a legal right.
[19] Paul Craig, 'Perspectives on Process: Common Law, Statutory and Political' [2010] PL 275, 280-281; *R. v Gaming Board for Great Britain Ex p. Benaim and Khaida* [1970] 2 QB 417; *R v Huntingdon DC Ex P Cowan* [1984] 1 WLR 501; *R v Secretary of State for the Home Department Ex p Fayed (No 1)* [1998] 1 WLR 763; *R (Thamby) v Secretary of State for the Home Department* [2011] EWHC 1763.

ordinary duties of procedural fairness arise where a claimant is threatened with the withdrawal of an important benefit; '*legitimate expectations is not required to explain why obligations of fairness arise in such cases*'[20]. He states that if an authority is to take a decision that radically affects an individual's life, the authority should consult the individual as a matter of basic fairness, regardless of whether there was any prior practice[21]. Similarly, Lord Mustill in *R v Secretary of State for the Home Department ex parte Doody*[22] has stated that '[f]*airness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf*'[23].

It is clear therefore that the doctrine of legitimate expectations fails to fulfill a necessary role in terms of triggering the application of procedural fairness obligations. The existence of a legitimate expectation may entitle an applicant to more extensive procedural safeguards. However, it would be a stretch to argue that the doctrine of legitimate expectations plays a distinctive role in this regard. The courts have always taken into account the importance of the applicant's interest and the impact on the applicant when determining the content of the duty to act fairly[24]. The existence of a legitimate expectation simply forms part of the court's broader inquiry as to the requirements of fairness in a given case.

On the whole, the doctrine of legitimate expectations has expanded beyond its natural justice roots. The natural justice origins of the doctrine of legitimate expectations cannot adequately explain the substantive protection of substantive legitimate expectations,

[20] Varuhas (n 3) 34
[21] ibid 38-40.
[22] [1994] 1 AC 531
[23] ibid 560
[24] *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, 182

as exemplified by *R v North and East Devon HA ex p Coughlan* [25]. As discussed in Chapter One, the claimant had been moved to Mardon House, an NHS facility for the long-term disabled and was assured by the defendant health authority that she would have a 'home for life'. The Court of Appeal quashed the defendant's decision to close Mardon House, on the grounds that the decision was an unjustified breach of its promise to the claimant, which constituted '*unfairness amounting to an abuse of power*'[26].

While the cases discussed above suggest that the claimant would be entitled to make representations before the public authority closes the facility, they do not require the public authority to do more than provide the claimant with the opportunity to be heard. In order to understand the development of the substantive legitimate expectations, it is necessary to explore the estoppel roots of the doctrine.

B. Estoppel: The Development of the Doctrine of Substantive Legitimate Expectations

There is a separate strand of case law on estoppel that has had a significant influence on the doctrine of substantive legitimate expectations. Bamforth takes the view that the '[t]*he modern concept of legitimate expectation seems to have developed – largely through the agency of Lord Denning – from the Robertson line of estoppel cases'*[27]. Lord Denning famously applied the promissory estoppel principle established in *Central London Property Trust Limited v High Trees House Limited*[28] in the case of *Robertson v Minister of Pensions*[29], holding that *Robertson*:

[25] [2001] QB 213
[26] ibid [89]
[27] Nicholas Bamforth, 'Legitimate Expectation and Estoppel' [1998] 3 JR 196, 197
[28] [1947] KB 130 (KB)
[29] [1949] 1 KB 227 (KB)

falls within the principle that if a man gives a promise or assurance which he intends to be binding on him, and to be acted on by the person to whom it is given, then, once it is acted upon, he is bound by it[30].

Robertson was the first case in which Lord Denning applied the promissory estoppel principle which he developed in *High Trees*. In *High Trees*, the claimant landlord had granted the defendant a tenancy of a block of flats in 1937. The claimant agreed to reduce the rent due to wartime conditions but resiled from this position in September 1945 and sought the full rent for the entire period. Lord Denning held that despite the absence of consideration, the landlord's promise was intended to be binding and would give rise to an estoppel, for the courts would not allow the party making the promise to act inconsistently with it.

Lord Denning applied the *Robertson* principle once again in *R v Liverpool Corporation ex p. Liverpool Taxi Fleet Operators' Association*[31] ('the *Liverpool Taxi* case'), a case that has been characterized as one involving the doctrine of legitimate expectations[32]. In this case, the Liverpool Corporation proposed to increase the number of taxis but provided an undertaking that this would not be done until a private bill was enacted by Parliament and came into force. However, the decision was later reversed and 50 more licences were issued without consulting the taxi owners. The Court of Appeal held that the corporation should not depart from their undertaking, Lord Denning holding as follows:

So long as the performance of the undertaking is compatible with their public duty, they must honour it…At any rate they ought not to depart from it except after the most serious

[30] [1949] 1 KB 227, 231.
[31] [1972] 2 QB 299 (CA).
[32] *Attorney-General of Hong Kong Appellant v Ng Yuen Shiu Respondent* [1983] 2 AC 629, 637-638; *R v Secretary of State for the Home Department ex p Khan* [1984] 1 WLR 1337 (CA) 1343-1344; Bamforth (n 27) 197.

consideration and hearing what the other party has to say: and then only if they are satisfied that the overriding public interest requires it.[33]

Bamforth argues that legitimate expectations and *Robertson*-style estoppels share a common origin and are guided by the same policy considerations, and largely operate in a similar fashion[34]. As such, he argues that the *Robertson*-style estoppel cases '*should ideally be re-categorised as early examples of the modern concept of legitimate expectation*'[35]. Bamforth's argument that legitimate expectations and the public law estoppel cases share a common origin, rests *inter alia* on the fact that the *Liverpool Taxi* case, which was '*seen as an early example of a legitimate expectation*'[36], applied *Robertson* in reaching its decision. A potential problem with this argument is that while the *Liverpool Taxi* case may have been later characterized as a legitimate expectation case, '*there was no mention of the Schmidt Case or the principle of legitimate expectation'*[37] in *Liverpool Taxi* itself. Furthermore, Lord Denning makes no reference to either the doctrine of estoppel or *Robertson* in *Schmidt*, when he first mentioned the doctrine of legitimate expectations.

This does not mean however that there is no link between the legitimate expectations doctrine and estoppel. Lord Denning introduced the concept of legitimate expectations via a throwaway remark in *Schmidt*, which suggests that he was not concerned with delivering a thorough exposition on the doctrine. By contrast, he spent far more time developing the doctrine of estoppel. From 1949 to 1980, he undertook the mammoth job of reworking the principle of equitable estoppel in cases spanning both private and public law[38]. Given the amount of time Lord Denning spent developing the doctrine of estoppel,

[33] [1972] 2 QB 299, 308
[34] Bamforth (n 27) 203
[35] ibid
[36] ibid 197
[37] Ganz (n 4) 150
[38] Charles Stephens, *The Jurisprudence of Lord Denning: A Study in Legal History, Volume II* (Cambridge Scholars 2009)

it is not unthinkable that principles of estoppel would have eventually influenced the doctrine of legitimate expectations, which he introduced around the same period.

Indeed, subsequent cases indicate that the doctrine of substantive legitimate expectations developed through an amalgamation of estoppel principles and concepts of fairness and abuse of power. This particular evolution of the doctrine of legitimate expectations occurred notwithstanding the wariness evinced by judges in a number of cases about the appropriateness of applying estoppel principles against public bodies[39]. Thus, although Lord Denning in *HTV v Price Commission*[40] acknowledged the principle that public bodies cannot be estopped from carrying out their public duties, he argued that this principle is subject to the qualification that a public authority must not misuse its power by acting unfairly towards a citizen where there is no overriding public interest to warrant it[41].

The House of Lords in *R* v *Inland Revenue Commissioners ex parte Preston*[42] affirmed Lord Denning's observations in *HTV*. Lord Templeman held that the taxpayer appellant in *Preston* would be entitled to relief via judicial review for '"*unfairness" amounting to abuse of power if the commissioners have been guilty of conduct equivalent to a breach of contract or breach of representations on their part*'[43]. Lord Templeman's emphasis on the need for the conduct to be equivalent to a breach of representation is interesting, given that he had earlier in his judgment '*paid lip service to the principle that estoppel did not apply to public bodies'.*[44] Although the House of Lords could not directly apply the estoppel doctrine, Lewis notes that they achieved the same result indirectly by

[39] See *Howell v Falmouth Boat Construction* [1951] AC 837 (HL)*; Western Fish Products v Penwith District Council* [1981] 2 All ER 204 (CA); *Rootkin v Kent County Council* [1981] 1 WLR 1186 (CA)*; R (Reprotech (Pesham) Ltd v East Sussex CC* [2003] 1 WLR 348 (HL).
[40] [1976] ICR 170 (CA).
[41] ibid 185-186.
[42] [1985] 2 WLR 836.
[43] ibid 867.
[44] Clive Lewis*,* 'Fairness, Legitimate Expectations and Estoppel' [1986] 49 MLR 251, 252.

incorporating the principles underlying estoppel into the general principles of judicial review[45].

Neither *Preston* nor *HTV* made any reference to the doctrine of legitimate expectations. This is unsurprising given that the doctrine of legitimate expectations was considered to offer only procedural protection to a claimant. However, by combining private law principles with the concepts of fairness and abuse of power, the courts in *Preston* and *HTV* laid the foundations for the protection of substantive legitimate expectations. This link between private law principles, fairness, and legitimate expectations is highlighted in *R v Inland Revenue Commissioners ex parte MFK Underwriting Agents Ltd*[46]. Applying *Preston*, Bingham J went on to propose certain conditions that a taxpayer would have to meet in order to successfully claim that the Inland Revenue Commissioners had represented to forgo the relevant tax, namely the taxpayer would have to place her cards face upwards on the table and the statement relied upon must be *'clear, unambiguous and devoid of qualification'*[47]. Bingham J did not think that these requirements would '*emasculate the valuable, developing doctrine of legitimate expectations'*[48]. He stated:

> *If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness.*[49]

[45] Lewis (n 44) 252.
[46] [1990] 1 WLR 1545.
[47] ibid 1569.
[48] ibid.
[49] ibid 1569-1570.

Stuart-Smith LJ accurately observed in *R v Jockey Club, ex parte RAM Racecourses Ltd*[50], that Bingham J's judgment reveals certain similarities between legitimate expectations and estoppel. This is evidenced by the requirement of a clear and unambiguous representation, the reference to the claimant acting to their detriment as well as the need for the claimant to put her cards upwards on the table, which is reminiscent of the maxim that a claimant must come to equity with clean hands.

As this chapter will later demonstrate, there are certain issues with applying some of these requirements in the public law context. This should not obscure the fact that when applied appropriately, these estoppel requirements can help provide some structure to the doctrine by clearly identifying the circumstances that would trigger the doctrine. In so doing, they also signal the presence of an important individual interest that merits additional protection under the first limb of the framework of good administration.

The application of estoppel requirements in the public law context provides some insight as to the normative values that underpin the doctrine of legitimate expectations. The emphasis placed upon the clarity of a public authority's representation and the unfairness that results from a public authority resiling from said representation, highlights the doctrine's concern with holding public authorities to their word. This concern with ensuring that an authority stands by its word, is distinct from the concerns underpinning the other grounds of review[51], enabling the doctrine of legitimate expectations to fulfill a distinctive function within judicial review.

The above discussion highlights some of the benefits of using principles of estoppel to shape and inform the doctrine of legitimate expectations. As this chapter will argue, this

[50] [1993] 2 All ER 225.
[51] Varuhas (n 3) 43.

does not mean that these principles should be applied in the public law context sans modification. Special attention has to be accorded to the public interest under the second limb of the framework of good administration and the vulnerability of individual citizens. Part Two explores these issues in more detail and it also examines why it is important to hold public authorities to their representations and promises.

2. The Normative Rationale of the Doctrine of Legitimate Expectations

Having explored the natural justice and estoppel roots of the doctrine of legitimate expectations, the second part of this chapter turns its attention to the doctrine's normative rationale. While the doctrine has largely outgrown its natural justice roots, it was suggested above that the core normative principle that the doctrine has extracted from the private law concept of estoppel is the importance of holding public authorities to their representations. The first sub-section examines this proposition in more detail, by considering why it is generally important to protect promises. Aided by insights derived from promissory theories of contract and philosophical theories of promise, it argues that the normative imperative for protecting promises arises from the need to protect the trust and vulnerability of the promisee. The second sub-section then considers how these concepts of trust and vulnerability should be construed in the context of public law and the framework of good administration.

A. The Importance of Protecting Promises

From an intuitive point of view, it is difficult to deny the feeling of injustice that arises when a public official breaks a promise or an assurance to an individual. It is necessary however to explore the underlying reasons behind that intuitive feeling, and to articulate why it is wrong to break a promise. In his seminal work, 'Contract as Promise', Fried argues that the obligation to keep a promise is grounded in respect for individual autonomy

and trust[52]. For Fried, an individual is morally bound to keep his promise, '*because he has intentionally invoked a convention whose function it is to give grounds - moral grounds - for another to expect the promised performance*'[53].

Fried notes that in promising '*there is an invitation to the other to trust, to make himself vulnerable'*[54], and by breaking that promise, the promise-breaker abuses that trust. Fried views promising as a device that '*free, moral individuals have fashioned on the premise of mutual trust, and which gathers its moral force from that premise*'[55]. He argues that contracts have to be kept because they are a special class of promise. While Fried uses the promise principle as the organizing principle for his theory of contract, his theory relies on Kantian principles of trust and respect for individual autonomy to provide the moral imperative to keep promises.

To fully understand the intricate relationship between promise and trust, it is important to understand how breaking a promise abuses the promisee's trust. Fried locates this reason in the invitation to the promisee to trust the promisor, suggesting that to trust is to somehow render oneself vulnerable. Similarly, Friedrich and Southwood locate the moral wrongfulness of breaking a promise in the invitation to the promisee to trust the promisor[56]. While they do not explicitly draw a link between trust and vulnerability as Fried does, they argue that in making a promise, the promisor invites the promisee to trust her to do something, and that in inviting the promisee's trust and having the trust accepted, the promisor incurs an obligation to the promisee not to betray that trust. They also note

[52] Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (2nd edn OUP 2015).
[53] ibid 16.
[54] ibid 16.
[55] ibid 17.
[56] Daniel Friedrich and Nicholas Southwood, 'Promises and Trust' in Hanoch Sheinman (ed) *Promises and Agreements: Philosophical Essays* (OUP 2011) 278.

that the act of promising brings into existence a special kind of relationship between the promisor and the promisee.

The link between vulnerability and trust has also been explored more generally by Misztal[57], who notes that the main difference between trust and confidence is connected with the degree of certainty we attach to our expectations[58]. She observes that trust involves believing without certainty and it involves an element of risk resulting from our inability to monitor others' behaviour or to have complete knowledge about other people's motivations[59]. Part of trusting someone requires us being placed in a vulnerable position, for we believe them despite the risk of them acting contrary to our expectations.

Although the approaches outlined above (specifically the theories put forward by Fried and Friedrich et al) are primarily morally deontological in nature, it is also possible to take a consequentialist approach to the issue of promise keeping. For instance, within the context of contract law, it is clear that proponents of the efficient breach theory of contract adopt a drastically different view from Fried on the importance of keeping promises. According to Posner, giving the promisor her expected profit on a transaction provides the promisor with an incentive to fulfill her promise unless the result would be an inefficient use of resources[60]. His theory suggests that promises should only be upheld where it is economically efficient to do so.

While the concept of trust is not necessarily irrelevant under an efficiency-based approach, it is likely that it would be viewed as a value that needs to be set against other considerations, such as the gain to be made from breaching a contact. If the parties are in a

[57] Barbara A. Misztal, *Trust in Modern Societies*: *The Search for the Bases of Social Order* (Polity Press 1996).
[58] ibid 16.
[59] ibid 18.
[60] Richard Posner, *Economic Analysis of the Law* (9th edition Wolters Kluwer Law & Business 2014) 130.

long-term contractual relationship, then maintaining the trust between the parties may be more valuable and a contractual breach may be less efficient, but if they are not in such a relationship, then it may be more efficient for the contract to be breached notwithstanding the loss of trust. As the following sub-section suggests, there is room in public law for both moral and pragmatic approaches to the concept of trust.

B. Trust in the Public Law Context

Having examined Fried's promissory theory of contract and various philosophical theories on promise, it is clear that the normative imperative for upholding promises is the protection of trust. This offers some insight as to the normative rationale of the doctrine of legitimate expectations, namely the protection of trust in the representations of public authorities. It is however important to consider how the concept of trust should be interpreted within the public law context and the framework of good administration.

Generally, individual citizens have no ability to monitor the actions of the government and are not privy to the complex decisions that public bodies make. They have no choice but to trust that the government is acting in their best interests. Thus, the vulnerability that Fried observes when an individual reposes trust in another individual is heightened and acquires added importance in the public law context. For Fried, the moral obligation not to betray the trust of an individual arises only when one has made a promise to her. This coheres with Friedrich and Southwood's argument that a special relationship is created through the mechanism of a promise. However, there is already a relationship between public bodies and citizens that exists whether or not a promise is made. This relationship is borne out of the duties that public bodies owe to private individuals. As

Laws J states, '*all of* [a public body's] *dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose*'[61].

The relationship between public authorities and private individuals cuts both ways. It has significant implications on the interests safeguarded under the framework of good administration and consequently, the approach taken towards the doctrine of legitimate expectations. On one hand, the unequal nature of this relationship indicates that an applicant's legitimate expectation merits additional protection under the first prong of the framework. It suggests that public authorities should be held to higher standards of conduct and that the requirements for establishing a legitimate expectation should be applied less harshly to address the individual's vulnerability. A similar point is made by Schiemann LJ in *Bibi,* in the context of the detrimental reliance requirement. He argued that an inflexible approach would enable those '*who have a choice and the means to exercise it in reliance on some official practice or promise…*[to] *gain a legal toehold inaccessible to those who…are compelled simply to place their trust in what has been represented to them'*[62]. Schiemann LJ rightly recognized that vast societal disparities may leave unprotected those individuals who are unable to demonstrate concrete detrimental reliance.

On the other hand, the duties owed by public authorities to the public, which are safeguarded under the second limb of the framework, may militate against the fulfilment of an applicant's legitimate expectation. Binding a public authority to a legitimate expectation may fetter to a degree, the authority's ability to change its policy in the public interest. Relatedly, to ensure the proper exercise of public power, it may be necessary to

[61] *R v Somerset City Council, ex parte Fewings and others* [1995] 1 All ER 513 (QB) 524.

[62] [2002] 1 WLR 237, 250.

prevent the enforcement of a legitimate expectation where it would raise *'wide-ranging issues of general policy…with multi-layered effects*'[63].

It should not however be assumed that the enforcement of a legitimate expectation will inevitably jeopardize the public interest under the second limb. Indeed, the doctrine's concern with the protecting the trust reposed in representations of public authorities, may require public authorities to be held to their word, for the sake of the public interest. Forsyth, whose conception of the doctrine of legitimate expectations is founded upon the protection of trust, argues that good government '*depends upon trust between the governed and the governor*'[64]. He warns that if this trust is not sustained, individuals will no longer order their affairs on the assumption that officials can be believed and government then '*…becomes a choice between chaos and coercion*'[65]. Similarly, Williams argues that failing to uphold a promise made by a public authority may jeopardize in the long run the public authority's ability to manage and govern, even if it may provide short-term relief[66].

Forsyth and Williams' analysis of the immigration children saga in Hong Kong demonstrates exactly how the departure from a public authority's representations may jeopardize good administration[67]. The Government of Hong Kong had interpreted the criteria for establishing a right of abode narrowly. To prevent large numbers of individuals from challenging this decision, the Government made media announcements and sent pink postcards to those who had applied for judicial review, asking them to take no further action and promising that it would be bound by the results of a test case to be heard by the Court of Final Appeal. However, when the court adopted a wider interpretation of a right to

[63] *Begbie* ibid 1131 (per Laws LJ).
[64] Forsyth (n 1) 430.
[65] ibid.
[66] Williams (n 2) 643-644.
[67] Christopher Forsyth and Rebecca Williams, 'Closing Chapter in the Immigration Children Saga: Substantive Legitimate Expectations and Administrative Justice in Hong Kong' (2002) 10 APLR 29.

abode, the Government asked the Standing Committee of the National People's Congress for an 'interpretation' of the relevant provisions which, once given, contradicted the findings of the court. The applicants brought another case[68] claiming that their legitimate expectations had been breached. The court found in favour of those who received the pink cards, but not those who simply believed the media announcements.

Forsyth and Williams note that as a result of the CFA's intervention, the coloured card procedure would probably be effective in the future if a similar problem arose[69]. Media announcements however would probably not be as effective, as the CFA has shown that they cannot be relied on. A key takeaway from Forsyth and Williams' approach is that there are pragmatic and instrumental reasons for holding public authorities to their representations, even when it might hamper their actions in the immediate future. Allowing public authorities to depart from their representations, may cause an erosion of trust in a public authority's assurances. This might prevent the public from cooperating with the government in the future and detrimentally affect a public authority's ability to carry out its duty under the second limb of the framework of good administration. Recognizing the different layers of the notion of trust paves the way for a more nuanced understanding of the doctrine of legitimate expectations and its role within judicial review.

3. The Uncertainty Surrounding the Doctrine of Legitimate Expectations

The first two parts of this chapter explored the conceptual roots of the doctrine and its normative rationale, namely the protection of the trust reposed in the representations of public authorities. Part One in particular, highlighted how principles of estoppel provided some semblance of structure to the doctrine and shed light on the normative values

[68] *Ng Siu Tung & Others v Director of Immigrations* [2002] HK Legal Rep & Dig 561.
[69] Forsyth and Williams (n 67) 42.

underpinning the doctrine. However, it also recognized that there were some problems with the way that these principles were applied in public law. The doctrine of legitimate expectations has since expanded beyond its estoppel roots, and the precise boundaries of the doctrine have been difficult to establish. The following sub-sections examine some of the problems with the current law on legitimate expectations and how they hinder the protection of the interests under the framework of good administration.

A. Lack of Clarity Concerning the Ambit and Role of the Doctrine of Legitimate Expectations

The rapid expansion of the doctrine of legitimate expectations and its development from two different strands of law, has prevented a detailed consideration of the doctrine's role within judicial review. This has caused the doctrine to be applied in a wide range of factual scenarios that are better addressed by other principles or grounds of review, as the doctrine plays no distinctive role in these cases[70]. This is exemplified by the controversial case of *R*(*Rashid) v Secretary of State for the Home Department*[71]. The Court of Appeal in *Rashid* held that the claimant had a legitimate expectation that the Secretary of State would apply his policy on asylum to the claimant's case, even though the claimant had no knowledge of the policy in question. Claiming that a person is capable of expecting something of which she has no knowledge requires stretching both the English language and the doctrine of legitimate expectations beyond acceptable limits.

Unsurprisingly, some commentators and judges have suggested that policy cases like *Rashid* should be excluded from the doctrine of legitimate expectations, and be considered under the principle of consistency[72]. Thus, in *Mandalia v Secretary of State for*

[70] See Varuhas (n 3).
[71] [2005] EWCA Civ 744.
[72] Richard Clayton, 'Legitimate Expectations, Policy, and the Principle of Consistency' [2003] CLJ 93; Mark Elliott, 'Legitimate Expectation, Consistency and Abuse of Power: The Rashid Case*'* [2005] JR 281;

the Home Department[73], Lord Wilson suggested that the applicant's right to have her application determined in accordance with the correct policy flows from the principle that public bodies ought to deal straightforwardly and consistently with the public[74]. He claimed that this principle was *'related to the doctrine of legitimate expectations but free-standing*'[75]. Unfortunately, further development of this free-standing principle of consistency was stymied by the Supreme Court decision of *Gallaher*. Lord Carnwath held that UK law does not recognize equal treatment as a distinct principle of administrative law, but he noted that issues of consistency may arise generally as aspects of rationality[76].

While Lord Sumption does refer to the '*common law principle of equality'*[77], he notes that it is usually no more than a particular application of the ordinary requirement of rationality imposed on public authorities. He also cautions against unnecessarily multiplying categories in public law, noting that it '*tends to undermine the coherence of law by generating a mass of disparate special rules distinct from those applying in public law generally'*[78]. Interestingly, neither Lord Carnwath nor Lord Sumption refer to *Mandalia* in their judgments. While *Mandalia* and *Gallaher* evince different views as to whether there is an independent principle of equal treatment or whether issues of consistency fall under the ambit of rationality review, they demonstrate that there are other grounds and principles of review which are capable of addressing situations in which there has been a failure to apply the proper policy to an applicant's case. However, as explored in Part 4 below, there is a small category of cases involving the departure or failure to apply

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Mandalia v Secretary of State for the Home Department [2015] 1 WLR 4546; Varuhas (n 3) 29-32. Policy cases are dealt with in more detail in Part 4.

[73] [2015] 1 WLR 4546.

[74] Lord Wilson cites Laws LJ's observations on the principle of good administration in *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 [68] when articulating this principle of consistency.

[75] [2015] 1 WLR 4546 [29].

[76] [2019] AC 96 [50].

[77] ibid [50].

[78] ibid.

the proper policy that may generate the additional protection of the doctrine of legitimate expectations.

This thesis argues that the doctrine of legitimate expectations should be confined to cases which invoke the normative principle of the protection of trust. Any uncertainty surrounding the ambit of the doctrine and its normative basis, prevents a proper analysis of how the interests under the framework of good administration should be protected. To illustrate this point, it is worth considering *Gallaher* in more detail. The case concerned the Office of Fair Trading's ('OFT')[79] investigation into price-fixing in the tobacco market. Several of the parties involved, including the respondent, entered into early resolution agreements ('ERAs') with the OFT in which they received lighter penalties for admitting to infringements of competition law. One of the parties, TM Retail ('TMR'), managed to obtain an assurance from the OFT that it would get the benefit of any other parties' successful appeals if did not appeal the OFT's decision. Following the successful appeals of six investigated parties, the OFT agreed to repay the financial penalty imposed on TMR but declined to refund the penalties paid by the respondent.

The respondent challenged the OFT's decision, arguing that it was conspicuously unfair and/or a breach of the equal treatment principle for the OFT to repay TMR, while refusing to repay the respondents. While the Supreme Court took the view that the assurance provided to TMR was mistakenly given, they held that it was rational for the OFT to repay the financial penalty to TMR but not to the respondent. The Supreme Court recognized that there was a '*potentially crucial difference*'[80] between the positions of TMR and the respondent. Lord Carnwath pointed out that while the respondents had accepted the risk that other parties would successfully appeal the OFT's decision, TMR refused to

[79] Predecessor to the Competition and Markets Authority.
[80] [2019] AC 96 [44].

accept such a risk. Instead, they sought and obtained an assurance from TMR on which they claimed to have relied. In other words, the assurance obtained by TMR justified the OFT treating their claim differently from the respondents.

It is clear that the doctrine of legitimate expectations is *prima facie* engaged in TMR's case as there is a need to protect the trust reposed in the OFT's assurance that TMR would derive the benefit of any successful appeal. Thus, TMR can be said to possess an important individual interest under the first limb of the framework; one which warrants additional judicial protection. Unfortunately, the respondent could not demonstrate the existence of a similar claimant centric interest. The respondent's claim more properly engaged the interests under the second limb of the framework, as it was concerned broadly with whether OFT had misused its power and acted unlawfully by treating TMR differently. It is argued that the principle of equal treatment and/or the rationality ground were the appropriate tools to be used in reviewing the OFT's decision.

Although Lord Carnwath rather confusingly suggested that the respondent had in '*public law terms a legitimate expectation that they would be treated equally*'[81], it is difficult to see the point of affixing the label of legitimate expectations to the respondent's claim when it is incapable of offering additional protection for the respondent. Lord Carnwath recognized as much, noting that the respondent's legitimate expectation '*…tells one nothing about the legal consequences of such an expectation, in terms of rights and remedies in public law*'[82]. It is better by far to avoid using the label of legitimate expectations in such cases as the doctrine of legitimate expectations plays no valuable role.

[81] ibid [29].
[82] ibid.

The above discussion shows the importance of clarifying the normative basis and function of the doctrine of legitimate expectations. It helps restrain the ambit of the doctrine and prevents the doctrine from being invoked in cases that are better dealt with under existing grounds and principles of review. Uncertainty surrounding the basis and ambit of the doctrine can hinder fruitful examination of the best modes of safeguarding the interests encompassed under framework of good administration.

B. Improper Approaches towards Conceptual Borrowing

Another central flaw of the legitimate expectations case law is the courts' approach to conceptual borrowing. Part One of this chapter emphasized some of the advantages of applying estoppel principles in judicial review. However, it also observed how judges in cases like *Preston* frequently asserted that estoppel did not apply to public bodies, while indirectly incorporating these principles into judicial review[83]. This approach hardly facilitates an in-depth, considered analysis of the ways in which estoppel principles may need to be adapted to suit the public law context. The problem is further exacerbated by the fact that the courts have, in developing the doctrine of legitimate expectations, combined estoppel principles with abstract concepts such as 'abuse of power' and 'conspicuous unfairness'[84]. As discussed in the following sub-section, these concepts have enabled the courts to depart from the requirements of the doctrine of legitimate expectations when they see fit, further contributing to the doctrine's uncertainty.

As the doctrine of legitimate expectations has expanded, the courts have expressed more reluctance with the notion of applying private law requirements in public law. Thus, Lord Hoffmann in *Reprotech* states: that '*public law has already absorbed whatever is*

[83] See pages 106-107; Lewis (n 44) 252.
[84] *Preston* [1985] 2 WLR 836; *MFK* [1990] 1 WLR 1545.

useful from the moral values which underlie the private law concept of estoppel and the time has come for [the doctrine of legitimate expectations] *to stand upon its own two feet'*[85]. Some of this reluctance is understandable, as the courts have rightly highlighted the difficulties that arise from applying certain estoppel elements in the public law context, specifically the 'detrimental reliance' requirement.

As discussed in Part Two, Schiemann LJ in *Bibi* argued that a rigid application of this requirement may place the weakest in society at a distinct disadvantage. In *Bibi*, the local authority had assured the refugee applicants that they would be provided with permanent accommodation, under the mistaken belief that it was obliged to provide the applicants with such accommodation, and subsequently sought to depart from its assurance. Schiemann LJ found that the applicants' prolonged disappointment and the loss of their possibility of settling elsewhere in the UK where it was easier to find secure housing constituted moral and potential detriment. He held that such things mattered in public law, '*even though they might not found an estoppel…in private law, because they go to fairness and through fairness to possible abuse of power'*[86].

In analysing this judicial reluctance towards conceptual borrowing, it is worth considering the different approaches taken by Lord Carnwath in the Privy Council case of *United Policyholders Group and Others v The Attorney-General of Trinidad and Tobago*[87] *('UPG')* and *In the Matter of An Application by Geraldine Finucane for Judicial Review (Northern Ireland)*[88]. In the former case, Lord Carnwath displayed a more positive mindset towards conceptual borrowing. He considered the case of *Coughlan* and stated in obiter:

[85] ibid [35].
[86] [2002] 1 WLR 237 [55].
[87] [2016] 1 WLR 3383.
[88] [2019] UKSC 7.

> *Where a promise or representation, which is "clear, unambiguous and devoid of relevant qualification", has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it.*[89]

As discussed further in Part Four of this chapter, Lord Carnwath's judgment utilizes private law concepts of consideration and detrimental reliance, suggesting that these concepts may offer guidance to the doctrine of legitimate expectations. However, Lord Carnwath retreated from this approach in *Finucane*, stating that his observations regarding the need for detrimental reliance or some form of action by the promisee, were based on the analogy of breach of contract and estoppel, and were to be limited to cases involving a promise made to an identifiable person or group relating to a substantive benefit. He went on to note that even in this limited context, his proposition may have been '*too narrowly stated*'[90], and he suggested that his approach in *UPG* was inconsistent with the '*modern approach which has tended to sever any direct link between public and private law'*[91].

From the above, it seems as though judicial reluctance to engage in conceptual borrowing in the context of legitimate expectations stem from the difficulties that arise from the detrimental reliance requirement and a general unease with linking public law concepts with private law principles. It would however be short-sighted to dismiss the benefits of conceptual borrowing for these reasons.

Firstly, the doctrine of estoppel is not as an inflexible as it may appear in the legitimate expectations case law. An applicant may have recourse to the doctrine of promissory estoppel despite the absence of detrimental reliance. In the case of *High Trees*

[89] [2016] 1 WLR 3383 [121]
[90] ibid [158]
[91] ibid [159]

discussed above, there was no concrete evidence of detriment; the tenants were only asked to pay the rent that they had been contractually obliged to pay[92]. Furthermore, in a later case, Robert Goff J stated that it is not necessary to show detriment in every case, as a representee may have benefited from the representation but it may still be inequitable, at least without reasonable notice, for the representor to enforce her legal rights[93].

Secondly, the court's reluctance to apply private law principles in public law can be addressed by modifying these concepts to address the specific concerns of public law. The doctrine of legitimate expectations' roots in promissory estoppel has not entailed the import of every estoppel principle. For instance, while the doctrine of promissory estoppel cannot be used to create a new cause of action[94], the courts have not sought to impose this limitation in relation to legitimate expectations. One of the main reasons why the English courts have (controversially)[95] maintained that promissory estoppel can only be used as a shield and not a sword, is to safeguard the role played by consideration[96]. This concern does not arise in the public law context. Indeed, given that most individuals are vulnerable to the exercise of discretionary power by public authorities, such authorities should be held to higher standards of conduct than private entities, particularly in relation to their representations[97]. Enabling the doctrine of legitimate expectations to operate as a sword ensures that public authorities are held to these higher standards of conduct[98] and it enhances the protection of the public interest under the second limb of the framework of good administration.

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[92] Ewan McKendrick, *Contract Law: Text, Cases and Materials* (OUP 2018) 220.
[93] *Société Italo-Belge pour le Commerce et l'Industrie* v. *Palm and Vegetable Oils (Malaysia) Sdn Bhd* [1982] 1 All ER 19, 26–27.
[94] *Combe v Combe* [1951] 2 KB 215.
[95] The High Court of Australia has recognized that the doctrine of promissory estoppel can act as a sword in certain circumstances: *Walton Stores (Interstate) Ltd v Maher* (1987) 164 CLR 387.
[96] Roger Halson, 'The Offensive Limits of the Promissory Estoppel' [1999] LMCLQ 257, 260.
[97] See the above quote by Schiemann J in *R (Bibi) v Newham LBC (No 1)* [2002] 1 WL 237 at (n 86).
[98] Williams (n 2) 646.

As Part Four of this chapter demonstrates, the doctrine of legitimate expectations can benefit from judicious conceptual borrowing. It is simply a matter of ensuring that the relevant private law principles are properly adapted to the public law context.

C. The Inconsistent Application of the Requirements of the Doctrine of Legitimate Expectations

Without a clear idea as to the normative rationale of the doctrine and its function, it is difficult to formulate a coherent approach towards the requirements of the doctrine. Consequently, the courts have struggled with applying these requirements consistently and have deviated from these requirements when they see fit, through the use of abstract principles such as 'unfairness' and 'abuse of power'. This is exemplified by *R v Inland Revenue Commissioners ex parte Unilever*[99], where the court rejected a submission that a substantive legitimate expectation claim had to strictly adhere to the *MFK* requirements in order to be successful.

The court considered whether the Commissioners could reject Unilever's statutory claim for loss relief against corporation tax on the grounds that the claim was time-barred. The Commissioners had accepted late claims from Unilever for over 20 years under an agreed procedure developed between both parties to manage Unilever's complex accounts. However, Unilever conceded that they were not able to satisfy the requirement for an unqualified and unambiguous representation as there was no conscious practice or policy on the part of the Commissioners to allow late claims.

Notwithstanding the absence of a representation, the Court of Appeal found that the Commissioners' decision to reject Unilever's claim was so unfair as to amount to an abuse of power. Simon Brown LJ held that unfairness amounting to an abuse of power is

[99] [1996] STC 681.

unlawful, not because it involves conduct that infringes '*some equivalent private law principle…but…because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power'*[100]. The court appeared to use the concepts of 'conspicuous unfairness' and 'abuse of power' to ameliorate the perceived rigidity of the *MFK* approach. However, these concepts only contribute to the doctrine's uncertainty. As Lord Carnwath argues in *R (Gallaher Group Ltd & Ors) v Competition and Markets Authority*[101], substantive unfairness (unlike procedural fairness) is not a distinct legal criterion and addition of phrases like 'abuse of power' and 'conspicuous' add nothing to ordinary legal principles[102].

In contrast to *Unilever*, the majority of the House of Lords in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2*) construed the requirement of a clear and unambiguous representation stringently. The House of Lords had to determine whether a written ministerial statement by the Foreign Secretary gave rise to a legitimate expectation on the part of the exiled inhabitants of the Chagos Islands that they would be permitted to return to their homeland. In the Foreign Secretary's statement, the Government accepted the ruling in *Bancoult (No 1*)[103] that the exclusion of the Chagos Islanders from their homeland was unlawful and also announced that a new Immigration Ordinance would be made, allowing the exiled inhabitants to return to the Chagos Islands.

The majority held that the criterion of a clear and unambiguous representation was not met, as the government's undertaking was conditional upon the outcome of an ongoing feasibility study on the possibility of resettlement. The majority's strict interpretation of the representation is open to question because the ministerial statement created the

[100] [1996] STC 681, 695.
[101] [2019] AC 96 (SC).
[102] ibid [41].
[103] [2001] QB 1067.

impression that the government would honour the spirit of the Divisional Court's ruling. Indeed, Lord Bingham in his dissenting judgment argued that the ministerial statement constituted a clear and unambiguous representation that the government '*would not persist in treating the Chagossians as it had reprehensibly done since 1971*'[104]. Furthermore, the abovementioned feasibility study considered whether it was financially viable for the UK government to carry out a resettlement programme, which as Elliott and Varuhas point out, is a distinct question from whether the Chagos Islanders should be allowed to return to their home[105].

The strict approach adopted by the majority in *Bancoult* stands in sharp contrast with the approach taken in *Rashid*. In *Rashid*, the Court of Appeal glossed over this requirement altogether, simply stating that there '*plainly is a legitimate expectation in a claimant for asylum that the Secretary of State will apply his policy on asylum to the claim*'[106]. The differing approaches taken in the cases of *Unilever*, *Bancoult* and *Rashid* suggest that judges are able to reach a desired outcome by changing the emphasis placed on the clarity requirement and by manipulating concepts of unfairness and abuse of power.

4. Restructuring the Doctrine of Legitimate Expectations

The above discussion has highlighted some of the problems surrounding the doctrine of legitimate expectations, including the lack of certainty surrounding the ambit of the doctrine, the difficulties that arise from the courts' approach to conceptual borrowing and the lack of consistency in the way that the courts have applied the requirements of the doctrine.

[104] [2009] 1 AC 453, 495.
[105] Mark Elliott, Jason Varuhas, *Administrative Law: Text and Materials* (OUP 2017) 196.
[106] [2005] EWCA Civ 744 [25].

When seeking to restructure the doctrine of legitimate expectations, it is necessary to start with the normative rationale of the doctrine. This chapter has argued that the doctrine of legitimate expectations is concerned with protecting the trust reposed in the representations of public authorities. It is worth noting at this juncture that representations can be construed broadly to encompass both promises and policies[107]. These two types of representations engage the two limbs of the framework of good administration in different ways therefore they will be dealt with separately.

A. Promise Cases

The normative imperative of the protection of trust is evident in cases where 'an authority makes an express promise, assurance or undertaking to an individual or group of individuals that the authority will act or omit to act in some case' ('Promise Cases')[108]. As discussed above, the act of promising can be construed as an invitation to the promisee to trust and render herself vulnerable. This is exemplified by the case of *Coughlan*. Lord Woolf noted that the health authority's unequivocal promise of a 'home for life' was made for the authority's own purposes, namely to encourage the claimant to move from Newcourt Hospital to Mardon House. He also observed that this promise was repeated and confirmed to reassure the claimant. The claimant's agreement to move to Mardon House indicates that she relied and trusted the authority's assurance that she would have a permanent home.

The public authority's promise to the claimant and her agreement to move to Mardon House serve to illustrate the highly individualized nature of the claimant's interest, indicating that it falls squarely within the first limb of the framework of good

[107] Lord Woolf's judgment in *Coughlan* suggests that he considers policies to be a type of representation: [2001] QB 213 [57].
[108] Varuhas (n 3) 40.

administration. This point is also borne out by the courts' frequent use of private law terminology when justifying judicial intervention in Promise Cases. For instance, Lord Woolf MR observed in *Coughlan* that most substantive legitimate expectations are likely to be cases where the promise has the '*character of a contract*'[109]. He argued that the decision to resile from the promise of a home for a life was '*equivalent to a breach of contract in private law*'[110]. The courts in *Preston* and *MFK* have also held that a claimant is entitled to relief if the public authority is guilty of conduct equivalent to a breach of contract[111].

In order to protect this important individual interest, it is necessary to determine the requisite elements of a legitimate expectation claim. In formulating these elements, this chapter modifies certain key contractual and estoppel principles, as they help provide a clear framework for the doctrine of legitimate expectations. It is argued that the doctrine of legitimate expectations is triggered where there is a clear, unambiguous representation that is made to an individual (or an identifiable and finite class of individuals) who has either undertaken some form of obligation in exchange for that representation or relied upon the representation. The following sub-sections analyse these requirements in more detail.

(i) The Requirement of a Clear and Unambiguous Representation

To devise a consistent approach in this area, it is imperative that the courts begin every legitimate expectation inquiry by considering whether there is a clear and unambiguous representation. Part Three discussed some of the difficulties that the courts have had when applying this requirement. As demonstrated by the case of *Bancoult*, there is still some uncertainty surrounding what constitutes an 'unambiguous' representation. It could be

[109] [2001] QB 213 [59].
[110] [2001] QB 213 [86].
[111] *Preston* [1985] 2 WLR 836, 867 (per Lord Templeman); *MFK* [1990] 1 WLR 1545, 1569-1570 (per Bingham J); *Coughlan* [2001] QB 213, 253.

argued that the government's representation in *Bancoult* is ambiguous as the majority and the minority reached different conclusions as to what was entailed by that representation. Does the requirement of unambiguity mean that a representation should only be capable of being interpreted one way?

In order to answer this question, it may be instructive to consider how the doctrine of estoppel has addressed this issue. In *Low v Bouverie*[112], the court held that the requirement of unambiguity does not mean that the language used in the representation cannot be open to different interpretations, rather the language '*must be such as will be reasonably understood in a particular sense by the person to whom it is addressed'*[113]. Applying this test in the legitimate expectation context may facilitate a more structured enquiry. Thus, in *Bancoult*, the ability of the representation to be interpreted in two different ways would not necessarily be fatal to the claim. The court would have to consider whether the language used by the Foreign Secretary could be reasonably understood to mean that the exiled islanders would be allowed to return to their homeland.

It is also worth considering whether any limits should be imposed in relation to the number of people to whom the representation is made. In *Coughlan*, Lord Woolf suggested that most substantive legitimate expectations are likely to be cases where the expectation is confined to one person or a small group of people[114]. Similarly, in a later case, Laws LJ observed that while in theory, there may be no limit to the number of beneficiaries of a promise for the purpose of a substantive legitimate expectation, '*in reality it is likely to be small, if the court is to make the expectation good*'[115].

[112] [1891] 3 Ch 82.
[113] ibid 106.
[114] [2001] QB 213, 242.
[115] *Bhatt Murphy* [2008] EWCA Civ 755 [46].

There are a number of reasons for holding that only a representation made to a small group of people is capable of generating a substantive legitimate expectation. Where the class of representees is large, there may be concerns over ossification[116] and the burden on the public purse is likely to be greater[117]. On the other hand, it seems counterintuitive to reject a claim simply because the public authority's representation was made to a large group of people, who may all be adversely affected if the public authority is allowed to resile from it. Rather than limiting the beneficiaries to a small group of people, a better option may be to require that the representation be made to an identifiable and finite category of individuals. This criterion should not pose much difficulty in Promise Cases as most of these cases involve promises made to an identifiable person or group of individuals[118].

(ii) An Exchange of Obligation

Although the estoppel origins of the doctrine have been discussed in Part One, it is clear that other contractual principles have influenced the development of substantive legitimate expectations. Williams delves deeper into the parallels between contract law and legitimate expectations, labelling Promise Cases like *Coughlan* as 'almost contract' cases[119]. She argues that the almost-contract category of legitimate expectations reflects the '*combination of binding promise and exchange of obligation*'[120] that lies at the heart of contracts. She also states that *'it is the very essence of this kind of legitimate expectation that there will be almost-consideration on the part of the private entity*'[121]. Lord Carnwath

[116] Varuhas (n 3) 45.
[117] Williams (n 2) 643.
[118] See for instance *Coughlan* [2001] QB 213 (promise made to the residents of Newcourt Hospital); *Bibi* [2002] 1 WL 237 (promise made to two applicants and their families, who were refugees); *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32 (assurance made to members of the Maxi-Taxi Association).
[119] Williams (n 2) 640-648.
[120] ibid 645.
[121] ibid 642.

in *UPG* lends credence to Williams' suggestion that there needs to be some form of consideration on the individual's part in the Promise cases. In particular, he argued that the claimant should show that a representation or promise was given to an individual or group of individuals '*either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment*'[122].

It would be useful to apply this notion of consideration or exchange of obligation in the context of Promise Cases in particular. Resiling from a legitimate expectation where the applicant has undertaken some form of action in return for the authority's representation involves a particularly significant breach of trust on the authority's part. An applicant who is capable of satisfying this criterion possesses a particularly important individual interest under the first limb of the framework. This means that any argument that the public interest under the second limb will be unduly jeopardized by the enforcement of this expectation will be scrutinized extremely heavily.

An important question to consider at this juncture is whether the doctrine of legitimate expectations should emulate the approach taken in private law in relation to gratuitous promises. It is clear that not all promises and agreements are enforceable in private law. An informal promise is only enforceable if it is supported by consideration, namely if there is an exchange of obligation or a bargain between the parties. However, a promise may be enforced despite the absence of consideration via the doctrine of promissory estoppel, where the promisee has relied on the promise and it would be unconscionable for the promisor to resile from it. As Williams observes, if a similar approach were to be adopted in the context of legitimate expectations, an alternative form of consideration would be required. The asymmetry in power and the pre-existing

[122] [2016] 1 WLR 3383 [121].

obligations owed by the state to its citizens indicate that consideration may take a different form in public law than in standard contracts.

Coughlan and *Paponette v Attorney General of Trinidad and Tobago* demonstrate the type of '*mutuality of commitment'*[123] capable of constituting consideration in public law. In *Coughlan*, the public authority's promise of a 'home for life' was made in order to persuade the claimant to move to Mardon House without further objections. A similar sort of promise was made to the claimants in *Paponette*, who operated a taxi stand for which they did not have to pay a fee. They reluctantly agreed to move to another site, on the basis of the assurances by the government of Trinidad that management of the new site would eventually be handed over to them, and they would not have to seek permits or pay a fee. When the government introduced regulations that gave the Public Transport Service Corporation responsibility for managing the site and the authority to charge the claimants for their use of the site, the claimants alleged that their legitimate expectations had been frustrated. The Privy Council upheld the claimants' challenge. As in *Coughlan*, there was a promise from a public entity, which was made in return for specified action on the part of the claimants.

How should the courts approach cases in which the authority's promise is unsupported by the sort of mutuality of commitment that is present in *Coughlan* and *Paponette*? Williams argues that as gratuitous promises are not enforceable in private law, it seems difficult to justify the enforcement of a gratuitous promise to use public resources[124]. She notes with approval the manner in which Schiemann LJ protected a gratuitous promise in *Bibi*, namely by remitting the decision back to the primary decision-

[123] A phrase employed by Lord Carnwath in his discussion of both cases in *UPG*: see [2016] 1 WLR 3383, [111] and [120].
[124] Williams (n 2) 645.

maker and requiring them to take the applicant's legitimate expectation into account as a relevant consideration.

Williams' approach seems to strike the right balance between protecting the applicant's interest under the first limb of the framework and ensuring that the public interest in the control of public power is not jeopardized. It is necessary to offer some form of protection to an individual who is the recipient of a gratuitous promise, as this promise is still capable of inducing an individual to trust the public authority and to render herself more vulnerable to the authority's exercise of discretionary power. Excluding gratuitous promises from the ambit of the doctrine of legitimate expectations would place those who are the most vulnerable in society at an extreme disadvantage, as they will lack the necessary resources to demonstrate either mutuality of commitment or reliance. However, where it appears as though the public purse will be unduly strained by the substantive enforcement of such a promise, it may be necessary to consider alternative methods of protecting the applicant's interest, such as remitting the decision back to the initial decision-maker.

(iii) Reliance

In the absence of consideration or mutuality of commitment, an applicant should still be entitled to the protection of the doctrine of legitimate expectations, where she has relied on the public authority's representation. It should be noted that the emphasis here is on reliance, rather than detrimental reliance. Part Three of this chapter has already shown why it may be problematic to require a claimant to demonstrate detrimental reliance in the public law context. However, as discussed below, detrimental reliance may be particularly relevant in cases involving policy departures or policy changes, as they demonstrate the existence of acute trust issues that warrant the protection of the doctrine of legitimate expectations.

In order to satisfy the criterion of reliance, the applicant should at least have knowledge of the representation in question otherwise the meaning of 'reliance' and 'expectation' would be stretched beyond acceptable limits. Furthermore, the above discussed normative values of the doctrine, specifically the moral wrongfulness of breaking a promise and the potential betrayal of an individual's trust, are only really engaged in a situation where an individual is cognizant of a public authority's representation.

It is worth noting that in many cases '*the form of reliance will be…negative…*[as] *the claimant will have refrained from taking action*'[125] in reliance on the representation. As Schiemann LJ points out, the fact that a person '*has not changed his position after a promise has been made to him does not mean that he has not relied on the promise'*[126]. Williams, recognizing that it may be difficult in practice to require the claimant to prove that she has relied upon a representation, suggests that proof that an applicant positively did not know of the representation or that she would acted the same way regardless of the representation, ought to be sufficient to defeat the applicant's claim[127]. This approach towards the reliance requirement is eminently sensible and should be adopted as it takes into account the vulnerability of individual citizens.

B. Policy Cases

The previous sub-section has explored how various principles of contract and estoppel may be modified to protect the trust reposed by applicants in Promise Cases. Although a policy may be regarded as a '*form of public promise*'[128], there are some important differences between the Promise Cases discussed above and cases in which a public authority seeks to depart or change a policy that an individual has relied upon. Varuhas takes the view that a

[125] Williams (n 2) 643; *Bibi* [2002] 1 WLR 237 [53]-[55].
[126] *Bibi* ibid [53].
[127] Williams (n 2) 643.
[128] *Bhatt Murphy* [2008] EWCA Civ 755 [69] (per Sedley J).

distinction should be drawn between Promise Cases and cases involving policy departures and changes, as the latter are capable of being addressed under grounds of review such as the principle of consistency, rationality and relevance of considerations, and thus do not require the protection of the doctrine of legitimate expectations.

While Varuhas rightly points out that the majority of policy cases are capable of being addressed properly under existing grounds of review, it is argued that there are a small class of policy cases which may require the additional protection afforded by the doctrine of legitimate expectations as they engage the normative principle of the protection of trust. As Reynolds observes, it is possible for 'a *policy statement to incite…trust that* [the] *public official will stick to her word*'[129]. Moreover, societal disparities and the inherent inequality of the relationship between public authorities and citizens might mean that there will be some individuals who will have no recourse but to simply place their trust in a policy statement as they are not in the position to demonstrate the existence of a promise.

These small category of policy cases also engage the two limbs of the framework of good administration in important ways. On one hand, the proper exercise of public power requires public authorities to have the discretion to change and depart from policies as needed in the public interest. On the other hand, as argued below, the presence of acute trust issues in certain policy cases can help distinguish an applicant's claim from the general public and individualize her interest. Thus, the interrelation of the two limbs of the framework of good administration is particularly highlighted in policy cases. To address these complexities, the following sub-sections explore the cases of policy departures and

[129] Reynolds (n 2) 348.

policy changes, and consider how the above requirements of the doctrine of legitimate expectations should be applied in such cases.

(i) Policy Departure Cases

Part Three has shown that the irrationality ground of review and/or the principle of consistency are capable of addressing cases in which a public authority has failed to apply the proper policy to the claimant's case. As such, the doctrine of legitimate expectations will only be triggered where the public authority's departure from a policy raises acute trust issues that warrant the additional protection of the doctrine of legitimate expectations. The requirements of a clear, unambiguous representation and reliance helps the court identify the presence of acute trust issues. The former criterion is easily satisfied by the applicant demonstrating the existence of a clear and unambiguous policy statement that is made to an identifiable and finite category of individuals. The requirement that the representation be made to an identifiable and finite category of individuals serves as a delimiting criterion, as it helps ensure that the doctrine of legitimate expectations is confined to those individuals who are likely to have reposed trust in the authority's representations and whose claims are distinguishable from the general public.

However, the reliance criterion requires further analysis. According to Reynolds, the doctrine of legitimate expectations should be triggered where an applicant has knowledge of the challenged policy. He takes the view that the doctrine of legitimate expectations is concerned with the protection of specific trust, namely the '*trust which an individual reposes in a decision-maker, pursuant to some kind of representation, to do what the decision-maker has indicated that it will do'*[130]. Reynolds argues that an individual who had knowledge of a challenged policy may be entitled to greater protection than an

[130] Reynolds (n 2) 343.

individual who was unaware of the policy, '*due to the specific trust which was induced and reposed in the policy maker*'[131].

While Reynolds rightly recognizes that an individual cannot repose specific trust in a policy statement of which she is unaware, he does not explain how it is possible to infer from an applicant's knowledge of a policy that specific trust has been induced and reposed in the policy maker. Reynolds claims that the concept of specific trust is capable of preventing the doctrine of legitimate expectations from becoming '*uselessly overextended'*[132] yet inferring specific trust simply from an individual's knowledge of a policy may lead to this very danger.

An applicant's knowledge of a policy that the public authority has failed to apply does not in and of itself raise any acute issues of trust that warrant the additional protection of the doctrine of legitimate. In order to trigger the additional protection afforded by the doctrine, the applicant must have relied on the policy and should be able to show that the public authority had induced her to believe that the relevant policy would be followed. These additional requirements highlight the potential severity of breaching the applicant's trust and they also indicate that the public authority's failure to apply the appropriate policy engages more than the principle of equal treatment. Imposing these additional requirements in cases involving a departure in policy will help prevent the doctrine of legitimate expectations from being extended beyond acceptable bounds. At the same, it enables the doctrine of legitimate expectations to respond to potentially serious breaches of trust in cases that do not fit the promise paradigm.

[131] ibid 348.
[132] ibid 343.

It is worth recalling at this juncture, Peter Gibson LJ's observations in *Begbie*, in which he warned against understating the significance of reliance and stated that it would be '*very much the exception, rather than the rule, that detrimental reliance will not be present when the court finds unfairness in the defeating of a legitimate expectation*'[133]. He also cited a passage from Wade and Forsyth, which asserted that detrimental reliance may be relevant in two situations:

> [F]*irst, it might provide evidence of the existence or extent of an expectation. In that sense it can be a consideration to be taken into account in deciding whether a person was in fact led to believe that the authority would be bound by the representations. Second, detrimental reliance may be relevant to the decision of the authority whether to revoke a representation.*[134]

Wade and Forsyth's observations are particularly relevant in the context of cases involving policy departures. Detrimental reliance may help distinguish the applicant's position from the public at large, and it may be used as evidence of the applicant's expectation. The presence of detrimental reliance indicates that the individual has reposed trust in the authority's representation, and has been adversely affected as a result of that representation. As Wade and Forsyth observe, it might show that the applicant was induced to believe that the authority would abide by its representation. Thus, the presence of detrimental reliance will help the applicant show that she has relied on the policy and that she was induced to believe that the authority would apply the relevant policy to her case.

An example of a case that meets the criteria set out above and which demonstrates how a public authority's failure to apply an existing policy may raise key issues surrounding the protection of trust is *Khan*. The claimant, a Pakistani citizen domiciled in the UK, wished to adopt his brother's child from Pakistan and sought advice from the

[133] [2000] 1 WLR 1115, 1124.
[134] ibid.

Dalston Advice Bureau on the adoption procedure. He was given a letter issued by the Home Office, explaining the system. The letter stated that:

> *There is no provision in the immigration rules for a child to be brought to the United Kingdom for adoption. The Home Secretary, may, however, exercise his discretion and exceptionally allow a child to be brought here for adoption where he is satisfied that the intention to adopt under United Kingdom law is genuine and not merely a device for gaining entry; that the child's welfare in this country is assured; and that the court here is likely to grant an adoption order. It is also necessary for one of the intending adopters to be domiciled here*.[135]

The letter also contained details of the immigration procedure, which due to an administrative error, was not implemented in the claimant's case. Thus, although the claimant took the necessary steps set out in the letter and applied for a temporary entry clearance for the child, the entry clearance was denied. The claimant was informed that the Secretary of State was not satisfied that '*serious and compelling family or other considerations make exclusion* [of the child from the UK] *undesirable*'[136]. It is worth noting that this criterion was not mentioned anywhere in the letter that the claimant received. The claimant sought judicial review of the decision to reject the entry clearance.

The above shows that the letter constitutes a clear and unambiguous representation made to an identifiable and finite category of people, namely individuals seeking advice on the adoption procedure for children who are being brought to the UK. There is evidence of the claimant relying on the letter from the Home Office, as he followed the necessary steps and applied for a temporary entry clearance for the child. Moreover, Parker LJ noted that if the relevant policy required the Secretary of State to be satisfied that the natural parents were incapable of looking after the child, then '*the "guidance" given in the Home Office letter* [was] *grossly misleading*'[137], as no mention was made of this criterion. He

[135] [1984] 1 WLR 1337, 1339.
[136] ibid 1342.
[137] ibid 1343.

stated that the Home Office letter should be redrafted if this criterion were to be adopted in subsequent cases, to prevent '*false hopes...* [from being] *raised in those who may have a deep emotional need to adopt'*[138]. The mention of 'false hope' suggests that it was highly possible that the letter induced the claimant to believe that the temporary entry clearance would be granted if all four criteria set out in the letter were satisfied. This coupled with the claimant's reliance indicate that there are sufficiently serious issues surrounding trust, which justify the application of the doctrine of legitimate expectations in this case. Indeed, Parker LJ concluded that the '*Home Office letter afforded the applicant a reasonable expectation that the procedures it set out…would be followed*'[139].

It is clear from the above that there is a small class of policy departure cases which may merit the additional protection offered by the doctrine of legitimate expectations, as they raise acute issues surrounding the protection of trust, due to the claimant's reliance and because the applicant has been induced to believe that the relevant policy would be followed.

(ii) Policy Change Cases

It should be noted at the outset that there are strong normative reasons which militate against binding a public authority to its previous policy. For instance, in *Hughes v Department of Health and Social Security*[140], Lord Diplock held that the government's liberty to make changes in policies '*is something that is inherent in our constitutional form of government*'[141]. Lord Diplock further observed that where a change in administrative

[138] ibid 1358.
[139] ibid 1347. The decision was split 2-1 (Watkins LJ dissenting). Dunn LJ decided in favour of the claimant, but on different grounds.
[140] [1985] AC 776.
[141] ibid 788.

policy has been communicated in a departmental circular, '*any reasonable expectations that may have been aroused…by any previous circular are destroyed'*[142].

Laws LJ in *Bhatt Murphy* similarly highlights the importance of ensuring that public authorities are not bound by previous policies. He held that a public authority will not often be legally required to maintain a policy '*which on reasonable grounds it has chosen to alter or abandon'*[143], as '[p]*ublic authorities typically…enjoy wide discretions which it is their duty to exercise in the public interest*'[144]. This suggests that the ability of public authorities to alter policies may facilitate the protection of the public interest under the second limb of the framework of good administration. It is imperative that public authorities have the freedom to promulgate and tailor their policies in accordance with the changing needs of the general public. Varuhas warns that curtailing this freedom would ossify public administration and '*utterly undermine administrative pursuit of the public good*'[145]. He states that if the adoption of a policy in and of itself were capable of giving rise to enforceable expectations, public authorities may be discouraged from setting policies for fear that such policies may bind their hands in the future.

Notwithstanding these issues with binding public authorities to their former policies, there is a small class of cases involving policy changes which may warrant additional protection via the doctrine of legitimate expectations. While it is generally true that '*nobody has a legitimate expectation that policy will not change*'[146], individuals who have relied on a policy and whose applications, claims or transactions are in progress when the policy is changed ('Pipeline Cases'), can and should be, distinguished from the public

[142] ibid.
[143] [2008] EWCA Civ 755 [41].
[144] ibid.
[145] Varuhas (n 3) 21.
[146] *Hamble Fisheries* [1995] 1 CMLR 533, 557 (per Sedley J).

at large. The normative imperative of the protection of trust is strengthened in such cases by the individuals' reliance on the former policy and by the impact that a change of policy might have on their interests.

Forsyth argues that the crucial issue in cases involving policy changes is whether '*appropriate transitional arrangements have been made to protect adequately the expectations of those relying on the earlier policy*'[147]. Indeed, the transitional provisions devised by authorities to accommodate changes in policy, will likely encompass individuals in Pipeline Cases. Thus, when analyzing the relevant transitional arrangements in *Hamble Fisheries,* Sedley J held that '*the two pipeline exceptions to the* [new] *policy'*[148] were '*classes which might very well have been held to possess an expectation which the law would protect – a legitimate expectation*'[149]. The doctrine of legitimate expectations may be triggered by the absence of adequate transitional arrangements. In this sense, legitimate expectations might, as Williams argues, operate as 'court ordered' transitional provisions that help balance '*the need for the change in policy against the impact that this will have on those in the pipeline by encouraging some kind of phased change*'[150].

A potential objection against invoking the doctrine of legitimate expectations in Pipeline Cases is that it may be considered to encroach too heavily upon a public authority's discretion to alter policies. One should not however exaggerate the importance of this concern. Public authorities often formulate transitional provisions to accommodate

[147] Christopher Forsyth, '*Wednesbury* Protection of Substantive Legitimate Expectations' [1997] PL 375, 376.
[148] [1995] 1 CMLR 533, 556.
[149] ibid 557.
[150] Williams (n 2). Legitimate expectations as court-ordered transitional provisions fall within the second category of Williams' framework, as it involves the court's control of the use of policies by public authorities.

changes in policies and to protect individuals who will be affected by such changes[151]. Failure to do so may leave them open to a rationality challenge[152]. It is unclear why requiring a public authority to include appropriate transitional provisions in its new policy is deemed an acceptable restraint upon its discretionary freedom, while protecting the legitimate expectations of individuals caught in the pipeline is not, particularly when these expectations can be protected procedurally[153]. Thus, the reviewing court may opt for the less intrusive mode of procedural protection, if there is a legitimate danger of the authority's discretionary freedom being jeopardized.

Moreover, the case law demonstrates that an applicant's claim is unlikely to succeed if there are already transitional arrangements in place[154]. It is likely that a legitimate expectation claim will only succeed where there is an absence of transitional provisions, where the provisions are markedly deficient or where the provisions omit a class of individuals whose applications are in progress. This suggests that concerns of the doctrine of legitimate expectations severely inhibiting the discretionary freedom of public authorities are overinflated.

The second objection that might be raised is that existing grounds of review are capable of addressing any unfairness that arises in these cases, thus removing the need for the doctrine of legitimate expectations. Varuhas states that where a policy change prejudices an individual's interests under a prior policy, the individual may seek review under grounds such as rationality, relevance of considerations, and the no-fettering principle. In discussing the *Hamble Fisheries* case, he states that the question of whether a

[151] See for instance, the transitional arrangements in: *Hamble Fisheries* [1995] 1 CMLR 533; *Hargeaves* [1997] 1 WLR 906; *Bhatt Murphy* [2008] EWCA Civ 755, *R (Abbassi) v Secretary of State for the Home Department* [2011] EWCA Civ 844.
[152] Varuhas (n 3) 27.
[153] Williams and Forsyth have suggested that it is possible to procedurally protect the expectations of individuals caught in the pipeline: Williams (n 2) 658; Forsyth (n 147) 381-383.
[154] Williams (n 2) 657. See *Hamble Fisheries* [1995] 1 CMLR 533; *Bhatt Murphy* [2008] EWCA Civ 755.

new policy should contain transitional provisions preserving the claimant's interests is a question that '*goes to the substantive fairness of the transitional arrangements*'[155] and has '*nothing to do with expectations formed on the basis of the prior policy*'[156]. Rather, '*it is a bare rationality challenge to policy design'*[157].

As mentioned above, 'substantive fairness' is not a distinct legal criterion. It offers little insight as to the specific normative concern that is at work in pipeline cases, namely the protection of the trust. It is therefore a mistake to hold that transitional arrangements have '*nothing to do with expectations formed on the basis of the prior policy*'. Transitional arrangements play an important role in protecting the position of those who have relied on the former policy. In this sense, they are key to the substantive protection of legitimate expectations. It is reasonable for an individual with an application that is still in progress, to expect either that her application will be determined in accordance with the same policy or that she will be exempted from the new policy. The individual's trust in the public authority's representation may be broken if her expectation is not adequately protected.

The doctrine of legitimate expectations also plays a vital role in Pipeline Cases as it affords greater protection to the claimant's interest than is provided under existing grounds of review and may thus enhance the protection of individual interests under the first limb of the framework of good administration. Once a legitimate expectation is established, the court is tasked with determining whether there are any public interest considerations that justify departure from this expectation. This more claimant-centred analysis stands in sharp contrast with rationality review of a change in policy, in which the

[155] Varuhas (n 3) 23.
[156] ibid.
[157] ibid.

court simply has to assess whether the transitional provisions or the omission of such provisions is rational.

Having established why Pipeline Cases merit the additional protection provided by the doctrine of legitimate expectations, it is necessary to consider how an applicant in a Pipeline case may meet the criteria of a legitimate expectations claim. The claimant will first have to demonstrate the existence of a clear and unambiguous representation that is made to an identifiable and finite category of individuals. This requirement helps minimize the dangers of ossification that were discussed above. Williams suggests that the risks of ossification may be further ameliorated in Pipeline Cases if the duration of the expectation or the requirement to maintain the old policy is temporary in nature, as the new policy can still come on stream behind those individuals who are exiting the system under the old policy[158].

It is also necessary for the claimant to have relied on the old policy, which forms the basis of her legitimate expectation. To that end, detrimental reliance may be of relevance as the adverse impact faced by an applicant who is caught in the pipeline due to a policy change, may strengthen her claim that the authority's former policy should be applied in her case.

C. Summary

The doctrine of legitimate expectations is triggered where there is a clear, unambiguous representation that is made to an individual (or an identifiable and finite class of individuals) who has either relied on the representation or who has undertaken some form of obligation in exchange for that representation. The above discussion has considered how the requirements of a clear, unambiguous representation, consideration and reliance may

[158] Williams (n 2) 656-659.

help delimit the scope of the doctrine of legitimate expectations. It has also shown how these requirements play an important role in policy cases by helping to identify the presence of acute trust issues that justify the application of the doctrine of legitimate expectations. Part Five considers how the courts may balance the interests of an applicant asserting a legitimate expectation with that of the public under the framework of good administration.

5. Enforcing Legitimate Expectations: Balancing the Interests under the Framework of Good Administration

The above-discussed elements of a legitimate expectation claim, specifically the requirements of a clear, unambiguous representation, reliance and/or consideration, help shape and individualize the applicant's interest by distinguishing her claim from the general public. An applicant who is able to satisfy these elements possesses an important individual interest that requires proper protection under the first limb of the framework of good administration. As argued above, the situation is more complex in policy cases as the public interest in the control of public power also requires that public authorities have the freedom to depart and alter their policies in the public interest.

To determine whether there are any concerns militating against the fulfilment of a legitimate expectation, the court should closely scrutinize the authority's justifications for departing from the expectation. The Privy Council in *Paponette* held that once the applicant has discharged the initial burden of establishing the necessary ingredients of a legitimate expectation claim, '*the onus shifts to the authority to justify the frustration of the legitimate expectation*'[159]. The court warned that if the authority failed to put material

[159] [2012] 1 AC 1, 14.

before the court to justify its frustration of the expectation, it would run the risk of the court concluding that there was no overriding public interest to defeat the applicant's claim.

In accordance with the Privy Council's approach in *Paponette*, it is argued that when examining whether an authority's departure from a legitimate expectation is justified, the court should first determine whether there is any evidence to show that there is a real threat to the public interest under the second limb of the framework of good administration. For instance, where an authority alleges that resource considerations necessitated its frustration of an expectation, the court should refrain from automatically assuming that enforcing the expectation will result in an unjustifiable drain upon the public purse. Rather, the court should consider whether the authority has shown that upholding the applicant's legitimate expectation will actually entail the diversion of funds from an important public service. This point is examined in more detail in Chapters 4 and 6.

Indeed, the following chapter sets out in detail the proper approach that the courts should take when assessing competing interests and evaluating public authorities' justifications. At this juncture however, it is worth briefly considering the type of factors that may either justify the frustration of a legitimate expectation or impel stronger protection of one. The case law indicates that the frustration of a legitimate expectation will likely be justified where the enforcement of the expectation entails a threat to national security[160], unduly fetters a public authority's freedom to promulgate and change policy[161], or where it requires the court to delve too deeply into the macro-political or macro-economic field[162].

[160] The *GCHQ* case [1985] AC 374.
[161] *Bhatt Murphy* [2008] EWCA Civ 755.
[162] *Begbie* [2000] 1 WLR 1115.

Conversely, the courts are more likely to hold that the departure from a legitimate expectation is unjustified where the authority's assurance is '*pressing and focussed*'[163] in nature, where the applicant has relied on the assurance to her detriment[164], or where there are no '*wide-ranging issues of general policy…with multi-layered effects*'[165]. There is additionally, as discussed above, a stronger normative imperative to protect an expectation where there is some form of exchange of obligation or where the authority has specifically induced the applicant to rely on its representation.

The above factors may help a court determine in a particular case whether public interest considerations under the second limb outweigh the need to protect the claimant's interest under the first limb of the framework of good administration. However, rather than leaving claimants completely unprotected in cases where public interest considerations prevent the substantive enforcement of an expectation, the courts could choose to grant other remedial orders that are capable of reconciling, to a certain extent, the interests under both limbs of the framework of good administration. For instance, Williams suggests that where gratuitous promises are concerned, the reviewing court could, as in the case of *Bibi*, remit the decision back to the initial decision-maker with the instruction to take the applicant's legitimate expectation into account[166]. Similarly, the court could choose to protect an expectation procedurally. For instance, where a public authority has already formulated transitional provisions and an individual is arguing that she should be included in these provisions, the court may hold that the individual should be entitled to make representations to the relevant authority as to why she should be included.

[163] *Bhatt Murphy* [2008] EWCA Civ 755 [46].
[164] *Begbie* [2000] 1 WLR 1115, 1124 (per Peter Gibson J).
[165] *Begbie* ibid 1131 (per Laws LJ).
[166] Williams (n 2) 646.

Relatedly, the court could also consider awarding damages in certain legitimate expectation cases. In her discussion of almost-contractual legitimate expectations, Williams notes that in some instances, expectation damages may be more economically efficient than other methods of protecting an expectation[167]. An award of damages is also capable of addressing the harm suffered by the applicant, and in that sense, may help protect and vindicate the trust that the applicant has reposed in the authority's representations. At the same time, an award of damages places limited constraints upon a public authority's discretionary freedom. An award of damages may be particularly useful in relation to ultra vires representations, insofar as it prevents an authority from being bound to an unlawful representation, while recognizing that an individual applicant should not have to bear the financial consequences of the authority's mistake. This point is examined in more detail in the final chapter of this thesis.

6. Conclusion

Legitimate expectations constitute important individual interests under the first limb of the framework of good administration and this chapter has sought to explore how the protection of these interests may be enhanced through the use of judicious conceptual borrowing. To that end, this chapter has returned to the conceptual roots of the doctrine of legitimate expectations and analyzed how they have impacted the doctrine's evolution. It has also explored the normative rationale of the doctrine, namely the protection of trust reposed in the representations of public authorities.

This chapter has identified some of the problems surrounding the legitimate expectation case law, including the lack of certainty surrounding the ambit of the doctrine, the improper approaches adopted in relation to conceptual borrowing and a lack of consistent application

[167] ibid 645.

of the requirements of the doctrine. To rectify these problems, this chapter explored how private law principles of contract and estoppel may be modified when restructuring the doctrine of legitimate expectations. It argues that the doctrine is triggered where there is a clear, unambiguous representation that is made to an individual (or an identifiable and finite class of individuals) who has either relied on the representation or who has undertaken some form of obligation in exchange for that representation. Finally, this chapter has examined how the courts should strike a proper balance between the interests of an applicant asserting a legitimate expectation with that of the public under the framework of good administration.

CHAPTER FOUR

CONTROLLING PUBLIC POWER: A MODIFIED FIDUCIARY APPROACH

The previous chapter examined how private law principles of contract and estoppel may be utilized to tailor the protection of individual interests in judicial review. This chapter turns its attention to the collective interest of the public in controlling public power, and it explores the possibility of using fiduciary principles to enhance the protection afforded to this important interest. Specifically, this chapter explores how a modified fiduciary approach is capable of ensuring that those tasked with discretionary power are held to high standards of conduct, and how such an approach will help improve the decision-making process of public bodies and enhance the culture of justification in judicial review. The final part of this chapter will consider how certain key cases would be analysed under the proposed approach.

1. Key Fiduciary Theories and Case Law

In order to determine whether it is appropriate to apply fiduciary principles in judicial review, it is first important to understand how these principles operate in private law. The following sections will explore seminal theories and cases in fiduciary law concerning the fiduciary relationship, fiduciary duties and the nature and purpose of the fiduciary obligation.

A. Features of the Fiduciary Relationship: Differing Approaches

Before considering the duties imposed upon fiduciaries and the nature of the fiduciary obligation, it is worth examining whether it is possible to provide a general definition of a

fiduciary relationship. The following sub-sections discuss three different approaches that courts and commentators have taken in relation to this issue.

(i) The category-based approach

There are settled categories of relationships which are presumed to be fiduciary in nature, such as the relationships between trustees and beneficiaries, directors and companies, solicitors and clients, agent and principals and partners[1]. The courts have traditionally referred to these categories when determining whether an individual(s) should be subject to fiduciary duties. Indeed, it has been argued that fiduciary relationships have to be defined class by class, and that it is fruitless to search for a general definition of the fiduciary relationship[2]. The danger however with adopting a strict category-based approach is that it may lead to an overly rigid approach which prevents the recognition of fiduciary duties in situations which require the protection provided by fiduciary law. As a result, judges have cautioned against adopting a rigid approach[3], and instead have held that the categories of fiduciary relationships are not closed[4].

(ii) Ad-Hoc Fiduciary Relationships: the UK Approach

This desire to adopt a more flexible approach might explain why the UK courts have eschewed outlining the general characteristics of the fiduciary relationship[5]. Where a relationship does not fall into the settled categories of fiduciary relationship, the courts will consider whether the relevant party has undertaken to act or assumed responsibility[6] on behalf of another party. Some attempt at a definition of a fiduciary was provided by Millett LJ in *Bristol & West Building Society v Mothew*. He held that a fiduciary is '*someone who*

[1] John McGhee (ed) *Snell's Equity* (33rd edn Sweet & Maxwell 2015) 7-004.
[2] L.S. Sealy, 'Fiduciary Relationships' [1962] CLJ 69, 78. See also Brennan J's observation in *Breen v Williams* [1996] CLR 71, 92.
[3] *Tate v Williamson* (1866-1867) L.R. 2 Ch. App 55, 61; *Lloyds Bank Ltd v Bundy* [1978] Q.B. 326, 341.
[4] *Tate* ibid; *English v Dedham Vale Properties* [1978] 1 All ER 382, 398; Snell's Equity (n 1), 7-005.
[5] *Lloyds Bank Ltd v Bundy* [1978] Q.B. 326; *Vivendi SA V Richards* [2013] EWHC 3006 [138].
[6] *Vivendi* ibid [per Sales LJ].

has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence'[7]. The courts have however been coy in specifying exactly the type of circumstances which give rise to a relationship of trust and confidence, holding that fiduciary relationships have been held to exist in '*widely differing circumstances'*[8] and that it is '*neither feasible nor desirable to attempt closely to define the relationship, or its characteristics'*[9].

(iii) A General Account of the Fiduciary Relationship: Wilson J's Framework

The Canadian courts however have made a valiant attempt at describing the general characteristics of the fiduciary relationship. In *Frame v Smith*[10], Wilson J notes that an extension of fiduciary obligations to new "categories" of relationship presupposes the existence of an underlying principle which governs the imposition of the fiduciary obligation. She holds that fiduciary relationships share three general characteristics:

> *(1) The fiduciary has scope for the exercise of some discretion or power.*
> *(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.*
> *(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.*[11]

Unfortunately, Wilson J's framework is not free from problems. She fails to explore the interrelation between vulnerability and discretion, or to consider whether these concepts are imbued with special significance in the context of the fiduciary relationship. Fox-Decent's example of a motorist who approaches a pedestrian at a crosswalk highlights the weakness of Wilson J's framework[12]. He notes that this scenario fits within Wilson J's rough and ready guide, as the motorist arguably exercises unilateral discretionary power

[7] [1998] Ch 1, 18.
[8] *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326, 341 (per Sir Eric Sachs).
[9] ibid.
[10] [1987] 2 SCR 99.
[11] ibid para 60. Wilson J gave the sole dissenting judgment in this case, but the majority did not disapprove of her definition of the fiduciary relationship.
[12] Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (OUP 2011) 96-97.

over the pedestrian's interests, and the pedestrian can be said to be vulnerable to this exercise of power. However, it would be farcical to think that the motorist and the pedestrian are in a fiduciary relationship, or to argue that fiduciary duties should be imposed upon the motorist. Wilson J's conception of the fiduciary relationship is formulated at such a broad and abstract level that it could be applied to almost any scenario in which an individual exercises unilateral discretionary power over another.

The criticism levelled against Wilson J's framework has not however deterred others from searching for a general account of the fiduciary relationship. Where these theories differ from Wilson J's model, is in the level of examination spent dissecting the values underpinning the fiduciary relationship, and the ways in which these values interrelate. Much attention is spent on examining what Leib et al term as the three indicia which mark the fiduciary relationship, namely vulnerability, discretion and trust[13].

As mentioned above, Wilson J does not ascribe any particular meaning to vulnerability. It is therefore difficult to understand from her account, how powerful and wealthy clients can properly be described as being vulnerable. Fox-Decent on the other hand, locates the beneficiary's vulnerability in her lack of capacity to control or exercise the discretionary power to which she is subject[14]. Fox-Decent states that the beneficiary's inability to control the fiduciary's power explains why the fiduciary's office is one of trust. He argues that the moral basis of the fiduciary principle is premised upon a presumption of trust: when a fiduciary exercises irresistible discretionary power, she does so on the basis of the beneficiary's trust[15]. Fox-Decent's account of the fiduciary principle being based upon a presumption of trust is persuasive for it explains how fiduciary obligations can be

[13] Ethan J. Leib, David L. Ponet, and Michael Serota, 'A Fiduciary Theory of Judging' [2013] 101 California Law Review 699, 706.
[14] Fox-Decent (n 12) 102-104.
[15] See also Leib et al (n 13) 707.

imposed in cases where there is no prior consent, and it does not depend on the beneficiary actually doing something to repose trust in the fiduciary.

It is possible to argue that all fiduciary relationships currently recognized under UK law possess the three indicia of trust, vulnerability and discretion discussed above. However, even with the modifications made to Wilson J's framework, the general characteristics of the fiduciary relationships are broad and are easily applicable to a wide-range of relationships. If the UK courts were to adopt this approach, it might result in the courts holding for instance, that the relationships between parent and child, as well as doctor and patient, are fiduciary in nature. Both these relationships are currently recognized as being fiduciary in nature under Canadian law[16], but not under Australian and UK law.

It is beyond the scope of this chapter to examine whether the UK should adopt this approach to fiduciary law. However, the Canadian courts' willingness to embrace this broader approach might explain why most theorists who seek to apply the fiduciary principle in the public law context tend to focus on general accounts of the fiduciary relationship. The three indicia of trust, vulnerability and discretion are easily transportable across private law and public law. As Part Two will go on to show, it also explains why most public law fiduciary theories originate from the US and Canadian jurisdictions, rather than from the UK.

B. Fiduciary Duties

Having explored the different approaches to defining the fiduciary relationship, this section turns its attention to the duties imposed upon fiduciaries. As mentioned above, fiduciaries often hold significant amount of discretionary power over their beneficiaries' interests. The courts have therefore employed a range of techniques to control the exercise

[16] *Norberg v Wynrib* [1992] 2 SCR 226.

of discretionary power by fiduciaries, some of which appear to have a clear public law analogue. For instance, the fraud on a power/proper purposes doctrine, which requires that powers conferred on a fiduciary be used only for the purposes for which they were conferred[17], bears some similarities to the improper purposes doctrine in judicial review. The improper purposes doctrine similarly permits judicial intervention where discretionary power has been exercised for an extraneous purpose. Furthermore, when determining whether or not to set aside decisions made by fiduciaries for defects in the decision-making process, the courts often adopt language similar to that in judicial review. Thus, in the pension fund case of *Harris v Lord Shuttleworth and Others*[18], Glidewell J held that:

> (*a) the trustees must ask themselves the correct questions; (b) they must direct themselves correctly in law…(c) they must not arrive at a perverse decision i.e., a decision at which no reasonable body of trustees could arrive, and they must take into account all relevant but no irrelevant factors.*[19]

As Carnwath J notes, '[t]*o a public lawyer, those words are virtually identical to the so-called Wednesbury principles'*[20]. Similarly, in *Edge v Pensions Ombudsman*[21], Chadwick LJ cites Lord Greene MR's observations in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [22] as to the limits of the court's interference with a public authority's exercise of discretion, stating that it is no coincidence that courts considering the exercise of discretionary power by those entrusted with such powers '*should reach similar and consistent conclusions; and should express those conclusions in much the same language'*[23].

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[17] *Spackman v Evans* (1868) LR 3 HL 171, 189-90; *Bishopsgate Investment Management Ltd (in liquidation) v Maxwell (No 2)* [1994] 1 All ER 261; Richard C Nolan, 'Controlling Fiduciary Power' [2009] 68 CLJ 293, 297.
[18] [1994] I.C.R 991 (CA).
[19] ibid 999.
[20] *Wild v Pensions Ombudsman* [1996] Pens LR 275 [24].
[21] [2000] Ch 602, 628-629.
[22] [1948] 1 KB 223, 228-231.
[23][2000] Ch 602, 628.

The similarities between the proper purpose doctrine and the controls placed upon the decision-making process of fiduciaries, with the illegality and irrationality grounds of review in administrative law, suggests that there has been '*extensive cross-fertilisation between these areas*'[24]. While this cross-fertilization suggests that it is theoretically possible for fiduciary duties to be applied in the public law context, these similarities cannot in and of themselves supply the relevant normative justification for imposing fiduciary duties on public officials. Furthermore, these very similarities might suggest that fiduciary principles offer little by way of innovation to the way that the improper purpose and irrelevant/relevant considerations grounds of review function in judicial review[25].

The focus of this section is on the duties that are typically characterized as being fiduciary in nature and which do not appear to have a public law counterpart. At the outset, it should be noted that there is an ongoing debate in fiduciary law concerning the distinction between fiduciary and non-fiduciary duties. Millett LJ famously held in *Mothew* that the expression 'fiduciary duty' is *'properly confined to those duties which are peculiar to fiduciaries'*[26] and which attract remedies which are '*peculiar to the equitable jurisdiction and are primarily restitutionary…rather than compensatory'*[27]. This distinction appears to be premised on the differing remedial consequences which follow a breach of a fiduciary duty, as well as the proposition that there are duties which apply exclusively to fiduciaries.

The approach taken in *Mothew* sparked much debate as to the proper status of duties of care and skill, which the Court of Appeal held were not peculiarly fiduciary duties. Getzler

[24] Geraint W. Thomas, *Thomas on Powers* (OUP 2012), para [1.61].
[25] An interesting issue to be explored is whether fiduciary law has benefited from the cross-fertilization of concepts in public law, or whether it should reject any importation of public law concepts into fiduciary law. Unfortunately, due to space constraints, this issue cannot be adequately answered within this chapter. The following chapter does however consider whether the law of contractual discretion may benefit from a similar cross-fertilization of concepts between contract and public law.
[26] [1998] Ch 1, 16.
[27] ibid 18.

argues that the approach in *Mothew* effectively sanctions a fiduciary's negligence, by subjecting the equitable duty of care to the less stringent procedural, evidential and remedial rules applicable to tort and contract law rather than the special rules appropriate to the fiduciary obligation of loyalty.[28] It is beyond the scope of this thesis to adjudge the merits of these opposing views on the appropriate status of the duty of care. As *Mothew* has not been overruled and has been approved in obiter dictum by Lord Walker in *Hilton v Barker Booth & Eastwood*[29], this section's examination of fiduciary duties will not include duties of care and skill.

In his consideration of 'peculiarly' fiduciary duties, Millett LJ in *Mothew* states that the core fiduciary obligation of loyalty encompasses several facets which require the fiduciary to act in good faith and to refrain from profiting from her trust (the 'no-profit' principle), placing herself in a position where her duty and interest may conflict (the 'no-conflict' principle)[30]. This section will consider these principles briefly, as well as the duty to act in the best interests of the beneficiary, which is often characterized as a fiduciary duty[31].

(i) No-conflict and No-Profit Principles

[28] Joshua Getzler, 'Duty of Care' in Peter Birks and Arianna Pretto (eds) *Breach of Trust* (Hart Publishing 2002) 41, 41.
[29] [2005] 1 WLR 567, 575.
[30] Millett LJ also mentions as another facet of the obligation of fiduciary loyalty, the principle that the fiduciary has to refrain from acting in her own interests or that of a third party without the beneficiary's consent. This principle is also called the 'self-dealing' principle and is often considered to be an application of the no-profit principle, see: Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing 2010) 126-127; *Re Thompson's Settlement* [1986] 1 Ch 99, 115. The self-dealing principle will not be considered in this section due to space constraints and because it can be regarded as a facet of the no-profit principle.
[31] *Norberg and Weinrib* [1992] 2 SCR 226, *Cowan v Scargill* [1985] Ch 270.

There is general academic consensus that the no-conflict and no-profit principles form the crux of the fiduciary obligation of loyalty[32]. Lord Herschell in *Bray v Ford*[33] summarizes the no-conflict and no-profit principles as follows:

> *[A] person in a fiduciary position…is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict*[34]

According to Conaglen, the no-conflict and no-profit principles provide a prophylactic form of protection for non-fiduciary duties[35]. In the field of medicine, the term 'prophylactic' refers to a measure taken to maintain health and prevent disease. Similarly, in the context of fiduciary law, the no-conflict and no-profit principles are designed to '*prevent the disease of temptation in the fiduciary*'[36]. In *Bray* itself, Lord Herschell held that the no-conflict principle was founded on the consideration '*that human nature being what it is, there is danger…of the person holding a fiduciary position being swayed by interest, rather than by duty*'[37]. The prophylactic quality of these principles helps safeguard and enhance the decision-making process of fiduciaries. Smith notes that it is impossible for a person exercising judgment in a conflict situation to be certain that they have excluded extraneous considerations, and he provides the example of a professor who refrains from marking her child's examination script, as the professor '*could never be sure whether love for the child was leading towards a too-high grade, or whether the effort to exclude this was leading to overcompensation and a too-low grade'*[38].

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[32] See EJ Weinrib, 'The Fiduciary Obligation' (1975) 25 UTLJ 1; *Mothew* [1998] Ch 1; Charles Harpum, 'Fiduciary Obligations and Fiduciary Powers: Where are We Going?' in Peter Birks (ed) *Privacy and Loyalty* (Clarendon Press 1997) 145; Conaglen (n 30).
[33] [1896] AC 44 (HL).
[34] ibid 51.
[35] Conaglen (n 30) 39-40, 59-96.
[36] *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10 [413].
[37] [1896] AC 44, 51.
[38] Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another' (2014) 130 LQR 608, 624.

Employing a rule which prohibits fiduciaries from acting in circumstances where their self-interest is at stake, helps reassure everyone involved that the fiduciary's decision-making process is less likely to be compromised by irrelevant considerations. However, the no-conflict and no-profit principles are not designed to capture any actual wrong-doing. A fiduciary may still fall foul of the no-conflict and no-profit principles even if she is acting in good faith and performs her obligation to her beneficiary faithfully[39]. The strictness of these rules can be justified on the basis that they are specifically designed to prevent the misuse of power by fiduciaries, and to enhance better decision-making on the part of fiduciaries. Samet argues that the strictness of these rules help minimize the risk of self-deception on the part of fiduciaries, as even the most virtuous fiduciaries might misapprehend the harm which a conflict of interest might cause to their beneficiaries[40].

At this juncture, it is possible to recognize certain parallels between the no-conflict and the no-profit principles and the rules on bias in judicial review[41]. As in the case of the no-conflict and no-profit principles, the law on apprehended bias is not designed to target culpable forms of conduct, for the court recognizes that *'bias operates in such an insidious way that the person alleged to be biased may be quite unconscious of its effect'*[42]. Rather the concern is with ensuring that there are no factors present which could '*distort the judge's judgment'*[43]. Conaglen points out that the language used by the High Court of Australia in *Ebner v Official Trustee in Bankruptcy*[44], namely that the '*apprehension of bias admits of the possibility of human fraility*'[45] echoes Lord Herschell's discussion of the

[39] *Keech v Sandford* 25 ER 223.
[40] Irit Samet, 'Guarding the Fiduciary's Conscience – A Justification of a Stringent Profit Stripping Rule' [2008] 28(4) OJLS 763, 763.
[41] For a detailed consideration of these parallels, see Matthew Conaglen, 'Public-Private Intersection: Comparing Fiduciary Conflict and Bias [2008] Public Law 58.
[42] *R v Gough* [1993] AC 646, 672; Conaglen (n 41) 66.
[43] *Davidson v Scottish Ministers* (No 2) [2004] UKHL 34 [6]; Conaglen (n 41) 73.
[44] [2000] HCA 63.
[45] ibid [8].

conflict principle in *Bray*[46]. The presence of these similarities is unsurprising given that both fiduciary law and judicial review are concerned with safeguarding the sanctity of the decision-making process of those entrusted with discretion.

The rule preventing a fiduciary from placing herself in a position where her duty and interest may conflict has also spawned separate rules governing situations where the fiduciary owes inconsistent duties to different beneficiaries ('the duty-duty principle'[47])[48]. Conaglen's detailed analysis of the case law reveals that distinct principles are applicable in situations where there is a potential conflict of duties, an actual conflict of duties and where a fiduciary intentionally favours one principal over another[49].

A detailed examination of the fiduciary principles applicable in these different scenarios can be found in Millett LJ's judgment in *Mothew*. Millet LJ offers some guidance on the rule against actual conflict of duties, which is triggered when a fiduciary cannot '*fulfil his obligations to one principal without failing in his obligations to the other*[50]. He notes that in such a case the fiduciary '*may have no alternative but to cease to act for at least one and preferably both*'[51]. In relation to cases involving potential conflicts of duties, Millett LJ distinguishes between cases in which a fiduciary acts for two principals with potentially conflicting interests without obtaining their informed consent, and cases in which a fiduciary is '*properly acting for two principals with potentially conflicting interests*'[52]. In the former case, Millet LJ holds that there is an automatic breach of the fiduciary obligation of loyalty. However, he states that the latter scenario triggers the

[46] Conaglen (n 41) 73.
[47] This phrase was coined by Matthew Conaglen in his article, 'Fiduciary Regulation of Conflict between Duties' (2009) 125 LQR 111.
[48] Conaglen ibid.
[49] ibid 123.
[50] [1998] Ch 1, 19.
[51] ibid.
[52] ibid.

application of the 'no-inhibition' principle, prohibiting the fiduciary from allowing the performance of her obligations to one principal to be influenced by her relationship with the other, and requiring the fiduciary to serve each principal as faithfully and loyally as if she were his only principal. He further stipulates that conduct which breaches the no-inhibition principle must be intentional, though it does not have to be dishonest.

Conaglen suggests that the rules on actual and potential conflicts of duties (specifically where the fiduciary fails to obtain informed consent from her beneficiaries) mirror the prophylactic protection offered by the non-conflict principle, as the object of these rules is for the fiduciary to '*avoid situations where performance of non-fiduciary duties will be placed in jeopardy'*[53]. He argues that in contrast to these rules, the inhibition principle is less clearly protective in function and applies where two principals have knowingly consented to a fiduciary acting even though potentially inconsistent duties are owed to both. According to Conaglen, the inhibition principle respects the fully informed consent of the principals by permitting the fiduciary to act, but it responds to *'the delicacy of the situation*'[54] by prohibiting the fiduciary from consciously favouring one principal over the other. Conaglen suggests this is a sensible policy choice for the law to adopt, as it continues to protect the principals while allowing the fiduciaries to act in accordance with the informed consent provided by their principals.

At first glance, the rule against conflict of duties might appear to cast doubt on the ability of a fiduciary to act for multiple beneficiaries. However, as Gold points out, '[i]*n some circumstances a fiduciary relationship is designed to have multiple beneficiaries*'[55]. Indeed, the development of the inhibition principle demonstrates that it is possible for a

[53] Conaglen (n 47) 125.
[54] ibid 139.
[55] Andrew S. Gold, 'The Fiduciary Duty of Loyalty' in Evan J. Criddle, Paul B. Miller, and Robert H.Sitkoff (eds) *The Oxford Handbook of Fiduciary Law* (OUP 2019) 398.

fiduciary to act for more than one beneficiary with potentially conflicting interests. The concern of the fiduciary doctrine in these situations is to minimize the risk of a fiduciary's judgment being impaired by these potentially inconsistent duties. This issue of fiduciaries acting in situations with multiple beneficiaries with potentially conflicting interests will be explored in more detail in Part 4.

(ii) Duties of Good Faith and Duties to Act in the Best Interests of the Beneficiary

These duties will be considered together as they appear to fulfill similar functions. While the duty of good faith is not peculiar to fiduciaries as it also applies outside the fiduciary context[56], it is clear that all fiduciaries are subject to this requirement[57]. On one hand, the duty of good faith appears to perform a similar function to the no-conflict and no-profit principles in that it generally operates to qualify the exercise of power rather than demanding specific action[58]. However, the subjective state of mind of the fiduciary is relevant in establishing a breach of the duty of good faith[59], suggesting that the duty of good faith is concerned with addressing more egregious and culpable forms of conduct than the no-conflict and no-profit principles. In this sense, rather than serving a distinctly prophylactic function, the duty of good faith seems to be concerned with ensuring that fiduciaries abstain from any conduct that may harm their beneficiaries and that they abide by a high standard of conduct when performing their duties.

The duty to act in the best interests of the beneficiary has been described as the 'essence of the fiduciary relationship'[60]. There has been some judicial support for the

[56] In fact, Chapter 5 of this thesis discusses the obligation to act in good faith in the context of contractual discretion.
[57] Nolan (n 17); *Mothew* [1998] Ch 1; *Armitage v Nurse* [1997] EWCA Civ 1279.
[58] Nolan (n 17) 296. However, duty of good faith may exceptionally demand specific action from the fiduciary. A fiduciary may be required for instance, to disclose wrongdoing: See *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244.
[59] *Mothew* [1998] Ch 1, 18; *Regentcrest Plc (In Liquidation) v Cohen* [2001] B.C.C. 494 [120].
[60] *Norberg and Weinrib* [1992] 2 SCR 226.

recognition of a positive duty to act in the best interests of the beneficiary, focusing generally on the trustee's obligation to promote the financial interests of the beneficiaries[61]. Megarry VC held in *Cowan v Scargill*[62]:

> *The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries…When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests.*[63]

Megarry VC stated that the power of investment in the case at hand had to be exercised so as to yield the best return for the beneficiaries, and he emphasized the prescriptive nature of this duty by stressing that trustees '*must do the best they can for the benefit of their beneficiaries, and not merely avoid harming them*'[64]. However, Asplin J in *Merchant Navy Ratings Pensions Funds Trustees Ltd v Stena Line Ltd & Ors*[65] interprets Megarry VC's judgment in *Cowan* as meaning that the purpose of the trust defines what the best interests of the beneficiary is. As such, she argues that the best interests' duty should not be treated as separate from the proper purposes principle, noting that there is no stand-alone duty to act in the best interests of the beneficiaries[66]. Asplin J's interpretation of the best interests duty coupled with Millett LJ's exclusion of this duty from the subset of 'peculiarly fiduciary' duties suggests that there is no open-ended duty to act in furtherance of a beneficiary's interests[67]. Rather this duty appears to operate in combination with other fiduciary principles such as the duty to act in good faith[68] and the proper

[61] *Buttle v Saunders* [1950] 2 All ER 193; *Aberdeen v Blakie Brothers* (1854) 1 Macq 461.
[62] [1985] Ch 270.
[63] ibid 286-287.
[64] ibid 295.
[65] [2015] EWHC 448 (Ch).
[66] ibid [228]. See also Geraint Thomas, 'The Duty of Trustees to Act in the Best Interests' of Their Beneficiaries' [2008] 2 J of Equity 177.
[67] Lionel Smith discusses the difficulties of recognizing such a duty: see Smith (n 38).
[68] *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244.

purposes principle to emphasize the other-regarding nature of the fiduciary obligation and to form the basis of the standards of conduct to which fiduciaries are expected to adhere.

(iii) Reflections on the Overall Purpose of Fiduciary Duties and the Nature of the Fiduciary Obligation

Having examined the different duties imposed upon fiduciaries, this final sub-section reflects upon the overall purpose of fiduciary duties and the light that these duties shed on the nature of the fiduciary obligation. As discussed above, Conaglen provides a compelling, instrumentalist explanation of the purpose of fiduciary duties, namely that they provide a prophylactic form of protection for non-fiduciary duties. It is argued that Conaglen's thesis should be interpreted in light of fiduciary law's broader concern with imposing standards of acceptable conduct on fiduciaries. This concern is reflected in Cardozo CJ's judgment in *Meinhard v Salmon*[69], in which he held, in perhaps rather hyperbolic terms:

> *A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate...Only thus has the level of conduct for fiduciaries been kept a level higher than that trodden by the crow.*[70]

Conaglen casts doubt on Cardozo CJ's moralist interpretation of the fiduciary doctrine, highlighting a number of cases which recognize that trustees – whom he argues constitute the '*paradigm category of fiduciaries*'[71] – may have to '*act dishonourably (though not illegally) if the interests of their beneficiaries require it*'[72]. He suggests that a moralist view of the fiduciary doctrine is incompatible with his instrumentalist analysis of the doctrine, which views the fiduciary doctrine as being concerned with removing

[69] 164 NE 545.
[70] ibid 546.
[71] Conaglen (n 30) 107.
[72] Cowan v Scargill [1985] Ch 270, 288.

temptations that might cause a fiduciary to breach her non-fiduciary duties, rather than with ensuring fiduciaries meet an '*ill-defined standard of morality*'[73].

In order to examine this tension between moralist and instrumentalist interpretations of the fiduciary doctrine, it is worth considering the cases of *Buttle v Saunders*[74] and *Cowan v Scargill*, as they are often cited as examples of fiduciaries being held to less stringent moral standards. The court held in *Buttle* that when selling property, trustees had an '*overriding duty to obtain the best price which they can for their beneficiaries*'[75] and should not refuse the highest price simply because they felt bound by commercial morality to complete with the original purchaser. This case was cited with approval in the above-discussed decision of *Cowan v Scargill*, in which Megarry VC held that when exercising their power of investment, trustees must put aside their own personal views, and may have to, as quoted above, act dishonourably if the interests of their beneficiaries require it.

The decisions of *Buttle* and *Cowan* contradict Cardozo CJ's notion that trustees are held to something stricter than the morals of the marketplace. It is worth noting however that both cases were specifically concerned with the trustees' duty to promote the financial interests of their beneficiaries. Not all fiduciaries are expected to maximize the profits of the beneficiaries to the exclusion of all other ethical considerations. For instance, as discussed below, a lawyer is prohibited from misleading the court when promoting her client's interests, as a lawyer's duty to her client is subject to her duty to the court.

[73] Conaglen (n 30) 109.
[74] [1950] 2 All ER 193 (CH).
[75] ibid 195 (per Wynn-Parry J).

Furthermore, it is doubtful whether *Buttle* and *Cowan* would be interpreted and applied by the courts the same way today. In its report on the fiduciary duties of investment intermediaries, the Law Commission observed that *Buttle* is a controversial case that may be confined to its facts[76]. It has also been argued that it is unhelpful to give the impression that high standards of behaviour in business are irrelevant, as the financial interests of many pension funds would be damaged if the trustees were to gain a reputation of acting legally but dishonourably[77]. In addition, Watchman et al have provided a number of reasons as to why *Cowan* is not a reliable legal authority, including the obiter nature of much of Megarry VC's statements and the absence of equality of argument caused by Scargill representing himself.[78] Megarry VC's interpretation of the best interests' duty has also, as mentioned above, been criticized in *Merchant Navy Ratings Pensions Funds Trustees Ltd.*

Watchman et al challenge the perception that trustees are required by their fiduciary duties to put profit maximisation above all other considerations and they state that future courts analysing *Cowan* '*would look to the underlying principle of fiduciary law on which* [the] *decision was based*'[79], namely that investment powers must be exercised carefully for the purpose for which they are given and not any ulterior purpose. In a similar vein, the Law Commission has suggested that when making investment decisions, trustees should be able to take into account purely non-financial factors (including ethical considerations) where doing so would not involve significant risk of financial detriment to the scheme and where they have good reason to think that scheme members would support their decision[80]. The Supreme Court recently approved of the Law Commission's proposed criteria, Lord

[76] Law Commission, *Fiduciary Duties of Investment Intermediaries* (Law Com No 350, 2014) para 4.56.
[77] ibid para 4.55.
[78] Paul Q. Watchman, Jane Anstee-Wedderburn and Lucas Shipway, 'Fiduciary Duties in the 21st Century: A UK Perspective' (2005) 19(3) Trust Law International 127, 134.
[79] ibid 135.
[80] Law Commission (n 76) para [6.34].

Carnwath observing that the Law Commission's report had settled the debate as to the extent to which pension trustees could take non-financial factors into account[81].

The approach taken by Cardozo J in *Meinhard* and that taken by the courts in *Cowan* and *Buttle* represent two extreme positions. On one hand, there is a gap between the high-minded rhetoric employed by Cardozo J in *Meinhard*, and the fiduciary duties that the courts are willing to enforce[82]. On the other hand, as the above discussion shows, it is far from clear that fiduciaries will be required to act dishonorably or immorally when promoting their beneficiaries' interests. However, it is possible to recognize that fiduciary duties are capable forming acceptable standards of conduct for fiduciaries without delving too deeply into thorny issues of morality.

Indeed, it is argued that the concern with holding fiduciaries to acceptable standards of conduct is instrumental in nature. Finn argues that the primary concern of fiduciary law is to '*impose standards of acceptable conduct on one party to a relationship for the benefit of the other where the one has a responsibility for the preservation of the other's interests*'[83], but he justifies this concern on public policy grounds. He also notes that while judges like Cardozo CJ emphasize the rigorous standards of conduct exacted by the fiduciary principle, they frequently fail to acknowledge that the fiduciary principle '*is, itself an instrument of public policy...used…to maintain the integrity, credibility and utility of relationships perceived to be of importance in a society'*[84].

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[81] *R (Palestine Solidarity Campaign and another) v Secretary of State for Housing, Communities and Local Government* [2020] UKSC 16 [43].
[82] Kelli A. Alces, 'The Fiduciary Gap' [2015] 40 J Corp Law 351, 380.
[83] Paul D. Finn, 'The Fiduciary Principle' in Timothy G. Youdan (ed) *Equity, Fiduciaries and Trusts* (University of Victoria 1988) 2.
[84] Paul D Finn, *Fiduciary Obligations:40th Anniversary Republication with Additional Essays* (The Federation Press 2016) 329.

Fiduciary law's general goal of imposing standards of acceptable conduct on fiduciaries is reflected in the very nature of the obligation of loyalty itself. The prophylactic and protective function of fiduciary loyalty ensures that fiduciaries adhere to acceptable standards of conduct when performing non-fiduciary duties. The imposition of these fiduciary rules ensure that the fiduciary's preservation of her beneficiary's interests are not compromised.

2. The Application of Fiduciary Theories in Public Law: Insights and Criticisms

Having explored how fiduciary principles are applied in the private law context, the second part of this chapter turns its attention to the application of fiduciary theories in public law. Finn argues that '*the most fundamental of fiduciary relationships in our society is that which exists between the community (the people) and the State and its agencies*'[85]. This conceptualization of public officials as fiduciaries has since seen a burst of popularity, particularly in US and Canadian academic literature[86]. The following sub-sections explore these theories briefly, and consider the relevant insights that may be drawn from them as well as the objections that may be levelled against them. They also explore the reasons why the fiduciary principle has not enjoyed the same popularity amongst theorists in the context of UK administrative law, and why the scant attempts by the UK courts to apply this principle in judicial review have been problematic.

A. Public Fiduciary Theories Centering on the Nature of the Fiduciary Relationship

A popular premise adopted by some US and Canadian theorists is that there are important parallels to be drawn between the core features of the fiduciary relationship and the various

[85] Paul Finn, 'The Forgotten "Trust": The People and the State' in Malcolm Cope (ed) *Equity Issues and Trends* (Federation Press 1995) 131.
[86] See for instance Evan J Criddle, 'Fiduciary Foundations of Administrative Law' (2006) 54 UCLA L Rev 117; Fox-Decent (n 12); Leib, Ponet, and Serota (n 13); Ethan J Leib, David L Ponet and Michael Serota, 'Translating Fiduciary Principles Into Public Law (2013) 126 Harv L Rev Forum 671; Paul B Miller and Andrew S Gold, 'Fiduciary Governance' (2015) 57 Wm & Mary L Rev 513.

relationships at play in public law. A number of these theories utilize the factors of trust, vulnerability and discretion discussed above to highlight the supposedly fiduciary character of either the state or of specific public entities.

Fox-Decent for instance argues that the relationship between the state and its legal subjects is best characterized as being fiduciary in nature, as the state exercises discretionary power of an administrative nature over the important interests of its vulnerable subjects.[87] He considers legal authority to rest on this state-subject fiduciary relationship, as well as on the presumption that the state exercises power on the basis of the public's trust. Fox-Decent uses this particular conception of the fiduciary relationship as a justification for the state's legal authority, arguing that the state as a whole owes a fiduciary obligation to its legal subjects.

Leib at al on the other hand, examine the specific applicability of the three factors of trust, vulnerability and discretion to judicial power and authority[88]. They note that judges maintain wide discretionary authority, and that the delegation to judges of substantial legal authority to apply and interpret the law leaves citizens vulnerable given the control that judges have over persons, property and assets. They emphasize the importance of trust in enabling the relationship between judges and those over whom they rule to function properly as it is difficult to monitor a judge's exercise of legal power.

The malleability of the factors of trust, vulnerability and discretion is evident in the fact that they are used to justify both a general fiduciary account of the state and to impose fiduciary-like obligations on specific public officials. However, the danger with using the 'core features' of the fiduciary relationship to justify one's account of public law, is that it is based upon a faulty presumption, namely that the fiduciary relationship is capable of

[87] Fox-Decent (n 12).
[88] Leib, Ponet, and Serota (n 13).

being defined[89]. In fact, there is a large body of fiduciary law scholarship which holds that the fiduciary relationship is indefinable.[90] Indeed, DeMott argues that '*the characteristics of even the standard…fiduciary relationships…are too variable to enable one to distill a single essence or property that unites all in any analytically satisfactory way'*[91]. As discussed in Part One, these difficulties might explain why the UK courts have avoided providing a general definition of the fiduciary relationship.

Even in Canada, where the courts have made some attempts to provide a '*rough and ready'*[92] guide to fiduciary relationships, there has been a lack of consensus amongst the judiciary as to the pertinent characteristics of fiduciary relationships[93], particularly in relation to the vulnerability requirement. Furthermore, concepts such as trust and discretion are so broad and abstract that they either stretch the fiduciary doctrine beyond its appropriate boundaries or they effectively force commentators to qualify certain criteria in unconvincing ways. For instance, Fox-Decent qualifies the criterion of discretion, by stating that it has to be administrative in nature, that is, it has to be other-regarding, purposive and institutional in nature[94]. However, there is no evidence that the courts apply these particular conditions when examining whether or not a particular relationship is fiduciary in nature[95]. It is clear therefore that adopting a fiduciary theory of public law that is wedded to a particular conception of the fiduciary relationship is inherently problematic.

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[89]Although Criddle does make a half-hearted assertion that the fiduciary concept resists essentialization, he effectively essentializes the concept by identifying what he considers to be three foundational elements of all fiduciary relations: Criddle (n 86) 126.

[90] Miller provides a succinct summary of these views: Paul Miller 'The Fiduciary Relationship' in Andrew S. Gold and Paul Miller (eds) *Philosophical Foundations of Fiduciary Law* (OUP 2014) 66-67 See also Sealy (n 2); Conaglen (n 30) 9; Finn (n 83) 1.

[91] Deborah A. DeMott, 'Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences' [2006] 48 Arizona L Rev 925, 934-935.

[92] *Lac Minerals v International Corona Resources Ltd* [1989] 2 SCR 574.

[93] See Hoyano's survey of the various differences in the judges' opinions: Laura Hoyano, 'The Flight to Fiduciary Haven' in Peter Birks (ed) *Privacy and Loyalty* (OUP 1997) 169, 178-189.

[94] Fox-Decent (n 12) 30.

[95] Miller considers the requirement that discretion has to be administrative in nature to be inessential: Miller (n 90) fn 98.

B. Identifying the Beneficiary

A further problem with some theories seeking to link public law and fiduciary duties is their failure to consider who might be the beneficiary of such a relationship in the public law context. Leib et al observe that fiduciary political theorists have neglected to explore the difficulty of mapping fiduciary-beneficiary relationships in the public sphere[96]. Some theorists choose to sidestep the thorny issue of mapping by framing the beneficiary(ies) in unitary terms such as 'the people'. For instance, Finn holds:

> *If the powers of our government belong to and are derived from the people, can the donees of those powers…properly be characterized in terms other than that they are the trustees, the fiduciaries, of those powers for the people?*[97]

Whilst Fox-Decent does not explicitly hold that the state is a fiduciary for 'the people', his model too suffers from imprecision, particularly in the way it identifies the relevant beneficiary(ies) of the state's fiduciary obligations. He acknowledges the inherent differences between the public and private law contexts, noting that while the duty of loyalty in fiduciary law is owed to a 'discrete beneficiary', public officials are bound to '*consider both the interests of the public at large and the interests of individuals directly affected by their determinations*'[98]. Yet, as Leib et al rightly point out, this oscillation between the individual, those with affected interests and the public at large, takes us no further in determining the identity of the beneficiary[99].

By referring to the state in unitary terms, Fox-Decent inhibits any analysis of the diverse interests served by different entities of the state, and as such, he is unable to explain satisfactorily whether the identity of the beneficiary(ies) can change depending on the

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[96] Ethan J Leib, David L Ponet and Michael Serota, 'Mapping Public Fiduciary Relationships' in Andrew S Gold and Paul B Miller (eds) *Philosophical Foundations of Fiduciary Law* (OUP 2014) 389.
[97] Paul D Finn, 'A Sovereign People, A Public Trust' in Paul D Finn (ed) *Essays on Law and Government. Volume I: Principles and Values* (Law Book Company 1995) 14.
[98] Evan Fox-Decent, 'The Fiduciary Nature of State Legal Authority' [2005] 31 Queen's Law Journal 259, 261.
[99] Leib, Ponet and Serota (n 96) 396-397.

particular entity involved. For Fox-Decent, '*anyone subject to legal authority, regardless of status, is an equal co-beneficiary of the rule of law*'[100]. Endicott has criticized Fox-Decent's wide approach to the beneficiary question, stating that although a good public agency has to deal appropriately with the interests of strangers such as asylum-seekers, foreign victims of domestic pollution and foreign consumers, it cannot be said that the state owes general fiduciary duties to foreign individuals or states[101]. Fox-Decent responds to this objection to some extent in a later work with Criddle, by arguing that a state owes fiduciary duties not just to their own people, but also, together with international institutions, to humanity in general[102]. However, Endicott's objection makes clear that public authorities regularly have to protect a multitude of interests, not all of which may necessarily be fiduciary in nature. Careful work is required in isolating and identifying the relevant beneficiary(ies) in the public law context, and in determining how public authorities should reconcile competing interests.

C. Defining Fiduciary Obligations in the Public Law Context: Lost in Translation

Another issue which arises in public fiduciary theories is how fiduciary obligations should be construed to accommodate the specific concerns of public law. Leib et al observe that in understanding public officials as fiduciaries, it is important to consider the differences between private and public fiduciaries[103]. They highlight the need to translate fiduciary principles when applying them in the public law context in order to accommodate these differences. In formulating their fiduciary theory of judging, Leib et al draw a distinction between the basic fiduciary obligations owed by judges which have a clear private law

[100] Fox-Decent (n 12) 40.
[101] Timothy Endicott, 'Equity and Administrative Behaviour: A Commentary' in Peter G Turner (ed) *Equity and Administration* (Cambridge University Press 2016) 376.
[102] Evan J Criddle and Evan Fox-Decent, *Fiduciaries of Humanities: How International Law Constitutes Authority* (OUP 2016).
[103] Leib, Ponet and Serota (n 13) 712.

analogue, and those which flow specifically from the judges' role as public fiduciaries. In relation to the former set of obligations, they suggest that the duty of loyalty is easily translated into a requirement that judges remain impartial to litigants before them, while duties of candour and disclosure '*accord with our basic expectation of judicial transparency'*[104]. However, they argue that as public fiduciaries, judges also owe an obligation of deliberative engagement, which is an affirmative duty to engage in dialogue with those whose interests the public fiduciary representative holds in trust[105].

It is difficult to escape the conclusion that Leib et al's translation of the basic fiduciary duties owed by judges, such as interpreting the duty of loyalty as an obligation of impartiality, simply replicates duties that judges already owe to litigants in public law. This exposes their theory to Davis' criticism that the fiduciary analogy largely restates existing questions regarding judicial review of legislative and administrative action, rather than adding anything to them[106]. As he points out, no one would disagree that government should act purposefully or reasonably. When translating fiduciary duties to accommodate public law context, it is therefore important to avoid rendering such duties indistinguishable from existing public law duties.

D. Applying These Insights in the UK Context: The Problems of Improper Mapping and Direct Transplantation

A majority of scholarship concerning the applicability of the fiduciary doctrine in public law has originated in the US and Canadian jurisdictions. Although judges in the UK have flirted with the idea of applying fiduciary principles in judicial review[107], the idea has not taken root as strongly as it has in other jurisdictions. The courts have however attempted

[104] ibid 738.
[105] ibid 740-741.
[106] Seth Davis, 'The False Promise of Fiduciary Government' [2014] 89 Notre Dame L Rev 1145, 1151.
[107] *Prescott v Birmingham Corporation* [1955] Ch 210 (CA); *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768.

to curb what was perceived to be irrationally extravagant expenditure by local authorities, by recognizing that local authorities owe a fiduciary duty to ratepayers[108]. *Roberts v Hopwood*[109] in particular is often associated with this principle, and has been cited as evidence of the undesirability of applying the fiduciary doctrine in judicial review[110].

In this case, the local council's decision to pay its employees, whether male or female, a minimum wage was challenged by the district auditor. The Divisional Court decided in favour of the auditor, holding that the council was in a fiduciary position towards the whole of the ratepayers, and was not entitled to be unduly generous at the expense of those for whom it was trustee. The Divisional Court's recognition of a fiduciary duty owed by the council to the ratepayers was swiftly rejected in the Court of Appeal. Scrutton J held that each borough councillor was bound to '*protect the interests of all inhabitants of his borough, whether electors or not, whether ratepayers or not*…'[111], while Atkin J denied that there were '*any equitable rights in the ratepayers as such, which can be enforced by the interference of a court of equity'*[112].

While the House of Lords restored the Divisional Court's decision, it was '*orthodox unlawfulness criteria'*[113] rather than the fiduciary doctrine that dominated their reasoning. Lord Buckmaster and Lord Sumner for instance, made no mention of the council's alleged fiduciary obligations, and found that the council's decision was unlawful for it had failed to take into account relevant considerations such as the falling cost of living and the value of labour. Lord Atkinson notoriously held that the council decision was unlawful for taking into account '*eccentric principles of socialistic philanthropy*'[114] and 'a *feminist ambition*

[108] John Barratt, 'Public Trusts*'* [2006] 69 MLR 514, 529.
[109] [1925] AC 578.
[110] Endicott (n 101) 372-377.
[111] [1924] 2 KB 695 (CA) 719.
[112] ibid 726.
[113] Barratt (n 108) 531.
[114] [1925] AC 578, 594.

to secure the equality of the sexes'[115]. However, Lord Atkinson's judgment also contains echoes of the fiduciary doctrine as he states:

> *A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body, owes, in my view, a duty to those latter persons to conduct that administration in a fairly businesslike manner… Towards these latter persons the body stands somewhat in the position of trustees…*[116]

Endicott interprets Lord Atkinson's remarks as imposing a fiduciary duty upon the council to ratepayers[117]. He argues that the decision illustrates the danger of a general fix-it equity, arguing that through Lord Atkinson's imposition of a fiduciary duty, local communities got the rule of judges, with the result that local governments were required to act in the private interests of their ratepayers rather than in the public interest of the localities[118]. Yet, although Lord Atkinson suggests that the Council may be in a position that is somewhat like the position of trustees and has to have regard for the interests of ratepayers, he never explicitly states, as the Divisional Court does, that the council owes a fiduciary duty to the ratepayers nor does he confine the council's duty, fiduciary or otherwise, to ratepayers only. As Barratt observes, neither Lord Atkinson nor the other judges overruled the strong denial of a fiduciary duty to ratepayers in the Court of Appeal, and there is nothing in any of the judgments which create '*a distinctive, prioritising, special ratepayers' trust'*[119].

It is submitted that Endicott overemphasizes the role that the fiduciary doctrine plays in the House of Lord's decision. If the local communities got the rule of judges as Endicott claims, the fault lies with the judges' manipulation of the illegality ground of review, and not the fiduciary doctrine. The ratio of *Roberts* was not that the council owed

[115] ibid
[116] ibid 595-596
[117] Endicott (n 101) 374
[118] ibid
[119] Barratt (n 108) 531

a fiduciary obligation towards its ratepayers, but rather as Lord Greene notes in *Wednesbury*, that the council had fixed the wages *'by reference to a matter which they ought not to have taken into account and to the exclusion of those elements which they ought to have taken into consideration'*[120]. The scant discussion of the fiduciary doctrine in the House of Lord's decision casts doubt on Endicott's claims that *Roberts* represents a serious, but mistaken effort to import the fiduciary principle into English administrative law.

While *Roberts* may be dubious authority for the proposition that local authorities owe fiduciary duties to their ratepayers, there have been a number of cases since then which have recognized the existence of such duties. For instance, in *Prescott v Birmingham Corporation*[121], which involved a ratepayer's challenge of the local council's decision to provide free bus travel for pensioners, the Court of Appeal held that although local authorities are not trustees for their ratepayers, they do '*owe an analogous fiduciary duty to their ratepayers in relation to the application of funds contributed by the latter*'[122]. The House of Lords revisited this issue in *Bromley London Borough Council v Greater London Council*[123], where the Greater London Council (GLC) carried out an election manifesto commitment to reduce fares for tubes and buses by issuing a precept to all London boroughs to finance this fare reduction by imposing a supplementary rate on all rate-payers.

Lord Wilberforce held that the GLC owed a duty to two different classes, which had to be fairly balanced against each other. Not only did it have to provide for transport users under its responsibility for meeting the needs of Greater London, it also owed '*a duty of a fiduciary character to its ratepayers'*[124]. According to Lord Wilberforce, once it

[120] [1948] 1 KB 223, 232.
[121] [1955] Ch 210 (CA).
[122] ibid 235.
[123] [1983] 1 AC 768.
[124] ibid 815.

became apparent that the ratepayers' burden would be effectively doubled through the fare reduction, GLC acted in breach of its fiduciary duty. Lord Scarman too accepted that the GLC owed a fiduciary duty to its ratepayers, and took the view that by adopting the fare reduction, the GLC had abandoned business principles and breached their duty to the ratepayers[125].

Crucial consequences followed from the court's conclusion that GLC had breached a fiduciary duty to its ratepayers. This approach not only indicates that the ratepayers' interests are to be prioritized, but it enabled the House of Lords to interfere more heavily with GLC's discretion. This is evident in the way Lord Scarman swiftly deposed of GLC's argument that the balance between the interests of the travelling public and the ratepayers is not for the court to determine and that GLC has the right to prioritize the interests of the travelling public. By arguing that this view would make '*mincemeat of the fiduciary duty*'[126] owed to the ratepayers, Lord Scarman was able to justify the elevation of the ratepayers' interests at the expense of transport users as well as the severe inroads made by the House of Lords into GLC's discretion.

The danger with prioritizing the ratepayers' interests this way is that it may adversely affect the way that local authorities choose to exercise their funds in favour of vulnerable segments of the population, such as unhoused individuals or asylum-seeking children, who are unable to contribute to these funds. It could also have a chilling effect on local authorities exercising their discretion to promote the general welfare of their localities. Local authorities may be less inclined to embark on more ambitious projects for fear that it would leave them open to claims that they have breached their fiduciary duties to ratepayers by spending their funds thriftlessly. Indeed, Craig observes that fiduciary duty

[125] ibid 846.
[126] ibid 842.

operates in an asymmetrical fashion as it quashes expenditure deemed in breach of this duty but it does not impose any obligation to spend money that is unreasonably withheld[127].

It cannot be denied that the UK courts' attempts to apply the fiduciary doctrine to combat extravagant spending by local authorities have been flawed. Most of these problems stem from a lack of examination of the purpose of the fiduciary obligation and its relevance to the judicial review context. While judges frequently refer to an 'analogous' fiduciary duty to ratepayers, they fail to take their reasoning further by examining exactly how their duty to ratepayers mirror traditional fiduciary duties and how they differ. As a result, the fiduciary doctrine is applied in haphazard manner, without proper reflection as to whether it is appropriate to label ratepayers as beneficiaries, and to prioritize their interests over others.

These flawed attempts do not necessarily mean that there is no role for the fiduciary doctrine in judicial review. It does however demonstrate that it is insufficient to merely assert the similarities between fiduciary law and judicial review and to transplant fiduciary duties to the judicial review context without any modification. The following sections will examine why the imposition of fiduciary duties on public officials is normatively justified and how the fiduciary principle can be applied in a limited but useful way, to uphold high standards of conduct among public officials and to excise improper influences from the decision-making process.

3. Normative Justifications for Applying Fiduciary Principles in Judicial Review

At the outset, it is important to appreciate the relative modesty of this chapter's claim, namely that certain fiduciary-like duties may be owed by public officials. It is not contended that all of the duties owed by public officials are fiduciary in nature; indeed, as

[127] Paul P Craig, *Administrative Law* (8th edition Sweet & Maxwell 2016) para 19-013.

Part 1 has demonstrated, it is not even the case that every breach of duty by a fiduciary is a breach of a fiduciary duty. Finn observes that the fiduciary aspect of a commercial relationship may often be only '*a quite small…and discrete part of a larger arrangement that exists for the several, the individual, benefit of the participants*.'[128] Similarly, it is argued that the fiduciary aspect of a public authority's relationship simply forms part of the array of safeguards for controlling the exercise of public power under the second limb of the framework of good administration.

This section argues that fiduciary principles serve an important purpose in setting coherent standards of conduct for public authorities and in elevating the relationship between public authorities and the public generally. It will then go on to argue that with appropriate modification, fiduciary principles may improve the decision-making powers of public bodies and enhance the culture of justification in public law in relation to conflicting interests. In this sense, the modified fiduciary approach can be seen as a positive normative framework that supplements the existing safeguards provided by the Human Rights Act 1998 ('HRA') and the public sector equality duty[129] ('PSED').

A. The Importance of Setting Clear Standards of Conduct

The grounds of judicial review provide the means of challenging executive action, and they help ensure that the exercise of discretionary power by a public authority does not exceed the boundaries stipulated by the law. However, they are not primarily concerned with setting coherent standards to guide the conduct of public authorities. While one might argue that the Judge Over Your Shoulder ('JOYS') pamphlet published by the government is capable of fulfilling this function, this pamphlet suffers from certain limitations. The JOYS pamphlet was first published in 1987 as part of the government's efforts to enhance

[128] Finn (n 84) 367.
[129] Section 149 of the Equality Act 2010.

its ability to respond to potential legal challenges[130]. While the first edition of this pamphlet was criticized for its negative and petulant approach to judicial review[131], recent editions have adopted a more conciliatory tone, stating that the purpose of the guidance is to '*inform and improve the quality of administrative decision-making*'[132]. Notwithstanding the change in tone and the stated purpose, it is still primarily a guide designed to introduce public officials to judicial review and to help them understand the '*potential legal risks of* [their] *actions'*[133]. As such, this guide is informed by the parameters of legality set by the various grounds of judicial review. It will be argued below that the grounds of judicial review constitute the *minimum* standards of conduct that should be expected of public bodies. The fiduciary principle however, opens the door to the formulation of richer standards of conduct which will elevate the relationship between public officials and citizens, and enhance the protection afforded to the interests under the second limb of the framework of good administration.

At this juncture, it is worth considering the standards of conduct that are currently applicable to public officials. Firstly, there are the standards set by criminal law, which constitute the base level of conduct expected of public officials. For instance, there are common law and statutory offences dealing with the offences of bribery and corruption[134]. Criminal liability is also imposed when a public officer wilfully neglects to perform her duty and/or wilfully misconducts herself to such a degree as to amount to an abuse of the public's trust in the public officeholder without reasonable excuse or justification[135]. The courts have held that there must be a '*serious departure from proper standards…amounting*

[130] A Le Sueur and M.Sunkin, 'Can Government Control Judicial Review?' [1991] 44 Current Legal Problems 161; Maurice Sunkin, 'The Impact of Public Law Litigation' in Mark Elliott and David Feldman (eds) *The Cambridge Companion to Public Law* (Cambridge University Press 2015) 237.
[131] Dawn Oliver, 'The Judge Over Your Shoulder' [1989] 42 Parliamentary Affairs 302, 304.
[132] Judge Over Your Shoulders: A Guide to Good Decision Making (July 2016) 5.
[133] ibid 3.
[134] *R v Gurney* (1867) 10 Cox CC 550; *R v Whitaker* [1914] 3 KB 1283; Bribery Act 2010.
[135] *Attorney General's Reference* (No 3 of 2003) [2005] QB 73 (CA).

to an affront to the standing of the public office held'[136] and that a serious mistake will not suffice[137]. It is clear therefore that criminal law addresses the most egregious conduct displayed by public officers and public bodies.

The law has also sought to regulate the conduct of public officials through tort, namely through the tort of misfeasance of public office, which enables a citizen to claim damages when she has suffered loss as a result of a public officer's misfeasance. The courts have held that conduct amounting to misfeasance requires an element of bad faith, such as when a public officer exercises her power deliberately to injure the claimant, or when she acts with knowledge of, or reckless indifference as to the probability of causing injury to the claimant[138]. The tort of misfeasance mirrors to a large extent, the criminal offence of misconduct in public office, highlighting the fact that tort and criminal law are concerned with targeting the more serious forms of misconduct by public officials. Judicial review on the other hand, deals with conduct that does not warrant criminal prosecution or an action being brought in tort, but which is improper enough to afford the applicant the opportunity to challenge the action or decision. It is possible to infer from the irrationality ground of review that public authorities are expected to act reasonably and not arbitrarily, while the principles of natural justice highlight the importance of impartiality in a decision-maker.

Cumulatively, the rules imposed by criminal law, tort and judicial review make up the minimum standards of conduct that are expected of public officials. Whilst some may be hesitant to impose more onerous standards on public officials for fear that it may inhibit their flexibility to act in the public interest, there are good reasons for holding public officials to higher standards. Chapter Three has already demonstrated how trust is a crucial

[136] ibid [56] (per Pill LJ).
[137] *R v Borron* 106 ER 721.
[138] *Three Rivers District Council and Others v Governor and Company of the Bank of England* [2003] 2 AC 1, 192.

component to the effective running of government and administration[139]. Furthermore, there is evidence to suggest that members of the public will be more inclined to trust public institutions if they believe that their officials are held to high standards of conduct. Downe et al conducted a large-scale public survey and case analysis of nine local councils in England, and the results of their survey showed that while the performance of a local council was the most important variable in explaining levels of public trust, ethical standards and the behaviour of councilors were *inter alia* important determinants of public trust[140].

As discussed above in Part One, Millett LJ held that the overriding obligation of a fiduciary is the obligation of loyalty. Fiduciaries are not only expected to abstain from illegal conduct, but they are expected to display 'single-minded loyalty'[141] towards their beneficiaries. Finn observes that the standards imposed by equity are more exacting than those imposed by criminal law and tort, for even the possibility of or tendency to disloyalty can suffice. As Worthington notes, the fiduciary duty requires a '*general denial of self-interest: the fiduciary role proscribes certain perfectly legitimate activities unless the principal consents to the fiduciary's involvement*'[142]. The obligation of loyalty as interpreted by the courts in fiduciary law is far from onerous, yet it still serves as relatively clear guidance to fiduciaries as to their expected conduct in the performance of their duties.

Indeed, the 1992 report by the Australian Royal Commission demonstrates how fiduciary principles might be used to inform the standards of conduct expected of public

[139] See Part 2 of Chapter Three.
[140] James Downe, Richard Cowall, Alex Chan, and Karen Morgan, 'The Determinants of Public Trust: How Important is the Ethical Behaviour of Elected Councillors' [2013] 79(4) International Review of Administrative Sciences 597.
[141] *Bristol and West Building Society v Mothew* [1998] Ch 1, 18.
[142] Sarah Worthington, *Equity* (OUP 2006) 131.

officials[143]. The Commissioners conducted an inquiry and discovered that in the late 1980s, some ministers had '*elevated personal or party advantage over their constitutional obligation to act in the public interest*'[144]. The Report proposed making available to public officials in documentary form, a code which clearly explained the standards to which the community expects them to adhere. In summary, the Report stated that public officials were required to exercise their offices impartially, disinterestedly and conscientiously with all due care and skill, and were required to be scrupulous in their use of position, and of public property and information, and to be prudent when managing resources. In formulating these standards, the Commissioners relied heavily on the case of *Driscoll v Burlington Bridge Co*[145], which held:

> [Public officers] *stand in a fiduciary relationship to the people whom they have been elected and appointed to serve…In discharging the duties of their office, they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity…They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny…*[146]

It is submitted that fiduciary principles should be used as a jumping off point in determining the kind of conduct that is expected of public officials, beyond the standards imposed by criminal law, tort and judicial review. In using fiduciary principles to inform these standards of conduct, it is important to bear in mind the public law context and the position of public officials. Thus, the no-conflict and no-profit principles highlight the

[143] Royal Commission into the Commercial Activities of Government and Other matters, Report Part II (1992), hereinafter referred to as 'the Report'.
[144] ibid para [1.1.2].
[145] 8 N.J. 433(1952).
[146] ibid 474-475.

importance of public officials acting disinterestedly and avoiding situations which may sway them away from properly performing their public duties. The duty to act in good faith emphasizes the importance of public officials acting honestly and transparently when performing their duties.

As discussed above, the duty to act in the beneficiaries' best interests has been interpreted in a few trust cases as requiring the trustee to promote the beneficiaries' best financial interests, even if the trustee has to act dishonourably in doing so. Part 1(B) has explained why such an approach is flawed, and it has suggested that other fiduciaries such as lawyers are frequently subjected to more rigorous standards of conduct. Moreover, a public official's duty cannot be reduced to a simple duty to act in the public's best financial interests. A better approach would be to adopt Asplin J's interpretation of the best interests' duty, and to focus on the purpose of the power entrusted to the public official. As mentioned above, this understanding of the duty to act in the beneficiaries' best interests emphasizes the other-regarding nature of the fiduciary obligation and it reinforces the importance of public officials using their powers for the purposes for which they are intended.

B. Enhancing the Decision-Making Process of Public Bodies

An instrumental reason for welcoming the application of fiduciary duties in judicial review, is that it helps improve the quality of decision-making *ex ante* by ensuring that public authorities are not swayed from properly performing their duties. Fiduciary duties help provide a clear framework for the exercise of discretionary power by public officials, preventing them from having to rely on the curative process of judicial review to correct defects in their decision-making. Thus, when applied appropriately, these duties provide additional safeguards for the control of public power under the second limb of the framework of good administration. Moreover, a modified fiduciary approach enhances the

culture of justification in public law as it requires public bodies to demonstrate that they have properly considered and addressed conflicting duties and interests.

It is of course true that the application of principles, such as the no-conflict and no-profit principles are likely to be less clear-cut in the public law context and Part Four will explore how these principles can be modified to accommodate the diverse interests which public authorities serve. Specifically, it will argue that more discretion should be given to the administrative decision-makers in terms of deciding how they should manage the conflicting duties that they owe to different subsets of the public. Part Four will go on to detail how public authorities will be required to take the preliminary step of considering certain issues before exercising their discretionary power. They should identify the different types of interests that are contemplated by the power at hand, and where these interests conflict, they should reflect on how best to reconcile these interests.

This process of identifying the relevant beneficiaries in the public law context coupled with the imperative against acting in situations of conflicting interests, requires a closer consideration of the interests affected by the relevant exercise of discretionary power. In this sense, the modified fiduciary approach offers an analogous form of protection to that offered via the PSED, which requires public authorities to '*have due regard to*'[147] various equality issues[148] when exercising their functions[149]. The PSED and the modified fiduciary obligation help enhance the decision-making powers of public authorities, by requiring them to take stock of certain interests *before* carrying out their

[147] S149(1) of the Equality Act 2010.
[148] These equality issues include the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations between those who share a 'protected characteristic' and those who do not: S149 (1)(a) - (c) Equality Act 2010. The relevant 'protected characteristics' include age, disability, gender assignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation: S149 (7) of the Equality Act 2010.
[149] For a summary of the relevant legal principles concerning the PSED, see *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 [25] (per McCombe LJ). The PSED is explored in more detail below.

duties[150]. The latter obligation requires a public authority to consider whether there are any conflicting duties or interests that will be affected by its exercise of power, while the former requires a public authority to consider *inter alia* the need to eliminate unlawful discrimination and advance equality of opportunity.

At first glance, the modified fiduciary approach may seem ill-suited to the 'public wrongs' conception of judicial review, which is primarily concerned with the challenged decision itself and with determining if public power has been exercised properly, rather than with the existence of conflicting interests. Indeed, one understanding of the restrained, supervisory jurisdiction of the courts in judicial review is that it is premised on the notion that the primary judgment as to the balance between competing interests is for the primary decision-maker, and not for the courts.[151] It could be argued that adopting a more interests-focused approach in judicial review may lead to the courts usurping the proper authority of public bodies. However, this objection does not hold water. If judicial review is truly concerned with ensuring the proper exercise of public power, it is only reasonable for the reviewing court to consider whether or not the public body in question has properly deliberated on the different interests affected by its exercise of discretion. There is nothing in this exercise which should lead to the conclusion that the court is unwarrantedly encroaching upon the autonomy of the public body.

Another possible objection to this approach is that judicial review already has the requisite tools to ensure that public bodies take the relevant interests affected by a decision into account. For instance, when determining whether a challenged decision should stand, the reviewing court will consider whether the public body took all relevant considerations

[150] The courts have held that the PSED must be fulfilled before and at the time when a particular policy is being considered. They have also held that it is a continuing duty: *Bracking* ibid.
[151] Jason NE Varuhas, *Damages and Human RightS* (Hart Publishing 2016) 209-210.

into account, including the existence of any relevant competing interests that may be affected by the decision. It could also be argued that the proportionality standard of review allows the court to assess whether the primary decision-maker has appropriately considered and struck a fair balance between the relevant competing interests at stake.

However, it is worth noting that under most of the established grounds of review relating to abuse of discretion, the primary issue is '*whether something ha*[s] *gone wrong of a nature and degree which require*[s] *the intervention of the court'*[152]. Thus, the inadequate protection of competing interests is relevant in so far as it explains why the decision is flawed, but it is not the primary focus of the review itself. Under a modified fiduciary approach to judicial review however, the conflicting duties owed by public bodies warrant special attention. As discussed above, fiduciary principles such as the no-profit and no-conflict principles, operate on the basis that the existence of conflicting duties tend to prevent fiduciaries from properly performing their duties towards their beneficiaries. While conflicting duties and interests is justifiably more prevalent in public law, it is reasonable to believe that these conflicting interests may at times inhibit or influence the performance of statutory duties or may result in the lack of protection of certain interests. Take for instance, the difficult decisions that the local authorities had to make in *R v Gloucestershire County Council ex parte Barry*[153] and *R v East Sussex County Council ex parte Tandy*[154].

In the former, the local authority had withdrawn the provision of laundry and cleaning services to an infirm, elderly man due to budgetary constraints, while in the latter, the local education authority had reduced the home tuition hours of an ill child, also as a result of limited financial resources[155]. In both cases, there was a conflict between the local

[152] *R v Take-over Panel ex parte Guinness plc* [1990] 1 QB 146, 160 (Lord Donaldson MR).
[153] [1997] AC 584.
[154] [1997] AC 714.
[155] These cases are explored in greater detail below.

authority's mandatory statutory duty towards the claimant and its general obligation to manage resources effectively. It will later be argued that the House of Lords in *Barry* and *Tandy* failed to adopt a clear and considered approach towards these conflicting obligations and did not appear to appreciate in particular, how the local authority's obligation to manage resources inhibited its ability to properly discharge its statutory duty towards the claimant.

As Part Four will go on to argue, when applied in the public law context, the general presumption against acting in the face of conflicting duties or interests translates into a requirement that the conflicted public authorities justify their approach. This requirement helps promote good administration by enhancing the standards of decision-making by public authorities as it places the onus on these entities to demonstrate that they have properly identified and considered the relevant conflicting interests at stake. Furthermore, this requirement also offers greater protection of vulnerable minority interests which conflict with that of the majority, as the courts will subject the justification(s) for the infringement of such interests to scrutiny. Indeed, Mureinik persuasively points out that the justification of decisions can be used to include the interests of people who find it difficult to use the participatory process as decision-makers anticipating scrutiny of their decisions will be under pressure to take positive steps to ensure that these parties participate and are heard fully throughout the decision-making process[156].

It is clear that this proposed approach to conflicting duties coheres with the growing culture of justification in public law, insofar as it requires public bodies to justify their exercise of discretionary power. The term 'culture of justification' was coined by Mureinik, who famously discussed in the context of the South African Bill of Rights, the shift from a

[156] Etienne Mureinik, 'Reconsidering Review: Participation and Accountability' (1993) Acta Juridica 35, 43

culture of authority to a culture of justification in which every exercise of public power has to be justified[157]. In recent years, discussion of this culture has largely centred around the rights jurisprudence and the proportionality doctrine[158]. Hunt for instance, suggests that proportionality should be seen as a '*new type of approach to adjudication which subjects the justification for decisions to rigorous scrutiny*'[159]. He discusses the case of *R (Daly) v Secretary of State for the Home Department*[160], in which the House of Lords held that the proportionality doctrine should be applied in cases involving the HRA. According to Hunt, *Daly* represented a significant step towards the development of a ''*culture of justification',* a *destination to which English public law has been feeling its way for several years, but now at an accelerated rate thanks to the HRA*'[161].

This thesis argues that the modified fiduciary approach has the potential of enhancing and expanding the culture of justification in English public law beyond the context of the HRA. The proposed approach is premised on the notion that public bodies and public officials owe certain fiduciary-like duties to their beneficiaries. In light of the general rule against acting in the face of conflicting duties, public authorities should be required to show that they have acted impartially and properly considered the competing interests of different classes of beneficiaries. Thus, there is a normative imperative under the modified fiduciary approach for public bodies to justify their treatment of divergent

[157] Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 South African Journal of Human Rights 31. See also, David Dyzenhaus, 'Law as Justification: Etienne Mureinik's conception of legal culture' (1998) 14 South African Journal of Human Rights.
[158] See for instance Mosche Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press 2013); David Dyzenhaus 'Proportionality and Deference in a Culture of Justification' in Grant Huscroft, Bradley Wayne Miller, Gregoire Webber (eds) *Proportionality and The Rule of Law: Rights, Justification, Reasoning* (Cambridge Univeristy Press 2014).
[159] Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference' in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Bloomsbury 2003) 342.
[160] [2001] 2 AC 532.
[161] Hunt (n 159) 342.

interests and for subjecting such justifications to judicial scrutiny, even where no human rights are involved.

Given the emphasis that is placed on public authorities demonstrating that they have properly considered competing interests, it might appear that the modified fiduciary approach is concerned primarily with process rather than outcome. As mentioned earlier, there are certain similarities between the modified fiduciary approach and the PSED, and the latter duty has been described as a '*duty of process and not outcome*'[162]. In contrast, the courts have held that when assessing the proportionality of a public authority's decision under the HRA, '*what matters…is the practical outcome, not the quality of the decision-making process that led to it'*[163].

In *R v Governors of Denbigh High School*, the House of Lords criticized the Court of Appeal's procedural approach in determining whether the defendant school had infringed the claimant's right to manifest her religion under Article 9 of the European Convention of Human Rights ('ECHR'). The defendant refused to allow the claimant to attend school in a jilbab rather than a shalwar kameez, the latter uniform having been designed to accommodate the needs of a diverse community. The Court of Appeal set out a series of questions that primary decision-makers have to consider when faced with issues relating to potential infringements of ECHR rights and found against the defendant on the grounds that they had approached the issues from entirely the wrong direction. The House of Lords overturned the Court of Appeal's decision, holding that the focus of the Strasbourg court has always been on whether there has been a violation of an ECHR right(s), and not with whether the challenged decision was the product of a defective decision-making

[162] *R (Bridges) v Chief Constable of South Wales Police* [2020] 1 WLR 5037 (CA) 5075.
[163] *R v Governors of Denbigh High School* [2007] 1 AC 100, 116; *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, 1429-1430.

process[164]. Lord Bingham warned that the Court of Appeal's approach would '"*introduce a new formalism" and be "a recipe for judicialisation on an unprecedented scale"*'[165].

Notwithstanding the House of Lords' criticism of the Court of Appeal's process-based reasoning in *Denbigh*, there are good reasons for focusing on the decision-making processes of public authorities. For instance, in *R (Bridges) v Chief Constable of South Wales Police*, the Court of Appeal argued that the PSED's importance is not diminished by the fact that it is a duty of process for '*good processes are more likely to lead to better informed, and therefore, better decisions*… [and they] *help to make public authorities accountable to the public'*[166]. Moreover, subsequent cases involving the HRA suggest that a public authority's decision is more likely to stand when it has taken human rights considerations into account. Thus, in *R (Tigere) v Secretary of State for Business, Innovation and Skills*[167], which concerned the right to education and the prohibition against discrimination under the ECHR, the court noted that the respect accorded to a primary decision-maker is '*heightened where there is evidence that the decision maker has addressed his mind to the particular issue before* [the court]'[168].

The above discussion shows that the distinction between process and outcome is not particularly sharp, as a public official's decision is more likely to stand if it can be shown that she has deliberated on the interests that will be adversely affected by her decision. Thus, in enhancing the decision-making processes of public authorities, the modified fiduciary approach ultimately helps ensure that public authorities reach good decisions that take into account various competing interests. The modified fiduciary approach should therefore be seen as a positive normative framework that enhances the

[164] [2007] 1 AC 100, 115.
[165] ibid 116.
[166] [2020] 1 WLR 5037 (CA) 5075.
[167] [2015] 1 WLR 3820 (SC).
[168] ibid 3834 (per Baroness Hale).

culture of justification in public law, and which supplements the existing protection afforded under the PSED and the HRA.

4. Modifying Fiduciary Duties to Cater for The Public Law Context

Part Three put forward two normative justifications for applying fiduciary-like duties to public officials, namely that these duties help ensure that public officials are held to high standards of conduct and also improves the decision-making process of these officials by enhancing the culture of justification in judicial review. However, as Part Two has shown, identifying the appropriate beneficiary in the judicial review context can be problematic, and there are real difficulties with translating fiduciary duties in judicial review. This section will first examine how the beneficiary question should be addressed, before going on to consider how fiduciary duties may be modified to cater for the multitude of interests that public authorities serve.

A. The Beneficiary Question

If it is accepted that there are normative reasons for imposing fiduciary-like duties on public officials and authorities, it then needs to be established to whom these duties are owed and whether it is possible for a public authority to owe fiduciary-like duties to a particular class of beneficiaries when it is supposed to consider a range of interests. This chapter has already discussed some of the problems with labelling either the public or ratepayers as beneficiaries. Both approaches are insufficiently nuanced to be capable of addressing the multitude of interests that arise in the public law context.

In order to determine the identity of the relevant beneficiary in public law, a flexible and contextual approach is needed. Indeed, the US courts have adopted a flexible approach to the beneficiary question in the field of corporate law, accepting that a director owes fiduciary duties to both shareholders and the corporation even though they may have

competing and divergent interests[169]. Gold suggests that the ambiguity surrounding the beneficiaries of a director's fiduciary duties is desirable for it facilitates dynamic fiduciary duties[170]. He states that by instructing directors to act as fiduciaries to both shareholders and corporations, the courts have effectively given the directors '*leeway to exercise discretion; within limits, they may act as fiduciaries to the shareholders* ***or*** [original emphasis] *the corporation'*[171]. According to Gold, this discretion means that fiduciary duties can have changing beneficiaries as directors' interpretations of the appropriate beneficiary shift with time, and this dynamism may allow for a healthy evolution of approaches to fiduciary duties[172].

The UK courts have in contrast, adopted a much stricter approach to a director's fiduciary duties, holding that generally such duties are owed to the company and not shareholders. However even in the UK, the courts have been willing to recognize that in certain limited contexts, fiduciary duties may be owed to both the company and the shareholders. Thus, Mummery LJ in *Peskin v Anderson*[173] found that the fiduciary duties owed by directors to their companies:

> *do not necessarily preclude, in special circumstances, the co-existence of additional duties owed by the directors to shareholders. In such cases, individual shareholders may bring a direct action…against the directors for breach of fiduciary duty…*[174]

Mummery LJ recognized that in special circumstances, a director could owe fiduciary duties to her shareholders, provided that a '*special factual relationship*'[175] is established between the director and the shareholders in the particular case. This suggests

[169] Andrew S Gold, 'Dynamic Fiduciary Duties' [2012] 34 Cardozo L Rev 491, 493*; North American Catholic Educational Programming Foundation v Gheewala* 930 A.2d 92 (Del 2007).
[170] Gold ibid.
[171] ibid 495.
[172] ibid 523.
[173] [2001] B.C.C. 874.
[174] ibid 880.
[175] ibid

that even within the context of UK law, which adopts a much stricter and narrower view of the fiduciary duties of a director, there is room for a more flexible, contextual approach. Thus, it is clear that even in the sphere of private law, the beneficiary question will not always yield a clear-cut answer. It is important therefore to refrain from adopting a one-size-fits-all approach to the beneficiary issue in the public law context and instead recognize that the answer to the beneficiary question may differ from case to case.

One of the difficulties with designating the public as the beneficiary of a public body's fiduciary-like duties is that it masks the fact that the public is made up of different subsets of interests. This point is highlighted by Criddle, who argues that US administrative agencies should be seen as fiduciary institutes endowed with authority from the sovereign people to perform services for statutory beneficiaries. He observes that because '*the initial "entrustors" and ultimate "beneficiaries" are frequently one and the same – the people as a whole – there is a natural tendency to conflate these categories*'[176]. Criddle states that this is a mistake; while government authority may emanate from the people in the first instance, many administrative agencies service a discrete subset of the US population such as welfare recipients or aid persons outside US territory.

While Criddle's model is primarily concerned with US administrative agencies, the distinction he draws between the public at large and statutory beneficiaries might be useful in tackling the beneficiary question in the domestic context. As statutes are the mechanisms by which Parliament entrusts discretionary power and authority to public bodies, they should be used as guiding tools to determine the identity of the beneficiaries in judicial review. It is submitted that a public body should undertake a preliminary exercise before performing its statutory duty or carrying out its discretionary power. It should carefully

[176] Criddle (n 86) 138.

scrutinize the terms of the relevant statutory instrument to determine the specific sets of interests that the power or duty is designed to serve or protect. The public body should however be afforded a certain degree of discretion in determining the beneficiaries of a statutory power or duty, particularly where the duty or power in question is framed in generic or ambiguous terms.

To illustrate how the relevant statutory beneficiary should be identified, it is worth considering the Homelessness Reduction Act 2017 ('the 2017 Act'). The 2017 Act imposes duties on local authorities to provide meaningful access and help to those who are homeless, or threatened with homelessness. It is suggested that when discharging their duties under this act, local authorities owe specific fiduciary-like obligations to the statutory beneficiaries, namely those who fit the criterion of homeless or 'threatened with homelessness' under the 2017 Act. However, in the course of discharging their duties to these beneficiaries, a local authority might find that its obligations towards the beneficiaries are in conflict with its obligations towards another class of individuals.

The subsequent sub-section tackles the issue of conflicting interests in more detail. However, at this juncture, it is worth considering a question raised earlier, namely whether it is possible for a public body to owe fiduciary-like duties to a particular class of beneficiaries when it is also supposed to consider the interests of other individuals or the public at large. As mentioned above, the notion of a fiduciary owing duties to multiple classes of beneficiaries with different interests is not novel. Thus, the courts have recognized that trustees have to make investment decisions that may have different consequences for different classes of beneficiaries[177]. For instance, a trustee administering a trust fund may have to balance the interests of a life tenant, who is anxious to receive the

[177] *Nestle v National Westminster Plc* [1993] 1 WLR 1260.

highest possible income against the interests of a remainderman, who wishes the real value of the trust fund to be preserved[178].

It is clear therefore that fiduciaries may owe duties to multiple classes of beneficiaries even in the private law context. However, certain fiduciaries may also be required to consider interests beyond that of their beneficiaries. Criddle and Fox-Decent argue that there are some fiduciaries who owe not only discrete 'first order' duties to their beneficiaries, but also wider, 'second-order' duties to the broader public or to public purposes, which tend to prevail whenever there is a conflict with first-order duties[179]. Using lawyers as an example[180], Criddle and Fox-Decent state that these fiduciaries owe 'first-order' duties to their clients, but also bear a variety of 'second-order' duties as officers of the court to promote the just and orderly administration of justice.

Criddle and Fox-Decent's discussion of a lawyer's second-order duties is based primarily on US law. Yet, it is not difficult to find cases in the domestic context which confirm that '*lawyers conducting litigation owe a divided loyalty'*[181] as they owe duties not only to their clients, but also '*to the court and the administration of justice*'[182]. Additionally, Lord Hobhouse indicates that it is in the public interest that an advocate performs her duty of fearlessly promoting her client's best interests[183]. An advocate's duty to her client is however subject to her duty to the court, and the proper discharge of her duty to her client, should not cause her to be accused of being in breach of her duty to the court[184]. The courts have also offered some elucidation on an advocate's duty to the court

[178] *In Re Pauling's Settlement Trusts* (No 2) [1964] Ch 576; *Nestle* ibid.
[179] Evan J Criddle and Evan Fox-Decent, 'Guardians of Legal Order: The Dual Commissions of Public Fiduciaries' in Evan J Criddle, Evan Fox-Decent, Andrew S.Gold, Sung Hui Kim, Paul B. Miller (eds) *Fiduciary Government* (Cambridge University Press 2018) 67-95.
[180] Criddle and Fox-Decent also used doctors as another example of fiduciaries with second-order duties to the public: ibid 76-80.
[181] *Arthur J.S.Hall v Simons* [2002] 1 AC 615, 686 (per Lord Hoffmann).
[182] Ibid.
[183] *Medcalf v Mardell* [2003] 1 AC 120, 141.
[184] *Medcalf v Mardell* [2003] 1 AC 120, 142 (per Lord Hobhouse).

and the administration of justice. Thus, an advocate is expected to cite relevant law whether it is for or against her case and is prohibited from misleading the court, wasting time on irrelevancies even if her client thinks it is important and from making imputations of dishonesty unless this is supported [185].

Criddle and Fox-Decent have argued that the 'second-order' duties of fiduciaries like lawyers and doctors are distinctively fiduciary duties because '*they govern the fiduciary relationship that arises between certain fiduciaries and the general public*'[186] and '*emanate from the institutional character of particular fiduciary roles or positions*'[187]. With respect, this argument is flawed. It is difficult to see how a duty could be classified as 'distinctively fiduciary' when not all fiduciaries are subject to it. Furthermore, while the courts have certainly recognized that an advocate owes duties to both her client and the court, they have not suggested that the latter duties are fiduciary in nature. The non-fiduciary nature of an advocate's duty to the court should not however obfuscate the fact that it is possible for certain fiduciaries to considers interests other than that of their beneficiaries.

The above discussion suggests that some of the concerns surrounding the beneficiary question in public law have been overstated. Even in the private law context, it is possible for a fiduciary to owe duties to multiple classes of beneficiaries and to be bound by broader interests than that of their beneficiaries. As mentioned above, one criticism that Endicott levelled against a fiduciary theory of government is that a public agency may have to deal appropriately with the interests of strangers even though it does not owe any general fiduciary duties to these individuals. If it is possible for an advocate to owe a divided loyalty to her client and the court, it should be possible for a public body to owe fiduciary-like

[185] *Arthur J.S.Hall v Simons* [2002] 1 AC 615, 686 (per Lord Hoffmann).
[186] Criddle and Fox-Decent (n 179) 80.
[187] ibid.

duties to the beneficiaries of its statutory powers, while still taking into account the broader interests of the public, including the interests of strangers.

B. Modifying the No-Conflict Principle

An objection that is levelled against the application of the fiduciary doctrine in judicial review is its incompatibility with the conflicting interests which arise in the public law context. In reality, this is not a concern which is unique to public law for the fiduciary doctrine is frequently confronted with the problems of conflicting interests and the courts have devised mechanisms for regulating these conflicts. This section will briefly consider how fiduciary law has regulated conflicting interests in order to determine how this may guide our approach in judicial review.

(i) Informed consent

Fiduciary law has recognized an exception to the no-conflict principle, namely where the fiduciary has obtained informed consent from the beneficiaries[188]. At first glance, this seems to be a difficult exception to translate to the judicial review context. Finite public resources may be wasted if public bodies felt bound to seek informed consent every time they choose to act in the face of conflicting interests. It is also questionable whether free consent is even possible in this context where there is an imbalance of power between individuals and public bodies. This point is exemplified in Recital 43 of the General Data Protection Regulation ('GDPR'), which explores the meaning of freely given consent, holding that consent does not constitute a valid legal ground for the processing of personal data where there is a:

[188] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Clark Boyce v Mouat* [1994] 1 AC 428.

> *clear imbalance between a data subject and the controller, in particular where the controller is a public authority and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation*[189].

However, it is worth noting that, as discussed in Chapter Two, the courts have recognized in the context of judicial bias, that a party with a right to object to a judge hearing a case may waive her right to object, provided that the waiver is clear, unequivocal and made with full knowledge of all the facts relevant to the question[190]. Moreover, the exception of consent in the fiduciary context also covers other forms of authorizations. Thus, a trustee can be authorized by the settlor to act with a conflict in certain situations, regardless of whether or not the beneficiaries have consented to this arrangement[191]. Similarly, it is also possible for a company's constitution to authorize conflicted behaviour[192].

This approach of authorizing a fiduciary to act in situations of conflict could be accommodated within the judicial review context. The difficulty of obtaining informed consent in the context of judicial review largely dissolves if the statute has authorized the public body to act in situations where there are conflicting interests. This issue will be explored in more detail in the following sub-section.

(ii) Applying Different Standards to Conflicted Fiduciaries

Part One of this chapter discussed Millet LJ's formulation of the 'no-inhibition' principle, which is triggered when a fiduciary is properly acting for two principals with potentially conflicting interests. In summary, this principle holds that the fiduciary cannot act with the intention of furthering the interests of one principal at the expense of the other's

[189] Recital 43 of the General Data Protection Regulation (GDPR) (EU) 2016/679. This recital clarifies *inter alia* Article 7 of the GDPR on the Conditions of Consent.
[190] *Locabail (UK Ltd) v Bayfield Properties* [2000] QB 451.
[191] *Sargeant v National Westminster Plc (*1991) 61 P&CR 518, 522-524.
[192] Section 175(5) of the Companies Act 2006.

interests, and she cannot allow the performance of her obligation to one principal to be influenced by her relationship with the other.

The importance of Millett LJ's judgment in *Mothew* for our purposes is his suggestion that a different standard applies when fiduciaries act properly for beneficiaries with potentially conflicting interests. It shows that even in the context of fiduciary law, the obligation of loyalty is not necessarily best expressed as a '*requirement to abide by an exclusive claim*'[193]. This point is emphatically made by Miller, who argues that a fiduciary can have multiple loyalties, and that these multiple loyalties are not necessarily diminished by the mere presence of a conflict. He suggests that a fiduciary should act under a modified standard of conduct where an '*authorized, latent conflict ripens*'[194]. This standard, which he terms as the demonstrable partiality standard of loyalty, requires the fiduciary to show that her decisions were reasonably calculated to advance the interests of the beneficiary. Thus, the fiduciary has to identify the reasons for which a particular decision was made and to explain how they influenced her course of conduct.

Miller provides a list of more specific requirements that may be derived from this standard[195]. Might Miller's demonstrable partiality standard provide some guidance as to how public law should regulate potentially conflicting interests? It should be noted firstly that this standard is only triggered when an authorized conflict arises. As indicated above, it is possible for a statute to authorize a public body to act in a situation involving conflicting duties. In this respect, it is necessary to examine the relevant statute conferring the discretionary power upon the public body.

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[193] Paul B. Miller, 'Multiple Loyalties and the Conflicted Fiduciary' [2014] 40 Queen's Law Journal 301, 305.
[194] ibid 319.
[195] For the full list, see Miller (n 193) 328-329.

First, it is important to determine whether the relevant statute prohibits (expressly or impliedly) the public authority from exercising its discretionary power in favour of any class of person(s) apart from the class(es) stipulated in statute. Unless there is such a prohibition and provided that the public body does not exceed its power under the statute, the public body is authorized to act notwithstanding the presence of apparently conflicting interests. The obvious consequence of adopting this approach is that it would be easier for public bodies to act in the face of conflicting interests than in fiduciary law. This is to be expected given that public bodies have to serve a wider range of functions and interests than private fiduciaries.

Miller's partiality standard focuses on the reasons and justifications offered by a conflicted fiduciary for her chosen decision. How might this aspect of the partiality standard be applied in judicial review? Firstly, in accordance with the contextual approach of identifying beneficiaries outlined above, the public body has to identify the relevant interests affected by its exercise of the discretionary power in question. In the event that the public body has identified the existence of conflicting interests or obligations, it should carefully consider and evaluate the nature and extent to which these interests conflicts[196]. It should then investigate any possible courses of action capable of reconciling these conflicting interests without causing undue harm to any of the beneficiaries involved.

The public body should also be prepared to provide an explanation for its chosen course of action. A public body should not be held in breach of their fiduciary-like obligation for making a decision that benefits one class of beneficiary over another where they are able to provide sufficient reasons for doing so. As Part 3 has discussed, this modified fiduciary approach to conflicting interests has the advantage of cohering with and

[196] This suggestion is derived from one of the more specific requirements Miller formulates under his partiality standard: ibid.

enhancing the culture of justification in public law. This section will now examine how this modified fiduciary approach towards conflicting interests might be applied to the cases of *Barry* and *Tandy*. These cases were heard by the House of Lords within the space of a year and they highlight the financial burdens imposed on local authorities due to reductions in central government funding.

The appeal in *Barry* turned on the proper construction of S2(1) of the Chronically Sick and Disabled Act 1970 ('the CSDA'), which concerned a local authority's mandatory duty to provide certain services for a disabled person resident in its area; a duty triggered only where the local authority is satisfied that *'it is necessary to make such arrangements in order to meet the needs of that person*'[197]. The local authority made an assessment that Mr. Barry needed home care for laundry and cleaning, but later withdrew the provision of these services due to reduction in government funding. The House of Lords held that the local authority was entitled to take its financial resources into account when determining what was necessary to meet the applicant's needs. Lord Clyde held that in framing the criteria of whether there is a necessity to meet the needs of the individual, the severity of the disabled person's condition may have to be matched against the availability of resources[198]. He also noted that the range of facilities listed in the CSDA are so extensive that it is unlikely that Parliament intended them to be provided regardless of the cost involved[199].

The House of Lords in *Tandy* arrived at a different conclusion as to the relevance of cost considerations. The local education authority was under a duty to make arrangements for the provision of suitable education for children unable to attend school[200].

[197] S2(1) of the CSDA.
[198] [1997] AC 584, 610-611.
[199] Ibid.
[200] Section 298(1) of the Education Act 1993.

In accordance with this duty, the authority provided the applicant with 5 hours of home tuition per week but due to limited financial resources, the hours were reduced to 3. The House of Lords distinguished *Barry* arguing that unlike the local authority in that case, the authority's obligation towards the applicant was not contingent upon the exercise of a prior discretion to assess the necessity of making provisions for her education. Lord Browne-Wilkinson also pointed out that the definition of 'suitable education' in the Education Act 1993 expressly spells out the factors relevant to suitability, and limited financial resources was not one of them. Thus, the House of Lords held that scarcity of resources was an irrelevant factor in determining what constitutes a suitable education.

The judges in *Barry* and *Tandy* engaged in a detailed process of statutory interpretation to determine whether or not limited financial resources is a relevant consideration. It is clear that the court's determination on the relevance of cost considerations has a significant impact on how local authorities perform their statutory obligations. For instance, after the House of Lords' decision in *Barry*, local authorities began to refuse to perform other apparently mandatory obligations to provide community care services on the grounds that resources were scarce[201]. While the pragmatic approach taken by the court in *Barry* may have helped address the strained financial position of the relevant local authority, it is questionable whether this relief should have been provided through an artificial process of statutory interpretation and by the courts adopting the correctness standard of review required by the relevance of considerations doctrine. As Staughton J observes, in cases where it becomes '*impossible* [for an authority] *to fulfil all the tasks which Parliament has required to be performed with the money which the authority is allowed to spend, the remedy lies with Parliament*.'[202] The significance of

[201] Elizabeth Palmer 'Resource Allocation, Welfare Rights – Mapping the Boundaries of Judicial Control in Public Administrative Law' (2002) 20 OJLS 63, 82.
[202] [1998] AC 714 (CA) 720 (Staughton J).

S2(1) of the CSDA lay in the transformation of a local authority's mere power to provide welfare assistance to disabled persons[203] into a mandatory obligation, and the court's decision in *Barry* undermines the aspirational objectives of the legislature. *Barry* suggests that the relevance doctrine may be too heavy-handed an instrument to be used in cases involving scarce resource allocation.

This section will now consider how *Barry* and *Tandy* would be analysed under the modified fiduciary approach, and how this approach is capable of providing a structured framework for reviewing the decision-making of local authorities faced with conflicting duties to different groups of individuals. The first step to be taken under the modified fiduciary approach, is to identify the relevant beneficiary of the local authority's power or duty, and in order to do so, it is necessary to have regard to the statutory regime in question. In the case of *Barry*, S2(1) concerns a specific duty towards '*any person to whom* [section 29 of the National Assistance Act 1948] *applies who is ordinarily resident in their area*'[204] and to whom the local authority is satisfied that it is necessary to make certain arrangements in order to meet their needs. Thus, it is this group of individuals who are the beneficiaries of the local authority's duty under S2(1).

The next step to be taken is to examine whether the local authority owes any conflicting duties, which prevent the local authority from carrying out its duty towards the claimant. In *Barry*, the council's ability to perform its duty towards the claimant was hampered by its duty to ensure the effective allocation of its limited resources. The existence of this conflicting duty triggers an obligation on the council to demonstrate that it is still capable of performing its duty towards the claimant. The fact that S2(1) concerns

[203] This was under the original enactment of S29 of the National Assistance Act 1948.
[204] S2(1) of the CSDA.

a specific duty towards individuals in need, indicates that more will be required in order for this justificatory burden to be discharged.

It is therefore important that the council adduce evidence to demonstrate exactly how its ability to fund other public services or to carry out its responsibilities towards those who are more severely disabled would be prejudiced by the continued provision of laundry and cleaning services to the applicant. In order to demonstrate that it was properly performing its duties towards the applicant, the council would have to show that it had at least investigated different measures of meeting the applicant's needs without withdrawing the services completely. For instance, could the council have reduced the provision of cleaning and laundry services from twice a week to once a week or once a fortnight? There is also little evidence that the council actually considered the applicant's needs, given that it delivered standard form letters to individuals in a similar position as the applicant, which simply stated that certain services would be withdrawn due to lack of resources and the need to prioritize those who are more severely disabled. It seems as though the council thought its only option of meeting the applicant's needs was to raise funds by increasing council tax; an option it was unable to carry out due to government-imposed rate-capping.

The modified-fiduciary approach enables the court to focus specifically on whether the council handled its conflicting duty of properly allocating scarce resources, and it shows that the council paid inadequate attention to the applicant's needs. It is likely therefore that the court would hold that the council had breached its fiduciary-like duty towards Mr. Barry. This approach, which focuses specifically on how the council addressed the issue of conflicting duties, is preferable to the House of Lords interfering with Parliament's policy choices through the process of statutory interpretation.

How would the case of *Tandy* be decided under the modified fiduciary approach? S298(1) of the then Education Act 1993 makes clear that the beneficiaries of the local education authority's duty to make arrangements for the provision of suitable education are '*children of compulsory school age who, by reason of illness, exclusion from school or otherwise may not receive suitable education*'[205]. However, as in the case of *Barry*, the local education authority's ability to properly perform this duty was affected by budgetary constraints. The presence of this conflicting duty requires the local authority to show that it still attempted to carry out its duty towards the claimant, insofar as it was able to do so.

The authority would have to show why it was necessary to adopt extensive cuts in the budget for home tuition. It needed to explain how other important interests or services may have been adversely affected unless these cuts were made. The council did attempt to provide an explanation as to why these cuts were necessary, which was that the council had overspent £1m in the previous year on an item on the budget and needed to recoup this sum[206]. There was some evidence that they considered the applicant's individual circumstances, and that they had given some thought to the policy on home tuition. In relation to the latter, the council had shown that this policy was properly considered by a strategic forum made up of *inter alia* head teachers, youth and councillors, tasked with assessing the educational services provided by the council for possible budget reductions[207].

Notwithstanding the above, it is still difficult to avoid the conclusion that the council had failed to properly perform its duty towards the applicant. The strategic forum considered a policy that was primarily designed with the object of procuring savings in

[205] S298(1) of the Education Act 1993.
[206] [1997] AC 714, 719.
[207] ibid 723.

expenditure rather than with ensuring that children of compulsory school age have access to suitable education. Furthermore, the council does not seem to have investigated different options for meeting the education needs of the applicant in light of the budgetary concerns. For instance, there is no evidence that the council considered whether it could have diverted funds from other services which are discretionary in nature in order to meet the applicant's needs. It is clear therefore that the local education authority failed to have proper regard to the applicant's interest and that it was unable to properly discharge its justificatory onus. The existence of the conflicting interest of finite resources had impaired its ability to properly perform its duty towards the applicant.

C. Modifying the No-Profit Principle

The courts have generally adopted a strict approach towards the receipt of unauthorized profits by a private fiduciary and have applied this principle to strip a fiduciary of such profits, regardless of her motivations. This stringent approach is exemplified in *Keech v Sandford*[208], where a trustee acquired a lease for himself after failing to renew it for the beneficiary, who was an infant. Notwithstanding the absence of fraud, the court found that he was liable to account for the profits, emphasizing the necessity of strictly pursuing the rule even though it '*may seem hard, that the trustee is the only person of all mankind who may not have the lease'*[209]. The strict approach adopted in *Keech* was reaffirmed in *Boardman v Phipps*[210], where the House of Lords found that the solicitor had breached his fiduciary duty, holding that the rule of equity applied, even where there was only the possibility of conflict between personal interest and fiduciary position, and even where there is no positive wrongdoing. However, the Court of Appeal has since expressed its

[208] 25 E.R. 223.
[209] ibid 224.
[210] [1967] 2 AC 46.

dissatisfaction with the inflexibility of the rule, and has suggested that it may be time for the court to revisit the operation of the rule in '*harsh circumstances'*[211].

This suggestion of relaxing the no-profit rule should not be adopted in the public law context for the simple reason that public officials should be held to higher standards than private citizens. The prophylactic quality of the no-profit principle is even more significant in the public law context, where the nature of the discretionary power exerted by public officials is more far-reaching, and where citizens have a vested interest in the proper performance of public officials' duties. The need for a strict no-profit principle is further intensified where taxpayer money is concerned, as the misuse of such funds by a public official will have detrimental consequences on public trust and confidence.

D. Modifying the Duty to Act in Good Faith and the Best Interests' Duty

There is nothing particularly radical about applying the duty to act in good faith in the public law context. The courts have frequently asserted that public bodies do not have untrammeled discretion when exercising their powers or duties. For instance, in *Roncarelli v Duplessis*[212] *,* Rand J for the majority held that no statute can be taken as conferring an '*unlimited arbitrary power exercisable for any purpose'*[213], rather discretion '*necessarily implies good faith in discharging public duty'*[214]*.* Certainly, the presence of bad faith would, as Craig points out, automatically trigger the applicability of mechanisms such as relevance and purpose in judicial review[215]. As for the 'best interests' duty, given that it does not generally mandate any specific action on the part of fiduciaries, it should not be interpreted as imposing positive obligations on public officials and public bodies either.

[211] *Murad v Al Saraj* [2005] EWCA Civ 959 [82].
[212] *Roncarelli v Duplessis* [1959] SCR 121.
[213] ibid 140.
[214] ibid.
[215] Craig (n 127) 19-019.

These duties perform the same function in public law as they do in fiduciary law, namely they serve to emphasize the other-regarding nature of discretionary power, and by doing so, they ensure that public bodies are held to acceptable standards of conduct. Furthermore, they could play a significant role in relation to the justificatory onus that public bodies have to discharge when faced with conflicting interests. A public body will more easily discharge this burden if it can show that its proposed measures were designed with the objective of promoting the interests of the relevant beneficiaries.

E. Applying the Above Insights and Modifications to Roberts

Having considered the different ways in which fiduciary duties and principles may be modified to cater for the public law context, it is important to examine how they may be applied to a problematic case like *Roberts*.

(i) The role of the public body in Roberts

As the above sections considered the role of the relevant public body when exercising statutory discretion, this section will consider what the public body should have done before exercising their discretion under the statute. First, the public body would have to examine the relevant statute governing the exercise of their discretion to set wages for their workers. In this case, this would be S62 of the Metropolis Management Act 1855, which provides that a metropolitan borough council '*shall…employ...such…servants as may be necessary, and may allow to such…servants…such…wages as* [the Council] *may think fit*'.

The wording of this particular section suggests that the relevant statutory beneficiary to be considered by the council when setting wages are the workers themselves. Next, the public body should have considered whether the statute barred it from considering any other interests or beneficiaries apart from the employees when setting the wages. As there is no evidence of such a prohibition here, the public body should have considered

whether there would be any other interests affected by its exercise of discretionary power. Given that the council's exercise of discretion entailed the use of funds contributed by ratepayers, it could be argued that they would be adversely affected by the council's decision to pay its workers a higher rate. The council would then have to consider whether it was possible to reconcile the competing interests of the workers and the ratepayers. As the power in the statute concerns a discretion rather than a mandatory duty as in the case of *Barry* and *Tandy*, the council will not have to provide much by way of justification.

(ii) The role of the court in judicial review

The court would have to consider the council's justifications for prioritizing the workers' interests over the ratepayers. In assessing this justification, it would have to examine the wording of the statute and the nature of the discretion afforded to the public body. Given that the statute indicates that the discretion was to be exercised in favour of the workers in accordance with the amount that the council deemed fit, the court should have adopted a relatively light touch approach in scrutinizing the justification(s) offered by the public body.

However, the council might be able to argue that in setting wages for their workers they were acting in good faith and with the intention of furthering the interests of its statutory beneficiaries. Interestingly in *Roberts*, the good faith argument seemed to work against the council. Lord Sumner argued that the duty of good faith entails '*giving* [the council's] *minds …and their wills to the discharge of their duty towards* [the] *public, whose money and local business they administer'*[216] Although Lord Sumner speaks of the public, it is clear that he has the ratepayers in mind, and it is submitted that he has unfairly stretched the meaning of the good faith insofar as he thinks that it requires the council to engage in

[216] [1925] AC.578, 604.

a particular form of action. Under the modified fiduciary approach, the duty of good faith is generally taken to be negative in nature and it operates to prohibit undesirable conduct. There is no evidence in *Roberts* of any malicious intent on the part of the council in setting the wages for the workers. Indeed, the council seems to have been motivated by the laudable desire to provide fair and reasonable wages.

In the actual decision, Lord Buckmaster and Lord Sumner indicated that the public body had acted unlawfully for failing to take into account a relevant consideration, namely falling living costs[217]. As mentioned above, the problem with adopting this approach is that it assumes that the courts are necessarily the best arbiters on which considerations are relevant and which are not. Furthermore, there is nothing in the broad nature of the statutory discretion which states that the council had to be guided by what the court deemed to be '*ordinary economic…considerations*'[218]. Indeed, this wide statutory discretion suggests that the court should be slow to interpose its own views for that of the council, particularly where the council was acting in good faith and where it was pursuing the interests of its statutory beneficiaries, namely its workers. It is submitted that had the modified fiduciary approach been adopted, the court would have decided in favour of the council.

5. CONCLUSION

This chapter has examined key theories and cases on fiduciary law to determine whether they are capable of vindicating the public's interest in the control of public. It puts forward two normative justifications for applying fiduciary-like duties in public law, namely that such duties help uphold and maintain high standards of conduct and helps safeguard the decision-making process. In relation to the latter, it argues that the proposed fiduciary approach helps ensure that public bodies adopt a more interest-focused mode of

[217] [1925] AC 578, 589, 608-609.
[218] ibid 609 (Lord Sumner).

determination that enhances the growing culture of justification in public law. Finally, it has considered how certain key fiduciary principles may be modified to cater for the public law context, and it has examined how certain key cases would be considered under this structured approach.

CHAPTER FIVE

CONCEPTUAL BORROWING: A TWO-WAY STREET? AN ANALYSIS OF CONTRACTUAL DISCRETION

The previous chapters have examined how appropriate conceptual borrowing from private law may enhance the protection afforded to the interests under both limbs of the framework of good administration. This process of conceptual borrowing has involved identifying private law principles which share similar normative concerns to public law, and examining how these principles may be usefully modified to cater to the public law context. For instance, the preceding chapter considered how techniques used in fiduciary law to control discretionary power may be adapted so as to refine existing controls on public discretionary power by holding public officials to high standards of conduct and safeguarding the decision-making processes of public bodies.

While this chapter is similarly concerned with the control of discretionary power, its focus is on the exercise of contractual discretionary power. Through an examination of the contractual discretion case law, this chapter seeks to demonstrate that conceptual borrowing is capable of functioning as a two-way street. While it may not be desirable to import public law concepts across the board into all areas of contract law, it may be useful to adopt and adapt such concepts where they are capable of addressing the type of abuses and imbalances of power that arise in the contractual discretion cases. It has been argued previously that judicial review requires the careful balancing and mediation of interests under both limbs of the framework of good administration. A similar exercise is required in the context of contractual discretion, where the freedom of contract ideal has to weighed against the normative reasons for imposing judicial controls on contractual discretion.

This chapter is divided into six parts. It first explores the normative justifications for controlling contractual discretionary power. It then considers how public law concepts may be relevant in preventing abuses of power and controlling contractual discretion, before going on to outline briefly the key features of the specific public law concepts that have been applied in the contractual discretion cases. The chapter subsequently examines how the courts have utilized the method of the implied term to control contractual discretionary power and it discusses some of the flaws in the way that the courts have applied public law concepts in this context. The penultimate part of this chapter considers the nature of the implied term controlling contractual discretion, specifically the ambiguity surrounding the question of whether it is a term implied in fact or by law. Finally, this chapter puts forward a framework for the adoption of variable standards of review and relevancy review in the contractual discretion cases.

1. Why Control the Exercise of Contractual Discretionary Power?

Parties may use express contractual terms to confer discretionary power on one party or to a third person. In most cases, this discretion involves a decision-making function that the contract confers upon one party, which materially affects the interests of one or both contractual parties. Should the courts impose any restrictions upon the exercise of such discretionary power? One objection to the control of contractual discretionary power is that it would undermine the parties' declared intentions and their freedom to choose contractual terms. Arguably, parties can regulate undesirable behaviour by placing appropriate terms in the contract where judicial supervision is required and by relying on extra-legal sanctions[1]. However, the cases highlight three reasons for reviewing contractual

[1] Jonathan Morgan, 'Against Judicial Review of Discretionary Contractual Powers' [2008] LMCLQ 230.

discretionary power, namely the prevention of commercial absurdity, the protection of the reasonable expectations of the parties and the prevention of abuse of power.

Collins' explanation for the courts' control of unfettered contractual discretionary powers is that the courts are responding to the implicit dimensions of the contract, to the economic logic of the transaction. He argues that many long-term contractual relations depend upon adaptation to maximize the wealth achieved through the transaction and an unfettered discretionary power might jeopardise the economic potential of the contract. This suggestion is reflected to some extent in the case law, where the courts have recognized that unqualified contractual discretionary power can give rise to commercial absurdity. For instance, in *Paragon Finance v Nash*[2], Dyson LJ cites with approval the trial judge's observation that '*a contract where one party truly found himself subject to the whim of the other would be a commercial and practical absurdity'*[3].

The courts have also emphasised the importance of protecting the reasonable expectations of the parties. Thus, in *Paragon Finance*, Dyson LJ held that it was necessary to imply a term in each mortgage agreement that rates of interest would not be set dishonestly, '*in order to give effect to the reasonable expectations of the parties*'[4]. Similarly, in *Horkulak v Cantor Fitzgerald International*[5], which involved the construction of a discretionary bonus clause in an employment contract, Potter LJ held that '*it is presumed to be the reasonable expectation and therefore the common intention of the parties that there should be a genuine and rational…exercise of discretion'*[6].

[2] [2002] 1 WLR 685.
[3] ibid 698.
[4] ibid 701.
[5] [2005] ICR 402.
[6] ibid 413-414.

Lord Steyn observes that reasonable expectations in contract law refer to the expectations '*that are, in an objective sense, common to both parties*'[7]. Commercial parties usually contract on the basis that each party will generally act in a commercially sensible manner, and will not exercise discretionary power arbitrarily. It could be argued that by controlling the exercise of unfettered discretionary power, the courts are enforcing the parties' unexpressed intentions. This understanding of judicial intervention, namely that the courts are only enforcing the parties' intentions, is compatible with the freedom of contract ideal.

In more recent decisions involving contractual discretion, the courts have explicitly justified judicial intervention on the basis that they are preventing the abuse of contractual powers. Thus, in *Abu Dhabi National Tank Co v Product Star Shipping Ltd*[8] ('the *Product Star*'*)*, the Court of Appeal held that in cases involving contractual discretionary power, '*the essential question always is whether the relevant power has been abused'*[9]. Part Two will explore this rationale in more detail, specifically how it opens the door to valuable conceptual borrowing.

2. Preventing the Abuse of Power: The Potential Relevance of Judicial Review Concepts

Abuse of power is a rather nebulous concept as power comes in numerous forms and may be misused in different ways. There may be specific objectives which underpin the regulation of imbalances of power in different areas of law. For instance, a key aspect of competition law is ensuring that undertakings in dominant market positions do not abuse

[7] Johan Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' [1997] LQR 433, 434. See also Barry J Reiter and John Swan, 'Contracts and the Protection of Reasonable Expectations' in Barry J Reiter and John Swan (eds) *Studies in Contract Law* (eds) (Butterworths 1980) 7
[8] [1993] 1 Lloyd's Rep 397
[9] ibid 404.

their positions and market power, as this will influence the structure of the market and weaken the degree of competition[10]. These rules may not be appropriate for cases involving contractual discretionary power as abuse or imbalance of power in this context is intricately linked with assessments of the relevant undertaking's position in the market and the need to preserve the competitive process.

The courts have developed several techniques in judicial review to address the misuse of discretionary power, and it is argued that with appropriate modification, these techniques are capable of addressing the type of abuses of power that may arise in the contractual discretion context. In *Braganza v BP Shipping Ltd*[11], Lady Hale highlights the conflict of interest that arises where a contractual term provides one party with the power to make decisions affecting the rights of both parties[12], observing that a parallel exists between cases where a contract assigns a decision-making function to one party and where a statute assigns a decision-making function to a public authority as in '*neither case is the court the primary decision-maker*'[13].

Varuhas too recognizes that similar concerns underpin contractual review and the regulation of public discretionary power in judicial review. He observes that both aim to keep decision-makers on track and to prevent them from abusing their power[14]. He suggests that the normative driver for controlling contractual discretion is '*the juridical inequality that goes with being subject to the decision power of another*'[15]. Varuhas highlights the vulnerability that arises when a party or individual is subject to another's decision-making power, be it public or contractual discretionary power. In judicial review, this vulnerability

[10] *Hoffman-La Roche & Co AG v Commission* [1979] ECR 461 [6].
[11] [2015] 1 WLR 1661.
[12] ibid 1669.
[13] ibid.
[14] Jason Varuhas, 'Judicial Review Beyond Administrative Law: *Braganza v BP Shipping Ltd* and Review of Contractual Discretions' (31 May 2017) UK Constitutional Law Association Blog.
[15] ibid.

to the misuse of discretionary power is addressed through the grounds of review, which require *inter alia* that decision-makers abstain from making errors of law, adhere to the rules of natural justice and keep within the ambit of their conferred powers. These grounds enable judges to address the power imbalance that arises from being subject to another's decision-making power.

This concern with preventing abuse of contractual discretion is heightened in relationships where the parties are not of equal footing. Lady Hale in *Braganza* observes that the conflict of interests present in the contractual discretion cases is heightened where there is a significant imbalance of power between the contracting parties as in employment contracts[16]. Varuhas too notes that the juridical inequality entailed by contractual discretionary power is intensified in relationships characterized by power imbalance[17]. This suggests that there may be certain types of contracts or relationships where the risk of abuse of power is more potent and where greater supervision is needed, and others where the risk is minimal and where less protection is needed. It may therefore be useful to have recourse to judicial review techniques, which enable the courts to vary the intensity of review where appropriate.

3. Conceptual Borrowing: Understanding the Public Law Conceptual Apparatus

Part 4 considers the content of the implied term used to control contractual discretionary powers and the way that the courts have utilized public law principles in developing this implied term. However, before we can assess whether these principles have been appropriately applied in the contractual discretion context, it is necessary to understand how these principles operate in judicial review. As such, this section examines some of the key issues surrounding the *Wednesbury* principle and the duty to take into account only

[16] [2015] 1 WLR 1661 [18].
[17] Varuhas (n 14).

relevant considerations ('relevancy review'); both principles that have been applied in the contractual discretion context.

A. Two Notions of Unreasonableness

It is worth starting with a consideration of the *Wednesbury* unreasonableness principle, also known as the irrationality ground of review[18]. In *Associated Provincial Pictures Houses Ltd v Wednesbury Corporation*[19], a local authority, pursuant to its statutory discretion to license cinema performances, imposed a condition barring children under 15 from attending Sunday performances. Lord Greene, who delivered the majority judgment, held that the court was entitled to review the local authority's decision and consider whether they have taken into account relevant matters and excluded irrelevant matters. He stated that:

> *Once that question has been answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it*[20].

Craig calls the notion of unreasonableness used by Lord Greene in the above passage '*unreasonableness in the substantive sense*'[21]. It simply refers to a decision that is so unreasonable that no reasonable authority could ever have come to it. However, Lord Greene also employs unreasonableness in a broader, 'umbrella'[22] sense as exemplified in his discussion of the hypothetical situation of a teacher being fired because she has red hair. Lord Greene observed that such a decision:

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[18] *Council of Civil Service Unions v Minister of Civil Service* [1985] AC 374, 410 (per Lord Diplock).
[19] [1948] 1 KB 223.
[20] ibid 234.
[21] Paul P. Craig, *Administrative Law* (8th edition Sweet & Maxwell 2016) 19-002.
[22] ibid.

> *…is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact all these things run into one another*[23].

The 'umbrella' sense of unreasonableness includes taking into account irrelevant considerations, omitting relevant considerations and acting in bad faith[24]. As the following sub-section shows, this 'umbrella' sense of unreasonableness sits uneasily with the orthodox classification of relevancy review.

B. The 'Umbrella' Sense of Unreasonableness and Relevancy Review

(i) The orthodox classification of relevancy review

Legal orthodoxy views the irrationality ground of review as being confined to 'unreasonableness' in its narrow, substantive sense, and considers the failure to take into account relevant factors or exclude irrelevant ones as issues of statutory interpretation that fall under the illegality ground of review[25]. The relevance ground is one of *'*[t]*he more interventionist grounds on which judges will control the substance of some decisions'*[26] as evidenced by Lord Atkinson's judgment in *Roberts v Hopwood*[27], discussed in detail in the previous chapter. Lord Atkinson held that in deciding to pay male and female workers the same wages, the local council had been guided by '*some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes'*[28]. By regarding these considerations to be irrelevant, he was able to hold that the local council's decision was unlawful[29]. It is clear therefore that the courts are able to exert significant control upon the decision-making process via relevancy review. Given that relevancy review is

[23] [1948] 1 KB 223, 229.
[24] Craig (n 21) 19-002.
[25] Sir Harry Woolf, Jeffrey L. Jowell, Catherine Mary Donnelly, Ivan Hare, *De Smith's Judicial Review* (8th edn Sweet & Maxwell 2018) 5-001; *R v Secretary of State for the Environment, ex p Hammersmith & Fulham LBC* [1991] 1 AC 521, 597.
[26] Timothy Endicott, *Administrative Law* (OUP 2018) 275.
[27] [1925] AC 578.
[28] ibid 594.
[29] Mark Elliott and Jason N.E Varuhas, *Administrative Law: Text and Materials* (OUP 2017) 254.

considered to be an issue of statutory interpretation, it is regarded as a matter on which the court is entitled to substitute judgment[30].

However, the courts have recognized the need for caution in this context and have adopted a less intensive standard of review in a number of cases. In *CREEDNZ Inc v Governor General*[31], Cooke J held that a decision would only be quashed for failure to take into account relevant considerations where the statute expressly or impliedly identifies the considerations that have to be taken into account by the public body as a matter of legal obligation. Cooke J's reasoning was followed by the House of Lords in *Re Findlay*[32]. This indicates that judicial determinations on the relevance of considerations have to be guided by the specific legislative scheme. Perhaps to further offset the potential harshness of the relevance ground, the courts have accorded administrative decision-makers significant freedom in determining the weight to be attached to relevant considerations. Thus, the House of Lords emphasized that as long as the public authority has regard to all considerations deemed relevant by the court, it is free to give them whatever weight it thinks fit or even to give them no weight at all, provided that it does not lapse into *Wednesbury* unreasonableness in its narrow and substantive sense[33].

(ii) Problems with the relevance ground

Notwithstanding the above attempts at ameliorating the harshness of relevancy review, there are still a number of problems with this criterion. Firstly, determining the relevance of a particular consideration is not a clear-cut task. This is evidenced by the cases of *R v Gloucestershire County Council ex parte Barry*[34] and *R v East Sussex County Council ex*

[30] Paul Craig, 'The Nature of Reasonableness Review' [2013] CLP 131, 135.
[31] [1981] 1 NZLR 172, 183.
[32] [1985] AC 318.
[33] *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780.
[34] [1997] 2 WLR 459.

parte Tandy[35] (discussed in the previous chapter) where the House of Lords arrived at different conclusions as to whether limited financial resources was a relevant consideration to be taken into account in a public authority's discharge of its mandatory obligation towards vulnerable members of the public.

Secondly, the courts have not always been guided by the legislative scheme and have sometimes manipulated the uncertain boundaries within the illegality ground of review. This is highlighted in *R v Secretary of State for Foreign Affairs ex parte World Development Movement* Ltd[36] (*'WDM'*), where the Court of Appeal held that the Secretary of State's decision to grant aid to the Malaysian government was unlawful. Although the Secretary of State was clearly empowered by statute to grant aid '*for the purpose of promoting the development…of a country or territory outside the United Kingdom*'[37], the Court of Appeal decided to read the additional criterion of economic soundness into the provision, holding that as the grant of aid was not economically sound, it did not fall within the purpose of the statute. This case demonstrates how easily the courts are able to manipulate statutory language and the grounds of review. As Elliott and Varuhas point out, if the criterion of economic soundness had been characterized as a relevant consideration, the outcome would likely have been different because the decision-maker would have been free to determine how much weight should be given to that consideration[38].

(iii) The complications posed by Lord Greene's 'umbrella' sense of unreasonableness

Lord Greene's 'umbrella' sense of unreasonableness creates further uncertainty as it casts doubt on the existence of a clear divide between the illegality and irrationality grounds of review. It suggests that relevancy review, typically categorized under the illegality head,

[35] [1998] 2 WLR 884.
[36] [1995] 1 WLR 386.
[37] Section 1(1) of the Overseas Development and Cooperation Act 1980.
[38] Mark Elliott and Jason N.E Varuhas, *Administrative Law: Text and Materials* (OUP 2017) 241.

may be subsumed within rationality review. This is problematic because as discussed above, the illegality ground generally entails hard-edged review that is significantly higher in intensity than that under the irrationality ground.

Indeed, while Lord Greene utilized the umbrella sense of unreasonableness when discussing the above-mentioned example of the red-haired teacher, later in the judgment, he appears to distinguish between relevance and rationality. Specifically, he recognized that a local authority may have still reached a conclusion '*so unreasonable that no reasonable authority could ever have come to it*'[39], even though the authority has '*kept within the four corners of the matters which they ought to consider*'[40].

The above discussion highlights the intricate and complex relationship between the relevance and rationality grounds of review. The courts should be prepared to parse the complexities of this relationship, when applying these principles in the contractual discretion context. It will be argued below that the courts have failed in this exercise.

C. The Evolution of the *Wednesbury* Principle and the Adoption of Variable Standards of Review

Another aspect of Lord Greene's judgment that merits close examination concerns the 'substantive' meaning of unreasonableness. The tautologous phrase used by Lord Greene creates the impression of a fixed and high standard; an impression reinforced by Lord Diplock who notes that the irrationality ground of review or *Wednesbury* unreasonableness applies to a decision '*which is so outrageous in its defiance of logic or of accepted moral standards*'[41] that no sensible person could have arrived at it. In reality however, the courts

[39] [1948] 1 KB 223, 234.
[40] ibid.
[41] *Council of Civil Service Unions v Minister of Civil Service* [1985] AC 374, 410.

are willing to invalidate decisions that fall short of the extremely high threshold suggested by Lord Greene and Lord Diplock.

Indeed, Laws observes that while the courts have broadly adhered to the '*monolithic language of Wednesbury,* [they] *have to a considerable extent in recent years adopted variable standards of review'*[42]. The courts have set the threshold very high in cases involving political and economic considerations, by preventing review of discretionary power in the absence of bad faith, deception or manifest absurdity[43]. In cases involving human rights on the other hand, the courts have adopted a more intensive standard of review, holding in *R v Ministry of Defence ex parte Smith*[44] that '[t]*he more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision was reasonable*'[45]. There is also evidence of the courts preferring a less stringent test than that advocated in *Wednesbury* outside of the human rights context. Thus, Lord Cooke in *R v Chief Constable of Sussex ex parte International Traders Ferry Ltd ('ITF')*[46] suggests that a simpler test could be used, namely whether the decision in question was one which a reasonable authority could reach[47].

It should be noted that the proportionality test has supplanted the *Wednesbury* principle in some contexts, specifically in cases involving human rights and EU law. Although the proportionality test may be formulated in different ways[48], the test will usually require the courts to examine whether the challenged measure was suitable to achieve the desired objective, whether the measure was necessary for achieving the

[42] Sir John Laws, 'Wednesbury' in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade KC* (OUP 1998) 187.
[43] *Nottinghamshire County Council v Secretary of State for the Environmen*t [1986] AC 80; *R (Asif Javed) v Secretary of State for the Home Departmen*t [2001] EWCA Civ 789.
[44] [1996] QB 517.
[45] ibid 554 (per Sir Thomas Bingham MR). See also *R v Secretary of State for the Home Department ex parte Bugdaycay* [1987] AC 514.
[46] [1999] 2 AC 418.
[47] ibid 452.
[48] *R (Lumsdon and Others) v Legal Services Board* [2016] AC 697, 718 (per Lord Reed and Toulson).

objective, and whether the measure imposed excessive burdens on the individual[49]. Commentators in favour of proportionality replacing the *Wednesbury* test as a general head of review highlight the structured nature of the means-ends inquiry and its ability to facilitate reasoned justification for the exercise of public power and interference with fundamental values[50]. However, the Supreme Court has displayed considerable reluctance in abolishing the long-standing *Wednesbury* principle altogether[51].

The above discussion has demonstrated how the *Wednesbury* principle has evolved from a fixed, high standard to one capable of accommodating varying intensities of review. The evolution of the *Wednesbury* principle coupled with the introduction of proportionality review, shows that the courts in judicial review have developed a range of finely honed tools that are capable of addressing misuses of power while safeguarding as far as possible, the autonomy of administrative decision-makers. Part Six of this chapter considers how the courts might utilize these variable standards of review in the contractual discretion context.

4. Controlling Contractual Discretion: The Content of the Implied Term

The previous Parts considered the normative reasons for controlling contractual discretion and examined the workings of certain public law principles that have been used in this context. We are now better placed to assess and evaluate existing judicial controls upon contractual discretion. The courts have sought to control contractual discretionary power by implying a term in the contract as to the manner in which such powers are to be

[49] Craig (n 21) 21-021.
[50] ibid 21-037 to 21-041.
[51] *Pham v Secretary of State for the Home Department* [2015] UKSC 19; R (*Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355*; Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3.

exercised[52]. The following sub-sections explore the content of the implied term and the various principles that are commonly implied into the exercise of contractual discretion.

It is argued that the orthodox, substantive sense of *Wednesbury* unreasonableness offers no additional protection against the abuse of contractual discretionary power, but merely replicates existing obligations to act in good faith and refrain from arbitrary conduct. While the introduction of relevancy review in *Braganza* may offer additional safeguards against misuses of power, there are a number of problems with the way that the Supreme Court has interpreted and applied this requirement.

A. The Obligation to Act Honestly and in Good Faith

Although some of the earlier cases indicated that an exercise of contractual discretion could not be challenged unless it was exercised dishonestly[53], as the following sub-sections demonstrate, it is becoming increasingly clear that the requirement of honesty is simply one out of a range of concepts that operate to limit a contracting party's discretion, and it is often linked to the obligation to act in good faith. There is currently no general and overriding principle of good faith in contract law[54]. The courts have also indicated that '*the exact content of any implied obligation…to act in good faith will be highly sensitive to the particular context*'[55].

In the specific context of contractual discretion, the courts in some cases have suggested that the obligation to act honestly and in good faith operates in addition to the prohibition

[52] *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661, 1669 (per Lady Hale). See also *Paragon Finance v Nash* [2002] 1 WLR 685, 701 (per Dyson LJ); *Horkulak v Cantor Fitzgerald International* [2005] ICR 402, 413-414 (per Potter LJ); *Socimer International Bank Ltd v Standard Bank Ltd* [2008] Bus LR 1304, 1333 (per Rix LJ); *Waaler v Hounslow London Borough Council* [2017]1 WLR 2817, 2824 (per Lewison LJ).
[53] *Diggle v Ogston* [1915] 84 LJ KB 2165; *Weinberger v Inglis* [1919] AC 606.
[54] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, 439 (per Bingham LJ); *Horkulak v Cantor Fitzgerald International* [2005] ICR 402 [30]; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a) Medirest* [2013] EWCA Civ 200.
[55] *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch) [202] (per Fancourt J). See also *D&G Cars Ltd v Essex Police Authority [2015] EWHC 226 (QB)* [175].

against irrational, arbitrary and capricious conduct. For instance, Leggatt LJ in *Product Star* stated that '*the authorities show that not only must the discretion be exercised honestly and in good faith, but…it must not be exercised arbitrarily, capriciously or unreasonably*'[56]. However, some commentators argue that in the context of contractual discretion, the obligation of good faith *encompasses* the absence of irrationality and capriciousness. Thus, Hooley proposes embracing a limited concept of good faith in the context of contractual discretion that includes honesty and an absence of irrationality, capriciousness, arbitrariness and improper purpose[57].

Similarly, Arden LJ's judgment in *Lymington Marina Ltd v Macnamara*[58] suggests that the import of public law concepts such as irrationality is unnecessary as the obligation to act in good faith and the prohibition against arbitrary conduct are sufficient controls on contractual discretion. In determining whether the marina company had wrongly refused to approve the licensee's grant of successive sub-licenses, Arden LJ found that the trial judge '*was in error in using public law principles'*[59], namely the *Wednesbury* unreasonableness test, in the context of contractual discretion. Arden LJ has also argued extra-judicially that the qualities mentioned by Rix LJ in *Socimer* as limiting discretion, namely '*honesty, good faith and genuineness…and…the absence of arbitrariness, capriciousness, perversity and irrationality*'[60], may be encapsulated within the concept of good faith[61].

The expansive interpretation of the good faith obligation proposed by Arden LJ addresses to some extent the normative concerns underpinning the control of contractual

[56] [1993] 1 Lloyd's Rep 397, 405.
[57] Richard Hooley, 'Controlling Contractual Discretion' [2013] CLJ 65.
[58] [2007] EWCA Civ 151.
[59] ibid [37].
[60] [2008] Bus LR 1304, 1333 [66].
[61] Mary Arden, *Common Law and Modern Society: Keeping Pace with Change* (OUP 2015) 54.

discretion. The requirements of honesty and the prohibition against arbitrariness go some way in ensuring that the reasonable expectations of contractual parties are protected, while the stipulation against irrational conduct may help prevent commercial absurdity. The prohibition against arbitrariness and capriciousness might also help address the most egregious forms of abuses of power. One might therefore question whether it is necessary to import public law concepts to contract law if the good faith obligation is capable of tackling these normative concerns.

However, it is not clear that the courts have adopted Arden LJ's conception of good faith, for as mentioned above, the prohibition of arbitrary and capricious conduct is sometimes taken to operate in addition to the good faith obligation. Furthermore, as discussed below, the courts have utilized public law terminology when fleshing out the prohibition against arbitrary and capricious conduct in the contractual discretion context. Finally, while Arden LJ's conception of good faith may be useful in preventing egregious abuses of contractual discretionary power, it is too blunt a tool to address less severe misuses of power that are still capable of debilitating a vulnerable contractual party. As such, Part 6 of this chapter sets out a framework for utilizing the more finely honed variable standards of review employed in public law.

B. The Prohibition against Arbitrary and Capricious Conduct

Judicial discussion of the prohibition against arbitrary and capricious conduct is often elided with discussion of the obligation of good faith, absence of perverseness, and rationality[62]. Burton J in *Clark v Nomura International Plc*[63] does attempt to provide a definition of capriciousness, noting that a capricious decision contains '*aspects of*

[62] Hooley (n 57) 76-77.
[63] [2000] IRLR 766 (QBD).

arbitrariness or domineeringness or whimsicality or abstractness'[64]. In *Paragon Finance*, Dyson LJ provides an example of a capricious reason, such as when a lender decided to raise the rate of interest because its manager did not like the borrower's hair colour[65]. As mentioned above, Lord Greene offers a similar example of an absurd decision in *Wednesbury*, namely a teacher being fired because she had red hair[66].

As far as the prohibition against arbitrary conduct is concerned, Mance LJ notes in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)*[67] that the reinsurer's obligation not to withhold approval arbitrarily can also be rephrased to mean that the reinsurer will not withhold approval '*in circumstances so extreme that no reasonable company in its position could possibly withhold approval'*[68]. Both Burton LJ and Mance LJ adopted terminology from *Wednesbury* when explaining respectively the obligations not to act capriciously and arbitrarily. This might suggest that the concept of rationality is capable of encompassing both these obligations.

C. The Obligation to Act **Rationally**

Leggatt LJ held in *Product Star* that discretion must not be exercised unreasonably[69]. In *Socimer*, Rix LJ held that in the context of contractual discretion, the concept of reasonableness is deployed in a '*sense analogous to Wednesbury unreasonableness*'[70]. In order to determine whether the *Wednesbury* principle has been appropriately applied in this context, the following sub-section will consider whether this principle can be shorn from the normative considerations underpinning it. The remaining sub-sections will examine the

[64] ibid [40].
[65] [2002] 1 WLR 685, 700.
[66] *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223, 229. Lord Greene was referencing the example given by Warrington LJ in *Short v Poole Corporation* [1926] Ch 66.
[67] [2001] EWCA Civ 1047.
[68] ibid [73].
[69] [1993] 1 Lloyd's Rep 397, 404.
[70] [2008] Bus LR 1304, 1333.

application of the *Wednesbury* principle in cases prior to *Braganza* and the interpretation of *Wednesbury* adopted in *Braganza* itself.

(i) Can the Wednesbury Principle Be Shorn from the Normative Considerations that underpin it?

It could be argued that the *Wednesbury* test is designed to address constitutional concerns that do not arise in the contractual context. Lord Greene in *Wednesbury* emphasized the fact that Parliament had entrusted an executive discretion to the local authority, which had the requisite knowledge and experience to deal with the matter[71]. He held that the court in such a case is not an appellate court and cannot substitute itself for the authority. Irvine further elaborates on the constitutional imperative of judicial self-restraint which he argues forms the basis of *Wednesbury* unreasonableness[72]. He sets forth three bases for this principle of judicial self-restraint including a constitutional imperative as local authorities are entrusted with discretionary power by Parliament, lack of judicial expertise to make decisions involving matters of policy, and a democratic imperative as elected public authorities derive their authority in part from their electoral mandate[73].

The normative considerations which drive the *Wednesbury* unreasonableness test do not necessarily arise in the contractual context. There is no need for the courts to be cognizant of any constitutional or democratic imperative when determining whether a contractual party has exercised its discretion properly. This is not however a decisive argument against applying the *Wednesbury* principle in the contractual context. After all, the *Wednesbury* test is still applicable in relation to executive action that is carried out in

[71] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 228-230.
[72] Lord Irvine of Lairg, 'Judges and Decision-Makers: The Theory and Practice of Wednesbury Review' [1996] PL 59, 60.
[73] ibid 60-61.

pursuance of a common law or prerogative power[74] despite the absence of the constitutional imperative mentioned above. Lord Greene in *Wednesbury* was ultimately concerned with ensuring that the court does not substitute its judgment for that of the local authority. As the following sub-section shows, this concern with preventing substitution of judgment is what spurred the courts in the contractual discretion cases to reject the use of an objective reasonableness standard in favour of the *Wednesbury* test.

(ii) The Application of the Wednesbury Principle in the Contractual Discretion Cases Prior to Braganza

Prior to *Braganza*, the judges generally employed unreasonableness in its narrow, substantive sense. In reviewing a number of authorities in this area, Mance LJ noted that they proscribed '*unreasonableness in the sense of…a decision to which no reasonable person having the relevant discretion could have subscribed*'[75]. Barring a couple of fleeting references to the obligation to exclude irrelevant considerations[76], there was no explicit discussion of the 'umbrella' sense of unreasonableness in the case law prior to *Braganza*.

The courts also largely adhered to the notion of *Wednesbury* unreasonableness as a fixed, monolithic standard, suggesting that it was a better alternative to the control of contractual discretion than an objective test of reasonableness. Rix LJ in *Socimer* explained that '*pursuant to the Wednesbury rationality test, the decision remains that of the decision-maker, whereas on the entirely objective criteria of reasonableness, the decision-maker becomes the court itself*'[77]. However, the suggestion that rationality review is completely

[74] Provided of course that the subject matter is justiciable: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
[75] *Gan Insurance* [2001] EWCA Civ 1047 [64]. See also *Ludgate Insurance Company Limited v Citibank NA* [1998] EWHC 1144 [35] (per Brooke LJ).
[76] *Gan Insurance* ibid [62] (per Mance LJ); *Paragon Finance* [2002] 1 WLR 685, 704 (per Dyson LJ).
[77] [2008] EWCA Civ 116 [66].

free from the risk of substitution of judgment is not quite accurate, at least as far as judicial review is concerned. As discussed above, the rationality ground allows for varying intensities of review, and at the more intrusive end, there is greater risk of the court substituting judgment for that of the decision-maker. Conversely, it might be argued that there is no inherent reason for the objective criterion of reasonableness to be applied so stringently in the contractual context. These nuances are not always evident in the contractual discretion case law.

Indeed, the pre-*Braganza* case law contained little detailed consideration of *Wednesbury's* evolution from a fixed and high standard into one capable of accommodating differing intensities of review. A glancing reference to these developments can be found in *Krebs v NHS Commissioning Board*[78], where the court rejected the proposition that an express clause which required the defendant to act as a responsible public body, should be read in a restricted *Wednesbury* sense, noting that even in public law, the courts are prepared to dilute the *Wednesbury* test in appropriate cases. There is evidence of Lord Cooke's less stringent formulation of the *Wednesbury* test being applied in some of the contractual discretion cases. For instance, in the employment case of *Clark*, Burton J states that the test of irrationality amounts to asking '*whether any reasonable employer could have come to such a conclusion'*[79]. He does not however make any reference to Lord Cooke's judgment in *ITF* or to the developments in the *Wednesbury* doctrine.

Has the application of the *Wednesbury* principle in the contractual discretion case law (pre-*Braganza*) offered additional protection to the control of contractual discretionary power? Although the courts in the contractual discretion cases have occasionally applied

[78] [2014] EWCA Civ 1540.
[79] [2000] IRLR 766 [40].

the looser version of *Wednesbury*[80], they have generally adopted Lord Greene's orthodox standard. The review of contractual discretion will not be substantially assisted by adherence to the strict substantive meaning of unreasonableness adopted by Lord Greene in *Wednesbury* as the obligation to abstain from capricious or arbitrary conduct is capable of setting a similarly high threshold for judicial intervention.

(iii) *The Supreme Court's Judgment in Braganza*

In *Braganza*, the Supreme Court took a different approach to *Wednesbury* unreasonableness than that adopted in the above cases. The appellant widow, Mrs. Braganza, brought a claim against the first defendant, BP Shipping Ltd and the second defendant, BP Maritime Services (Singapore) Pe Ltd, for a death-in-service benefit under the terms of her husband's employment contract. Mr. Braganza's employment contract with the second defendant provided that death-in-service benefits would not be payable if, in the employer's opinion or the opinion of its insurers, the employee's death resulted from his own wilful act. Mr. Braganza disappeared overnight while on board one of the first defendant's tankers, and an inquiry was set up to investigate the circumstances leading up to his disappearance. On the basis of the investigation team's report, the second defendant's general manager concluded that Mr. Braganza had committed suicide by throwing himself overboard. When the appellant challenged the findings of this report, the investigation team reconsidered the matter and produced a supplemental report, adhering to their conclusion in the previous report. The general manager maintained his decision that Mr. Braganza had most likely committed suicide and that the appellant was not entitled to death-in-service benefits.

[80] *Clark* [2000] IRLR 766; *Mallone v BPB Industries Ltd* [2002] ICR 1045.

By a majority of 3-2 (Lord Neuberger and Lord Wilson dissenting), the Supreme Court held that the appellant was entitled to the benefits. Lady Hale observed that there were two limbs to the *Wednesbury* test; the first of which is focused on the decision-making process ('the process limb'), namely whether the right matters are taken into account, while the second ('the outcome limb') focuses on the outcome of the decision, specifically whether despite taking into account the right considerations, the result is still so outrageous that no reasonable decision-maker could have reached it[81]. She held that the general manager's decision was unreasonable in the *Wednesbury* sense, because he had failed to take into account relevant considerations. In particular, he had not taken into account *inter alia* the absence of a suicide note, or the fact that there was no evidence of any psychiatric problems or overwhelming personal or financial pressures that may lead Mr. Braganza to take his own life.

Several points should be noted. Firstly, Lady Hale acknowledged that the employer's decision was not '"*arbitrary, capricious or perverse", but…was unreasonable in the Wednesbury sense, having been formed without taking relevant matters into account'*[82]. It is possible to infer from the above statement that it is unlikely that the decision would have met the outcome limb's threshold, because the employer's decision was not '*arbitrary, capricious, or perverse'*. This further demonstrates that as far as contractual discretionary power is concerned, the orthodox, substantive sense of *Wednesbury* unreasonableness, simply replicates the protection offered by the obligation to refrain from arbitrary and capricious conduct.

Secondly, in her discussion of the outcome limb of the test, Lady Hale reinforces the fixed and high threshold set by Lord Greene in *Wednesbury*, and reaffirmed by Lord

[81] [2015] 1 WLR 1661, 1671.
[82] ibid 1675.

Diplock in *GCHQ*. None of the judges in *Braganza* make explicit reference either to the evolution of the *Wednesbury* principle or to the existence of variable standards of review in public law. However, Lord Hodge highlighted the fact that employment contracts have '*specialties that do not normally exist in commercial contracts*'[83], and he argued that the '*personal relationship which employment involves may justify a more intense scrutiny of the employer's decision-making process*'[84] than in other commercial contracts. Lord Hodge also suggested the scope for intensive judicial scrutiny may differ according to the nature of the decision which an employer makes, stating for instance, that there is less scope for intensive review in relation to an employer's decision on the grant of performance related bonuses. Although his observations were made in the context of employment contracts, Lord Hodge's judgment suggests that it may be possible and indeed desirable to adopt variable standards of review in certain cases of contractual discretion.

Thirdly, while Lady Hale's expansive interpretation of *Wednesbury* has the potential of offering additional protection against the misuse of contractual discretionary power, this approach also conflates the illegality and irrationality grounds of review and glosses over some of the uncertainties surrounding the relevance of considerations issue. It is undeniable that the *Braganza* approach requires more of a contractual decision-maker than to simply refrain from arbitrary conduct. It imposes an additional limit on the decision-maker's discretionary power, by requiring relevant matters to be taken into account in the decision-making process. However, as the following discussion will show, the manner in which the relevance requirement was imported to the contractual discretion context is problematic.

[83] [2015] 1 WLR 1661 [54].
[84] ibid [55].

Lady Hale's interpretation of the *Wednesbury* test, particularly her formulation of the 'process' limb, evokes the 'umbrella' sense of unreasonableness, as it suggests that the relevance criterion is a sub-set of the irrationality ground of review, rather than illegality. As the line between relevance and rationality is said to be '*inherently uncertain*'[85], it could be argued that the 'umbrella' approach to reasonableness adopted in *Braganza* helps avoid unnecessary line-drawing. However, it is questionable whether the Supreme Court should import the relevance criterion into contract law without at least acknowledging the orthodox classification of this criterion or referring to the relationship between the illegality and irrationality grounds of review.

Crucially, none of the judges discussed the differing standards of review that apply to the relevance criterion and the irrationality ground of review. There was no examination of whether the relevance requirement should be subjected to hard-edged review in the contractual context, or whether a less intensive standard of review should be used. The court also did not consider whether it was appropriate for judges to be the arbiters of relevance in this context. Arguably, the conferral of discretionary decision-making power upon a contractual party signifies that it is for that party to make a decision based on the considerations that she deems relevant.

Finally, the Supreme Court in *Braganza* failed to make a clear distinction between '*the question of whether something is a material consideration and the weight it should be given*'[86]. Although the majority held that the employer's decision was flawed for its failure to take into account relevant considerations, they appear to be primarily concerned with the weight attached to these considerations. Lady Hale stated that the employer had failed to

[85] Paul Craig, 'Political Constitutionalism and the Judicial Role: A Response' [2011] 9 International Journal of Constitutional Law 112, 124.
[86] *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780.

take into account the fact that there were no positive findings of suicide such as evidence of a suicide note or suicidal thoughts, while Lord Hodge found that the investigation team and the general manager did not appear to consider the real possibility of an accident[87]. However, the two reports that the employer relied on demonstrated that these considerations had been taken into account. The employer and the investigation team simply did not accord much weight to them and found other considerations to be more important. For instance, the supplemental report highlighted that the investigation team had considered the absence of a suicide note, but had found that it was not a firm indication that Mr. Braganza had not committed suicide, as there was other evidence which supported the possibility of suicide. Similarly, the reports showed that the investigation team had considered the possibility of an accident, but concluded that it was unlikely[88].

The reports produced by BP illustrate that they had taken the relevant considerations into account. This means that their decision can only be challenged if it can be shown that the weight attributed to these considerations was unreasonable in the narrow, substantive sense of *Wednesbury*. A reasonable employer, taking into account the above considerations, may well have concluded that Mr. Braganza had committed suicide. The investigation team had carefully considered all possibilities and had provided reasoned answers for why they reached the conclusions they had. Bearing in mind that the court was performing '*a reviewing function, and not…an originating fact-finding function*'[89], it is difficult to see how the majority could have concluded that the employer's decision was *Wednesbury* unreasonable.

[87] [2015] 1 WLR 1661 [40]-[43] (per Lady Hale); [58]-[60](per Lord Hodge).
[88] [2015] 1 WLR 1661 [116] (per Lord Neuberger).
[89] ibid [105] (per Lord Neuberger).

The above discussion demonstrates that Lady Hale's neat formulation of the two limbs of the *Wednesbury* principle, is not quite as straightforward as it may appear. *Braganza* really concerns the application of relevancy review, rather than irrationality. There are some real difficulties with relevancy review that the Supreme Court has simply glossed over, specifically in relation to the appropriate standard of review to be applied, and the extent to which the courts are entitled to examine the weight of relevant considerations.

D. Summary

Part 4 has explored the content of the implied term governing control of contractual discretion. The obligation of good faith and the prohibition against arbitrary and capricious conduct appears to replicate the protection afforded by the *Wednesbury* principle in so far as it is understood to be a fixed, monolithic standard. The introduction of relevancy review in *Braganza* has the potential of offering additional protection against the misuse of contractual discretionary power, however there are number of serious flaws in the court's interpretation of this criterion.

5. The Nature of the Implied Term: A Term Implied in Fact or by Law

Before examining how the courts may more effectively utilize public law techniques to exercise control over contractual discretion, it is worth reflecting on the mechanism through which public law concepts have been imported into this area of law, namely the implied term. While Part 4 focused on the *content* of the implied term governing contractual discretion, Part 5 is concerned with the nature of the implied term, specifically whether it is a term implied in fact or one implied by law. In *Marks and Spencer Plc v BNP Paribas Securities Trust Co (Jersey) Ltd*[90], Lord Neuberger observes that there are two types of contractual implied terms, the first of which is implied into a particular contract,

[90] [2016] AC 742. See also *Geys v Société Générale, London Branch* [2013] 1 AC 253 (per Lady Hale).

'*in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made*'[91], while the second arises because unless expressly excluded, the law effectively '*imposes certain terms into certain classes of relationship*'[92].

Collins explores the differing regulatory aims behind these two types of terms. He argues that for terms implied in fact, the objective is '*a precise surgical operation to revise the allocation of risk in the context of a particular transaction*'[93] while the aim behind terms implied by law is to '*provide a default rule for a particular kind of contract which will regulate this market transaction for the future*'[94]. The courts will only imply a term in fact where it represents the '*obvious, but unexpressed intentions*'[95] of the parties, or where it is necessary to give business efficacy to the contract[96]. However, in relation to terms implied by law, the courts are laying down default rules that apply to contracts of a particular type, and are able to take into account a range of factors and policy considerations[97].

Mance J's judgment in *Gan Insurance*, suggests that the courts' approach in contractual discretion cases is to imply a term in fact. He held that any implication of a term concerning the reinsurer's discretion to withhold approval of a settlement '*could only be justified if it represents the obvious though unexpressed intention of the parties or is necessary for the business efficacy of the contract*'[98]. He cautioned against the automatic implication of a term whenever a contractual provision confers discretion on another, arguing that it all

[91] [2016] AC 742, 752.
[92] ibid 753.
[93] Hugh Collins, 'Implied Terms: The Foundation and Fair Dealing' [2014] CLP 297, 303.
[94] ibid.
[95] HG Beale, *Chitty on Contracts* (33rd edn Sweet and Maxwell 2018) 14-008. See also *Reigate v Union Manufacturing CO (Ramsbottom) Ltd* [1918] 1 KB 592, 605 (per Scrutton LJ); *Shirlaw v Southern Foundries* (1926) Ltd [1939] 2 KB 206, 227 (per McKinnon LJ).
[96] *The Moorcock* (1889) 14 P.D. 64.
[97] Beale (n 95) 14-005.
[98] [2001] EWCA Civ 1047 [46].

depends on the circumstances[99]. Hooley also states affirmatively that the courts' preferred mechanism for controlling contractual discretion is through the use of an implied term in fact[100].

The implied term in fact test explicitly addresses two normative concerns underpinning the control of contractual discretion. The test's emphasis on business efficacy and the unexpressed intentions of the parties, coheres with the need to prevent commercial absurdity and protect the reasonable expectations of the parties. However, *Braganza* casts doubt on the proposition that the implied term used in contractual discretion cases is one in fact. None of the judges stated explicitly that they were implying a term in fact, nor did they refer to the usual criteria for implying a term in fact. Varuhas argues that the Supreme Court's approach in *Braganza* indicates that the term was one implied by law as none of the judges justified their intervention on the basis of the parties' intentions[101]. He notes that Lady Hale's rationale for imposing controls on contractual discretion was based on wider considerations of public policy, namely to prevent abuse of power.

Lim and Chan on the other hand, outline several difficulties with Varuhas' view that the implied term in *Braganza* arose by law[102]. They argue that the abuse of power rationale does not conclusively demonstrate that a wider policy goal was at work at *Braganza*, as it could equally be recast to mean that it would be contrary to the parties' reasonable expectations to allow one party to abuse its discretionary powers. They take the view that the authorities cited in *Braganza* demonstrate that abuse of power has to be evaluated

[99] ibid [62].
[100] Hooley (n 57) 68.
[101] Varuhas (n 14).
[102] Ernest Lim and Cora Chan, 'Problems with *Wednesbury* Unreasonableness in Contract Law: Lessons from Public Law' [2019] LQR 88,102-104.

according to the terms and purposes of the contract, which are supposed objectively to reflect the parties' intentions.

The differing approaches taken by the above commentators, stem in part from the nebulous nature of the abuse of power concept. On one hand, the concern to prevent abuse of power could be viewed as a public policy consideration that arises regardless of the parties' intentions. On the other hand, as Lim and Chan argue, this concern might also be encapsulated within the parties' objective intentions. Indeed, it does not require a leap in logic to recognize that commercial parties generally enter into contracts with the implicit understanding that discretionary power should not be abused or exercised irrationally. However, it is less clear whether the more extensive controls on contractual discretion imposed by the Supreme Court in *Braganza* can be adequately explained by reference to the parties' objective intentions.

Lim and Chan highlight the apparent logical fallacy in an argument from silence, stating that '*one cannot infer or conclude from the fact that the court did not state that the implied term was to reflect the parties' presumed intentions that it was implied in law*'[103]. However, it could equally be argued that the controls imposed by the court do not satisfy the implied term in fact test. In exercising their discretionary power to determine whether Mr. Braganza's death was the result of his own act, the second defendant in *Braganza* had set up an inquiry to investigate the circumstances of his death and the investigation team had produced two reports with reasoned answers for their conclusions. It is difficult to see how business efficacy or the parties' obvious but unexpressed intentions necessitates the implication of a term that would require the employer to do more than they had already done.

[103] ibid 102.

According to Lim and Chan, *Wednesbury* review is consonant with the parties' objective intentions as contracts are not made in a vacuum but against a background of established legal principles and that in light of *Braganza*, it is reasonable to conclude that the parties have implicitly accepted that discretionary power should not be exercised irrationally. This may very well be true for contracts entered into post-*Braganza*. However, nothing in the case law prior to *Braganza* indicated that the Supreme Court would proceed to import relevancy review into the contractual discretion case law. It would be a stretch to argue that the obligation to take into account relevant considerations was an established legal principle as far as contractual discretion is concerned, such that it constituted the objective intentions of the parties in *Braganza* itself.

The above discussion demonstrates that there is still a degree of ambiguity surrounding the nature of the implied term. The post-*Braganza* case law does not provide a clear answer as to how future courts should approach the implication of terms governing contractual discretion. While it has been held that a term governing contractual discretion is likely to be implied in any commercial contract under which one party is given the right to make a decision on a matter that affects both parties[104], it has also been suggested that a term governing contractual discretion can only be implied into a contract when it satisfies the implied term in fact test[105]. It is clear however that parties are rarely entitled to exercise contractual discretion free from any restrictions whatsoever. As Lord Sumption states in *British Telecommunications plc v Telefónica O2 UK Limited*[106], '*…it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously'*[107].

[104] *Super-Max Offshore Holdings v Malholtra* [2017] EWHC 3246 [138].
[105] *UK Acorn Finance Ltd v Markel (UK) Limited* [2020] EWHC 922 [58].
[106] [2014] UKSC 42.
[107] ibid [37].

Lord Sumption's remarks suggest that there is a presumption in favour of imposing certain controls upon contractual discretion. It is argued that where a contract confers discretionary power upon one party on a matter that affects both parties, the courts should imply a term governing the manner in which this discretion is to be exercised, in the absence of any provision expressly ousting judicial review. As discussed below, the precise content of this term may vary depending on a range of factors. The normative concerns underpinning contractual discretion, specifically the need to prevent abuse of power and commercial absurdity as well as the protection of the parties' reasonable expectations, must be bounded by the express intentions of the parties in order to be compatible with the freedom of contract principle. As such, any clause that very clearly excludes judicial control of contractual discretion, should be upheld.

6. A Modified Framework for Variable Intensity of Review and Relevant Considerations in the Contractual Discretion Context

A. Variable Intensity of Review

Lim and Chan argue that it should be possible to vary the intensity of review of contractual discretionary power. They identify several factors that would affect the appropriate level of review, including the need to prevent abuse of power and to protect freedom of contract, the expertise of the judge and the nature of the decision at hand. Taking their inspiration from public law, they also suggest adjusting the relevant standard of review and the weight to be given to the arguments proffered by the parties.

One possible objection against this approach could be that the contractual context mandates the use of an inherently deferential and monolithic standard. This objection can be dealt with relatively easily. Firstly, there is no need for such a standard as contract law already requires contractual parties to abstain from arbitrary and capricious conduct.

Secondly, the case law suggests that the control of contractual discretion requires a flexible and contextual approach. The courts have emphasized that '*whatever term may be implied will depend on the terms and the context of the particular contract involved*'[108]. The adoption of variable standards of review is more consonant with a contextual approach than the application of an immutable threshold of review.

The formulation of a framework of variable standards of review in contract law should involve a marriage of private and public law techniques. In particular, the adoption of variable standards of review has to be viewed through the lens of the implied term. In the absence of an effective exclusion clause, the courts will generally require that the relevant contractual party exercise its discretionary power in good faith and not in an arbitrary or capricious manner[109]. These requirements function well as default standards because they strike an appropriate balance between protecting the parties' objective intentions, preventing commercially absurd outcomes and safeguarding the freedom of contract principle. However, as discussed below, there may be situations where these fixed and high standards are inappropriate due to the inequality of power between the parties and the nature of the discretionary power in question. It is important for judges to be armed with the necessary juridical tools that will enable them to adopt a more flexible approach when required.

In examining the obligation to act rationally, this chapter recognized the growing prominence of the proportionality test in judicial review. Arguably, in order to derive the fullest benefits from conceptual borrowing, judges should have recourse to both proportionality and *Wednesbury* when reviewing contractual discretion, particularly if it

[108] *Braganza* [2015] 1 WLR 1661 [31] (per Lady Hale).
[109] *Mid-Essex Hospital Services NHS Trust Ltd v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 [83]; *British Telecommunications plc v Telefónica O2 UK Ltd* [2014] Bus LR 765.

can be shown that there is no meaningful difference between these two tests. In the context of judicial review, Williams has argued that there is *'relatively little to choose between'*[110] proportionality and rationality, as the key questions of suitability, necessity and fair balance exist within common law rationality just as they do within proportionality review[111].

While questions of suitability, necessity and fair balance may indeed be addressed through the rationality challenge in judicial review, it is unnecessary for the courts to undertake this specific analysis when reviewing contractual discretion. As some commentators have observed, not all decisions can be reduced to a means/ends calculation and shoehorning such decisions into proportionality review would entail distorting the nature of that review[112]. There is no hint in the contractual discretion case law of the courts being inclined to adopt the proportionality calculus when reviewing the contractual discretion law and there is no particular impetus for the courts to adopt proportionality review in contract law.

Is there room for modified rationality review in the contractual discretion case law? It is doubtful whether the control of contractual discretion requires the assistance of the super-*Wednesbury* test applied in the financial and economic policy cases. The courts have used this test in judicial review because it prevents cases involving complex political and economic policies from being completely immune to judicial review while limiting review to exceptional cases involving deception and bad faith. However, in the contractual context, parties have the opportunity to exclude the application of judicial controls through the use of a clearly worded exclusion clause.

[110] Rebecca Williams, 'Structuring Substantive Review' [2017] PL 99, 99.
[111] ibid 119.
[112] ibid 121; Tom Hickman, *Public Law After the Human Rights Act* (Hart Publishing 2010) 285.

On the other hand, Lord Cooke's formulation of the *Wednesbury* test may serve a valuable role in cases where it is appropriate to hold the contractual decision-maker to a higher standard. As mentioned above, this version of *Wednesbury* has been used in employment cases. It is less clear however whether the courts should adopt a more intensive standard of review, along the lines of that applied in human rights cases such as *Smith*. As mentioned above, prior to the use of the proportionality test, the courts in human rights cases have required the decision-maker to provide more by way of justification to demonstrate that a decision is reasonable where there is a substantial interference with human rights.

It could be argued that as this interpretation of the *Wednesbury* test places a higher justificatory onus on the decision-maker, it should not be applied outside the human rights context, particularly in relation to two private parties. However, *Braganza* suggests that in certain circumstances, the courts will require more justification that the decision was reasonable. According to Lady Hale, a decision that an employee has committed suicide is not a rational one, unless the employer '*has had it clearly in mind that suicide is such an improbability that cogent evidence is required to form the positive opinion that it has taken place*'[113]. A majority of the Supreme Court held that the investigation's team report and conclusion could not be considered sufficiently cogent evidence to justify the employer forming the positive opinion that Mr. Braganza had committed suicide.

Indeed, Lady Hale and Lord Hodge's judgments in *Braganza* offer valuable suggestions as to the type of factors that should affect the intensity of review of contractual discretion. Firstly, they indicate that certain relationships or contracts warrant more judicial scrutiny. As mentioned above, Lord Hodge argued that the personal relationship

[113] [2015] 1 WLR 1661 [36].

which employment involves may justify a more intense scrutiny of the employer's decision-making process. He even made the obiter suggestion that the employer's obligation of trust and confidence may provide another reason for requiring cogent evidence before concluding that an employee has committed suicide. Lady Hale too highlighted the special nature of the employer relationship and held that any decision-making function entrusted to the employer had to be exercised in accordance with the implied obligation of trust and confidence. On the other hand, in his dissenting judgment, Lord Neuberger cast doubt on whether the employer's obligation of trust and confidence survived the death of Mr. Braganza and he questioned whether such an obligation would require more than '*what in a normal commercial context would be expected, either of BP when carrying out the investigation, or of the court when scrutinizing the investigation and its results*'[114].

While Lord Neuberger raises a valid point as to whether the obligation of trust and confidence added anything in the specific context of *Braganza*, his argument should not detract from the fact that the special nature of the employment relationship, specifically the imbalance of power that exists between employers and employees, may require stricter constraints upon the exercise of contractual discretion. It is argued that the courts should adopt Lord Cooke's formulation of the *Wednesbury* test when controlling the exercise of discretion in employment contracts. As the orthodox *Wednesbury* test adds little to the obligation to act in good faith, it does not go far enough in terms of protecting employees from misuses of power.

Indeed, the more intense scrutiny mandated by Lord Cooke's test coheres with the general approach taken in employment law. Judges have been more willing to intervene in

[114] ibid 104.

contracts in order to protect the interests of employees. According to Lord Hoffmann in *Johnson v Unisys Ltd*[115], the courts have been more inclined to imply terms in employment contracts because the law has evolved to recognize the fact that a person's employment is '*usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem.*'[116]

There is also an increased risk of discretionary power being abused where the party exercising such discretion is significantly more well-resourced than the other party as was the case in *Braganza*. In order to minimize the impact of any disparity of power between contractual parties, the courts could place a higher onus upon sophisticated and well-organized bodies as they have the requisite resources to guide their decision-making. Indeed, one reason why more onerous decision-making requirements were imposed upon the employer in *Braganza*, was because the majority felt that a large and well-heeled company like BP was in a position to support its officials with legal and advisory services. Similarly, in *BHL v Leumi Abi Ltd*[117], Waksman QC observed that as the decision-maker in the case was a large, sophisticated and experienced organization, the argument regarding the impropriety of holding contractual decision-makers to the same standards as public authorities, could not be taken too far[118].

Another factor that may influence the intensity of review is the nature of the decision that the contractual party is tasked with making. In *Braganza*, Lord Hodge suggests that there is less scope for intensive review of contractual decisions concerning the grant of performance related bonuses compared to contractual decisions which relate to findings of facts. Outside of the employment context, it is unlikely that the courts will

[115] [2003] 1 AC 518.
[116] ibid 539.
[117] [2017] EWHC 1871 (QBD).
[118] ibid [41].

heavily scrutinize a commercial decision made by a contractual party, where the transaction at hand confers discretionary power upon the party to make certain decisions in the case of default by another party[119]. In such a case, it is accepted that the non-defaulting commercial party is entitled to prefer its own commercial interests.

The previous chapters have examined how the courts should utilize the framework of good administration in order to strike an appropriate balance between the protection of private interests and the control of public power. In a similar vein, this sub-section has put forward a framework for variable standards of review in the context of contractual discretion, that will allow the courts to strike an appropriate balance between respecting the freedom of contract ideal and the normative reasons for controlling contractual discretion, namely the prevention of abuse of power and commercial absurdity as well as the protection of the parties' reasonable expectations. This sub-section has discussed several factors that may justify more intensive review, however these factors are not exhaustive. The courts should be alert to the presence of other factors that suggest a heightened risk of abuse of power and should ensure that the adoption of more intensive review of contractual discretion in a particular case is compatible with the overall objective of the contract.

B. The Duty to Take into Account Relevant Considerations and Exclude Extraneous Ones.

The preceding sub-section argued that while the obligation to act in good faith and the prohibition against arbitrary conduct should function as default mechanisms of controlling contractual discretion, there may be situations in which it is necessary to adopt more intensive forms of review. To that end, the above sub-section considered the possibility of

[119] *Lehman Brothers International (Europe) (In Administration) v Exxonmobil Financial Services BV* [2016] EWHC 2699.

adopting variable standards of review in the contractual discretion context, focusing mainly on modifying rationality review.

This sub-section examines the issue of relevancy review, and how it fits alongside the other tools for controlling contractual discretion. First, it considers whether relevancy review should operate alongside the obligation to act in good faith and the prohibition against arbitrary conduct as default mechanisms for controlling all exercises of contractual discretionary power. It then outlines the proper approach that should be taken by a court tasked with assessing the relevance of a particular consideration in the contractual context.

(i) Relevancy Review: Applicable for All Exercises of Discretionary Power?

Unlike the obligation to act in good faith and the prohibition against arbitrary and capricious conduct, not all exercises of discretionary power should be subject to relevancy review. This view is borne out in *UBS AG v Rose Capital Ventures Ltd*[120], where the High Court made clear that the *Braganza* limitation would not be implied into every contract. Instead, a number of factors would be taken into account before this obligation is imposed, including the nature of the contractual relationship and balance of power between the parties, the type of decision the contractual party is tasked with making and the language of the contract[121]. The High Court further stipulated that the *Braganza* obligation would only arise in relation to decisions affecting the rights of both parties to the contract, where the decision-maker has a clear conflict of interest and is given a role in the on-going performance of the contract, as is the case when an assessment has to be made[122]. Thus, the

[120] [2018] EWHC 3137 (Ch).
[121] ibid [49].
[122] ibid [49].

Braganza obligation would not be triggered where a contractual party possesses a unilateral right to for instance, terminate the contract without cause[123].

The court refers to the *Braganza* obligation as a whole, rather than to relevancy review specifically. However, as relevancy review is one of the more interventionist methods of controlling discretionary power, it makes sense that it should be confined to cases where there is an increased risk of misuse of power. As such, it is submitted that when determining whether an exercise of discretionary power should be subject to relevancy review, the courts should first examine whether there are any factors indicating a heightened risk of misuse of power. These factors indicating misuse of power are not exhaustive and they mirror those enumerated in *UBS AG*, as well as the factors discussed in the previous sub-section.

(ii) Assessing Issues of Relevance in the Contractual Discretion Context

As discussed in Part 3, in judicial review, the relevance ground is usually classified as a matter of statutory interpretation, which means that the courts are supposed to be guided by the statutory framework at hand when determining issues of relevance. In the absence of any definitive statutory guidance in this context, it is submitted that the courts should focus instead on the terms and overall purpose of the contract when ascertaining the relevance of considerations. Some guidance may be derived from judicial review when considering how the courts might undertake this process.

One of the problems surrounding relevancy review in public law, is the amount of control it cedes to judges due to the fact it typically entails hard-edged review. Part Three

[123] ibid. There is some debate amongst commentators as to whether a contractual right to terminate should be subject to discretionary controls: see Hooley (n 57); David Foxton, 'A Good Faith Goodbye? Good Faith Obligations and Contractual Termination Rights' [2017] LMCLQ 360; Michael Bridge, 'The Exercise of Contractual Discretion' [2019] 135 LQR 227. Unfortunately, constraints of time and space prevent an examination of this issue. This thesis does take the view however that a contractual right to termination should not be subject to discretionary controls, as this would strike at the root of the freedom of contract ideal.

discussed how the courts in some cases attempted to ameliorate the potential harshness of relevancy review, by holding that a decision would only be quashed on this ground where the statute expressly or implicitly identifies the considerations that have to be taken into account by the public body. A similar approach should be adopted in contractual discretion cases, namely the court should examine whether the contract expressly or implicitly identifies the considerations that have to be taken into account by the contractual decision-maker.

This will be a relatively straightforward endeavor where the contract expressly sets out the considerations that have to be taken into account. When considering whether the contract implicitly requires particular considerations to be taken into account, it is suggested that the court should apply the implied term in fact test. Thus, the court should analyse the contractual provision conferring decision-making power upon a party, and consider whether particular considerations need to be taken into account because it either represents the '*obvious, but unexpressed intentions*' of the parties, or is necessary to give business efficacy to the contract. This approach reflects the above-discussed normative concerns of controlling contractual discretion, namely the protection of the parties' reasonable expectations and the prevention of commercial absurdity and abuse of power. It ensures that the court's identification of relevant considerations is based on the requirements and provisions of the specific contractual arrangement at hand and the parties' intentions.

The case of *BHL v Leumi ABL Ltd*[124] illustrates how the courts may be able to determine whether the contract expressly or implicitly identifies the considerations that have to be taken into account. The case concerned a receivables finance agreement, which

[124] [2017] EWHC 1871.

contained a clause that enabled the bank to charge its client a fee for taking over the collection of the client's outstanding receivables. The clause further stipulated that the fee could be up to 15% of the amounts collected. The bank argued that it had untrammeled discretionary power to charge whatever fee it liked, provided that did not exceed the 15% ceiling. The judge however held that this interpretation was '*commercially absurd'*[125]. He also observed that the bank's interpretation '*goes against the clear language actually used'*[126], as the clause included a sentence stipulating that the client acknowledged that the collection '*fee constitutes a fair and reasonable pre-estimate of* [the bank's] *likely costs and expenses*'[127] in providing the collection service. The judge held that the bank should have set a fee which is meant to estimate in some way its future costs and expenses in respect of the collection. The bank had failed to take this relevant consideration into account.

The judge's approach in the above case demonstrates how the court can use the contractual framework to effectively discern which considerations should be taken into account. To some extent, the contract could be said to explicitly set out the relevant considerations to be taken into account, as there was a reference to the fee constituting a fair estimate of the bank's likely costs and expenses. However, even without that reference, the courts could have used the implied term in fact test to determine whether the court implicitly required such an estimate to be taken into account. As mentioned above, the court recognized that if the bank were to set the fee without taking this consideration into account, it would lead to a commercially absurd result. Thus, the contract implicitly required the bank's likely costs and expenses in providing the collection service to be taken into account, to safeguard the business efficacy of the contract. It could also be argued that

[125] ibid [35].
[126] ibid.
[127] ibid [27].

the obvious and unexpressed intentions of the parties entailed that the collection fee be fixed with this consideration in mind.

A final point to note in relation to relevancy requirement, is that the courts should be focused on whether the contractual decision-maker has turned her mind to considerations material to the decision, and not the weight that she has attached to such considerations. In this sense, the courts should follow the approach taken in judicial review. Once the contract decision-maker has turned her mind to the relevant matters, the court should only be able to intervene if the weight attached to such considerations is *Wednesbury* unreasonable[128]. Part 4 of this chapter has explored in detail how the majority in *Braganza* overstepped the boundary between determining whether the contractual decision-maker had turned their mind to all material considerations, and interfering with the weight that the contractual decision-maker had attached to such considerations. Given the potential intrusiveness of relevancy review and the importance of protecting the freedom of contract, the courts have to ensure that they do not trample upon the decision-maker's autonomy in this regard.

7. CONCLUSION

The previous chapters have explored how judicious conceptual borrowing from private law may enhance our understanding of certain public law concepts. This chapter has examined the contrary proposition, namely whether public law concepts are capable of enhancing the safeguards available for controlling the exercise of contractual discretionary power. It has explored in detail how the courts have used the implied term technique to govern the exercise of contractual discretion and has evaluated whether public law concepts are capable of fulfilling a useful role in the context of contractual discretion. To that end, this

[128] *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759. This point is discussed in Part 3.

chapter put forward a framework for the adoption of variable standards of review and relevancy review in cases involving contractual discretion.

CHAPTER SIX

DAMAGES LIABILITY IN JUDICIAL REVIEW

This chapter considers how the concept of damages, which is a '*remedy focused on private harm and associated traditionally with individualist fields of private law'*[1], may be usefully accommodated within the framework of good administration. Chapter Six is structured into four parts. Part 1 considers the current system of remedies available in judicial review and examines whether this system adequately protects the interests under the two prongs of the framework of good administration. Part Two examines the liability of public authorities in private law and under the Human Rights Act 1998 ('the HRA').

Part Three explains how the recognition of some form of damages liability in judicial review may elevate the protection of interests under the framework of good administration. Finally, Part Four puts forward several suggestions as to how the issue of damages might be addressed under the framework of good administration. It argues that a fault-based model of liability will help safeguard the interests under the second limb of the framework, by ensuring that public bodies are held accountable for serious misuses of power. However, recognizing that a fault-based model of liability may not sufficiently protect interests falling under the first limb of the framework, this chapter also examines how different models of damages should be utilized in cases involving human rights and legitimate expectations respectively.

[1]Jason Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 1.

1. Non-monetary Remedies in Judicial Review: Prerogative Remedies, Declarations and Injunctions

This section considers whether prerogative remedies (mandatory, prohibiting and quashing orders)[2] and the remedies of declaration and injunction are capable of protecting the interests falling under the two prongs of the framework of good administration.

There are several features of the current remedial regime which suggest that it is capable of safeguarding the collective interest of the public in controlling the discretionary power of the executive. Firstly, these remedies, particularly the prerogative writs, have historically been used to control governmental powers[3] and ensure effective governance. The prerogative writ of mandamus was considered to be among the '*few effective instruments of public policy in the era between the abolition of the Star Chamber in 1640 and the creation of modern system of local government in the nineteenth century*'[4], while the writ of certiorari enabled the Court of the King's Bench to exercise control over the increasingly wide powers of the Justices of Peace in the seventeenth century to make orders over matters ranging from the upkeep of illegitimate children to the implementation of Poor Law[5].

Declarations have also come to play a crucial role in controlling misuses of public power. For instance, declarations of incompatibility issued under Section 4 of the HRA place political pressure upon Parliament and the government to change laws that are not in line with the European Convention of Human Rights ('ECHR')[6]. Declarations have in

[2] These orders are commonly classified as prerogative remedies as they have been historically associated with the rights of the Crown: S.A. de Smith, 'The Prerogative Writs' [1951] 11 CLJ 40, 41.
[3] C.F. Forsyth and William Wade, *Administrative Law* (11th ed OUP 2014) 500.
[4] ibid 520.
[5] ibid 513; Edith G. Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard University Press 1963) 94.
[6] Lord Hoffmann, 'Human Rights and the House of Lords' [1999] 62 MLR 159, 160.

general served as useful vehicles for the courts to make statements of fundamental constitutional principle that are difficult for the government to avoid[7].

Secondly, it could be argued that the discretionary nature of judicial review remedies facilitates the protection of the public interest under the second limb of the framework of good administration, as it ensures that the grant of relief is not contrary to the public interest. In *R v Panel on Take-overs and Mergers, ex parte Datafin*[8], Sir John Donaldson MR discusses the court's discretion to refuse to set aside an ultra vires decision in the public interest. He held that public law decisions '*affect a very wide public*'[9], whose interests have to be taken into account as much as the interests of the immediate parties to the dispute.

The court also has the discretion to award a less coercive remedy than that sought by the applicant. In *R (Hurley) v Secretary of State for Business Innovation and Skills*[10], a group of students sought to quash the government's decision to allow universities to increase fees. Although the court held that the Secretary of State had failed to fully carry out his public sector equality duties, they granted the applicants a declaration rather than a quashing order. Elias LJ held that the Secretary of State had substantially complied with his duties and quashing his decision would cause administrative chaos and entail significant economic implications. Given that the court had carefully assessed the extent to which the Secretary of State had failed in his duties and awarded a proportionate remedy, it could be argued that this approach adequately protects the public interest in controlling public power.

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[7] Peter Cane, "The Constitutional Basis of Judicial Remedies in Public Law" in Peter Leyland and Terry Woods (eds) *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone 1997) p 265.
[8] [1987] QB 815 (CA).
[9] ibid 840.
[10] [2012] EWHC 201(Admin).

There are also facets of the remedial regime that are capable of protecting individual interests. This is evidenced by a seminal case in the early history of mandatory orders known as *Bagg's Case*[11]. The chief burgess of Plymouth was removed from his office for uncouth conduct but the court used the writ of mandamus to restore him to his office as he had been disenfranchised without a trial. This case demonstrates how prerogative remedies are capable of bringing to an end any infringement of an individual's right. Lord Woolf has observed that when it is necessary to resort to the courts to uphold human rights, the remedies most frequently sought after by applicants are the prerogative orders[12]. Outside of the human rights context, the prerogative remedies can sometimes prove to be an effective way of protecting an individual's interest. In *Coughlan*, discussed in detail in Chapters One and Three, the court was able to protect the claimant's substantive legitimate expectation by quashing the health authority's decision to close the nursing home. Thus, the remedial regime is capable to a certain extent of protecting the interests under both limbs of the framework of good administration.

However, if we take a closer look at this system, it is possible to detect a few gaps in its ability to offer sufficient protection to these interests. Firstly, one should be wary of overstating the role that these remedies play in controlling public power and protecting private interests. Judges have evinced some reluctance with issuing coercive remedies like mandatory and prohibiting orders or injunctions against public bodies[13]. Although the court has the power to issue a mandatory order requiring a public body to perform a specific

[11] 77 E.R. 1271.
[12] *Anufrijeva v Southwark London Borough Council* [2004] QB 1124 (CA) 1153.
[13] Lord Woolf, 'The Human Rights Act 1998 and Remedies' in Mads Andenas and Duncan Fairgrieve (eds) *Judicial Review in International Perspective* (vol II, Kluwer Law International, The Hague, 2000) Speaking in the context of the panel on take-overs and mergers, Sir Donaldson MR suggested that the remedies of certiorari and mandamus would likely only be relevant in relation to breaches of natural justice: *R v Panel on Take-Overs and Mergers, ex parte Datafin Plc and Another* [1987] QB 815, 842.

duty, it is more often the case that the court will quash an unlawful decision, and require it to be made again[14].

While this ability to remit the case back to the decision-maker coheres with the supervisory role of judicial review, it can often feel like a pyrrhic victory to the individual litigant, particularly if the public authority makes the same decision after reconsidering the matter. It could be argued however that judicial review is about more than helping claimants get the decision they want, rather it is about holding the government to standards of good governance, such that every victory, regardless of the result for the claimant, '*is a victory for the rule of law*'[15].

It is certainly true that judicial review should not be relegated to an outcomes-oriented exercise. However, it is pertinent to remember that the majority of judicial review claims are not brought by high-minded individuals who are solely motivated by the public interest. A claimant waiting for an unlawful decision to be reconsidered by a public authority may suffer negative consequences in the interim, such as stress-related ailments and mounting rent arrears. Quashing a decision and remitting it back to the original decision-maker is appropriate in situations where the harm to the individual is minimal and there are other public interest factors militating against awarding a more coercive remedy. However, the courts should be wary of creating a situation in which claimants who have suffered loss as a result of an unlawful decision are left without a remedy and are worse off.

The main problem with the current remedial system is that it offers inadequate protection for individual interests. Although the above remedies may indirectly protect the

[14] Harry Woolf, 'Public Law-Private Law: Why the Divide? A Personal View' [1986] PL 220; Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Hart Publishing 2004) 103.
[15] Mark Elliott, 'Judicial Review – Why the Ministry of Justice Doesn't Get It' UK Const. L. Blog (16 December 2012).

claimant's interests by compelling public authorities to perform their duties or quashing an unlawful decision, they are not well-equipped to address the loss suffered by a claimant as a result of unlawful administrative action. As Lord Carnwath observed, '*although judicial review is…generally an effective means of ensuring future compliance, by itself it provides no redress for injury caused by past failures*'[16]. Part Two of this chapter will examine whether the remedies available under private law and under the HRA are capable of meeting this lacuna in the law.

2. A Brief Examination of Damages Claims Against Public Authorities in Tort and under the HRA

Unlawful administrative action, without more does not entitle a claimant to damages[17]. However, there are certain circumstances in which a claimant may be awarded a monetary remedy where a public authority has acted unlawfully. Thus, a claimant may be entitled to damages if she is able to establish a cause of action in tort against a public authority such as negligence, breach of statutory duty, or misfeasance in public office. Damages may also be awarded under Section 8 of the HRA following the breach of a claimant's ECHR right[18] and also where a public authority has committed a sufficiently serious breach of EU law[19].

Apart from damages, a claimant may also obtain restitutionary relief from a public authority, where money has been paid to a public authority pursuant to an ultra vires demand[20]. There are also a number of ways in which individuals may be able to secure monetary awards outside of judicial review. A potential judicial review claimant could try

[16] Robert Carnwath, 'The Thornton Heresy Exposed: Financial Remedies for Breach of Public Duties' [1998] PL 407, 418.
[17] *Three Rivers District Council and Others v The Bank of England* (No 3) [2003] 2 AC 1, 229 (per Lord Hobhouse).
[18] S8(3) of the HRA.
[19] *R* v *Secretary of State for Transport ex parte Factortame* [1996] ECR I-1029.
[20] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

making a complaint to the Parliamentary Commissioner for Administration (PCA), who has the power to recommend that compensation be paid to a person who has suffered injustice from maladministration. Alternatively, a public body may of its own accord make an ex gratia payment to an individual who has been injured by its actions. There are also statutory compensation schemes which recognize that there are certain situations in which individuals should be compensated[21].

Notwithstanding the above mechanisms for obtaining monetary relief, Fordham rightly argues that '[t]*he absence of a public law reparation remedy for maladministration is…a cause of injustice…which the patchwork of special remedies…does not properly address*'[22]. Space constraints preclude a detailed examination of the problems with these methods of obtaining monetary relief. As such, the following sub-sections will focus on the issue of public authority negligence, as it is emblematic of the difficulties that the courts experience in applying private law principles to public authorities. Part 2(b) will also go on to explore the limitations of the approach to damages adopted under the HRA.

A. Problems with Public Authority Negligence

The case law on public authority negligence demonstrates that there are a number of problems with bringing a claim against a public authority. The courts have vacillated between formulating specific rules to address the special position of public authorities and applying orthodox principles of negligence to public authorities. Neither approach has yielded wholly positive results.

(i) *The Use of Control Devices to Restrict the Liability of Public Authorities*

[21] See the Land Compensation Act 1973 and the Criminal Injuries' Compensation Scheme 2012.
[22] Michael Fordham, 'Reparation for Maladministration: Public Law's Final Frontier' [2003] 8 JR 104, 104.

The courts have sought to restrict the liability of public authorities by imposing control devices in addition to the ordinary test of negligence. This is exemplified by Lord Diplock's judgment in *Home Office v Dorset Yacht*[23]. Lord Diplock took the view that where statutory discretion is conferred upon a public authority, the court only has jurisdiction to determine the public authority's liability in negligence if the challenged act or omission was ultra vires in the public law sense[24]. The difficulty with Lord Diplock's approach is that it creates too many hoops for a claimant to jump through, as she not only has to establish that the public authority's act or omission is ultra vires, but also that the other elements for negligence are satisfied.

Judges in subsequent cases have criticized Lord Diplock's approach while resorting to other control devices to protect public authorities. Thus, in *X (Minors) v Bedfordshire County Council*[25], Lord Browne-Wilkinson argued that it is neither helpful nor necessary *'to introduce public law concepts as to the validity of a decision into the question of liability at common law for negligence*'[26]. He pointed out that a decision could be ultra vires in public law for breaching the rules on natural justice, which he argues has no relevance to the question of negligence. Despite Lord Browne-Wilkinson's disapproval of the use of public law concepts of validity in negligence, he clearly saw no issue with using the *Wednesbury* principle in the context of negligence. He held in the same case that public authority decisions falling within the ambit of statutory discretion cannot be actionable in common law, unless the decision is so unreasonable that it falls outside the ambit of the discretion conferred upon the authority[27].

[23] [1970] AC 1004.
[24] ibid 1066 -1067.
[25] [1995] 2 AC 633.
[26] ibid 736.
[27] ibid.

Not content with the high threshold imposed by the *Wednesbury* test, Lord Browne-Wilkinson imposed another restriction upon the court's assessment of whether an act fell outside the ambit of an authority's statutory discretion. He held that where factors relevant to the exercise of statutory discretion included matters of policy, the courts were precluded from adjudicating the matter and from ascertaining whether the decision fell outside the ambit of statutory discretion, meaning that 'a *common law duty of care in relation to the taking of decisions involving policy matters cannot exist*'[28].

When discussing how policy decisions could be identified, Lord Browne-Wilkinson referred to another control device that the courts have used to address the special position of public bodies, specifically the policy/operational distinction. Lord Wilberforce discussed this distinction in *Anns v Merton*[29], observing that liability in negligence is more likely to arise in conjunction with operational matters, namely matters which concern the practical execution of policy decisions[30]. In *Rowling v Takaro Properties Ltd*[31], Lord Keith suggested that the policy/operational distinction did not provide a touchstone for liability, rather it expressed the need to exclude decisions that were unsuitable for judicial resolution such as discretionary decisions on the allocation of scarce resources[32].

The problem with using the concept of justiciability as a precondition for public authority liability is that it is too blunt an instrument to be used to determine whether or not the court should intervene. This is evidenced by the 'spatial'[33] approach to justiciability adopted in the above cases, in which decisions involving policy factors or which appear

[28] ibid 738.
[29] [1978] AC 728.
[30] ibid 754.
[31] [1988] AC 473.
[32] ibid 501.
[33] Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in Nick Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart 2003).

generally unsuitable for judicial resolution are automatically excluded. Hunt criticizes the use of 'spatial metaphors' in judicial review which presuppose that there are certain areas of decision-making in which a decision-maker is immune from judicial interference, and therefore beyond the reach of legality[34]. Lord Nicholls has also expressed dissatisfaction with this approach in the context of the liability of public authorities in tort. In *Stovin v Wise*[35], he disapproved of the identification of '"*no go" area*[s] *for concurrent common law duties*'[36], observing that this exclusionary approach '*presupposes an identifiable boundary, between policy and other decisions*'[37]. According to Lord Nicholls, this boundary is elusive and the recognition of an area of blanket immunity is undesirable and unnecessary.

(ii) Application of Ordinary Rules of Negligence to Public Authorities

The above cases demonstrate that the courts' attempts at formulating special rules for public bodies have been unsuccessful. Unsurprisingly, the courts have retreated from this approach in later cases. In *Barrett v Enfield*[38], the House of Lords held that the fact that a challenged decision was made within the ambit of a public authority's discretion did not necessarily bar a claim in negligence. Lord Hutton adopted a more nuanced approach towards the justiciability doctrine, holding that a decision would only be held non-justiciable if it involves the weighing of competing public interests or is dictated by considerations which the courts are not fit to assess[39]. He went on to state that it was preferable for the courts to decide the validity of the claimant's claim by directly applying

[34] ibid 338-339.
[35] [1996] AC 923.
[36] ibid 938.
[37] ibid.
[38] [2001] 2 AC 550. See also *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619.
[39] *Barrett v Enfield* [2001] 2 AC 550, 583.

the principles of negligence rather than applying the public law concept of *Wednesbury* unreasonableness as a preliminary test[40].

A number of prominent private law scholars have championed the application of ordinary principles of negligence to public authorities[41]. Indeed, an approach which recognizes that public authorities are subject to the same liabilities in tort as private bodies has the advantage of cohering with Dicey's equality principle[42] while removing the need for unsatisfactory control devices. Unfortunately, this approach is not free from difficulties.

Firstly, there are still some problems surrounding the relevance and weight to be accorded to policy considerations. In the past, the courts frequently took into account public policy considerations when determining whether it was fair, just and reasonable to impose a duty of care upon public authorities[43]. However, in *Robinson v Chief Constable for West Yorkshire Police*[44], Lord Reed argued that the court could only consider whether it was fair, just and reasonable to impose a duty of care upon a defendant in novel situations where established principles did not provide an answer[45]. Lord Reed took a dim view of policy considerations, arguing that they could not override a liability which would arise under the ordinary principles of negligence and were only relevant when the court was considering whether to create a new duty of care as an exception to the ordinary application of common law principles[46].

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[40] ibid 586.
[41] S.H. Bailey and M.J. Bowman, 'The Policy/Operational Distinction – A Cuckoo in the Nest' [1986] CLJ 430; S.H. and M.J. Bowman, 'Public Authority Negligence Revisited' [2000] CLJ 85; Stephen Bailey, 'Public Authority Negligence: The Continued Search for Coherence' [2006] 26(2) LS 155; Donal Nolan, 'The Duty of Care After Robinson v Chief Constable for West Yorkshire Police' in Daniel Clarry (ed) *The UK Supreme Court Yearbook, Volume 9: 2017-2018 Legal Year* (Appellate Press 2019).
[42] *Robinson v Chief Constable for West Yorkshire Police* [2018] 2 WLR 595 (per Lord Reed).
[43] Paul Craig, *Administrative Law* (Sweet & Maxwell 2016) 30-006 and 30-008; *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495; *Smith v Chief Constable of Sussex Police* [2009] 1 AC 225.
[44] [2018] 2 WLR 595.
[45] ibid 604-605.
[46] ibid 608/

Lord Mance and Lord Hughes on the other hand, were more reluctant to dismiss the importance of policy considerations. Thus, Lord Mance pointed out that it would be unrealistic to suggest that the courts are not influenced by policy considerations when recognizing and developing an established category[47]. Lord Hughes, who considered some of the seminal cases on police liability in negligence, noted that the policy considerations in these cases were '*too considered, too powerful and too authoritative in law to be consigned to history*'[48].

Lord Reed's disapproval of policy considerations is understandable, given that policy concerns are often used to shield public authorities from liability in negligence[49] at the expense of an individual's right to compensation. The principal policy consideration that the courts have used to negate the existence of a duty of care, is that the imposition of liability would put public authorities in a '*detrimentally defensive frame of mind'*[50]. Yet, there is little empirical evidence available which shows that defensive practice is a likely consequence of imposing liability on public authorities[51]. It is also questionable whether the courts are institutionally capable of determining the proper weight to be accorded to policy considerations[52].

More recently, the Supreme Court in *Poole Borough Council v GN*[53] reaffirmed Lord Reed's stance regarding policy considerations, stating that the courts should apply established principles of law, rather than base their decisions on public policy

[47] ibid 621.
[48] ibid 633.
[49] Craig (n 43).
[50] *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 63 (per Lord Keith). See also: *X v Bedfordshire City Council* [1995] 2 AC 633, 750; *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335, 349; Hanna Wilberg, 'Defensive Practice or Conflict of Duties? Policy Concerns in Public Authority Claims' [2010] LQR 420.
[51] Law Commission, *Administrative Redress: Public bodies and the Citizen* (Law Com No 187, 2008) Appendix B.
[52] Mark Elliott and Jason N.E. Varuhas, *Administrative Law: Text and Materials* (Oxford University Press 2015) 606.
[53] [2019] 2 WLR 1478.

requirements[54]. The court also explicitly overruled the decision in *X (Minors)* insofar as the latter ruled out on grounds of public policy the possibility that local authorities might owe a duty of care towards children with whom they came into contact with in the performance of their statutory functions. This rejection of policy considerations is readily explicable when one considers that Lord Reed who delivered the lead judgment in *Robinson*, also delivered the sole judgment on behalf of the court in *Poole*.

However, the problem with eliminating policy considerations altogether and adopting a purely private law approach in this context, is that it may lead to the courts ignoring important differences between public bodies and private individuals. This is evidenced by the Supreme Court's decision in *Robinson*, in which an elderly claimant was injured during a tussle between the police and a suspect who was attempting to resist arrest. Lord Reed held that public authorities are generally subject to the same liabilities in tort as private individuals, therefore conduct that would be tortious if committed by a private person, would generally be tortious if committed by a public authority. He rejected the notion that *Hill* was authority for the proposition that police officers were immune from claims in negligence for acts or omissions carried out in the course of a criminal investigation. According to Lord Reed, police are generally under a duty of care to avoid causing reasonably foreseeable physical injuries, when such a duty would arise in accordance with ordinary principles of negligence.

While the Supreme Court's decision in *Robinson* should be lauded for affirming conclusively that the police are not immune from negligence claims, there are several problems with Lord Reed's approach. Firstly, Lord Reed interprets the long line of authorities on public authority negligence as expressing the principle that in the absence of

[54] ibid 1499.

special circumstances, no private law duty of care can be imposed on public authorities for omissions. However, as Lord Mance points out, while seminal cases concerning the liability of the police in negligence, such as *Hill* and *Smith v Chief Constable of Sussex Police*[55] could be rationalized as cases of omissions, that was not how they were reasoned. Thus, it is questionable whether Lord Reed's reinterpretation of an important line of authorities is consistent with precedent.

Secondly, as Lord Hughes articulates, there is '*no firm line capable of determination between a case of omission and of commission'*[56]. Indeed, Hallett LJ in the Court of Appeal took the view that the claim in *Robinson* concerned an omission rather than a positive act, as it was based on the officers' failure to prevent the suspect from harming the claimant. This distinction appears fairly easy to manipulate, and there is a danger that the courts may simply classify a particular act as an omission, to avoid imposing liability on a public authority. Problematic as policy considerations may be, they at least impel the courts to articulate the reasons why liability should not be imposed upon the public authorities. In *Poole*, Lord Reed recognized some of the difficulties with the act/omission distinction and chose instead to draw a distinction between causing harm and the failure to confer a benefit[57]. However, the distinction between causing harm and the failure to confer a benefit is simply another variation of the act/omission distinction that fails to account for the seminal differences between private bodies and public bodies.

Indeed, arguments against liability for omissions are often framed in terms of private individuals and have little application to public bodies. This is evidenced by Lord Hoffman's judgment in *Stovin* where he held:

[55] [2009] AC 225.
[56] [2018] 2 WLR 595, 634.
[57] [2019] 2 WLR 1478, 1489.

> *In political terms it is less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect. A moral version of this point may be called the 'why pick on me?' argument…In economic terms, the efficient allocation of resources usually requires an activity should bear its own costs…Except in special cases…English law does not reward someone who voluntarily confers a benefit on another. So there must be some special reason why he should have to put his hand in his pocket*.[58]

Lord Hoffmann concedes that some of these arguments do not apply to public bodies, particularly the 'why pick on me?' argument. However, he glosses over this issue, arguing that it did not mean that the distinction between acts and omissions were irrelevant to the duties of a public body[59]. It is worth highlighting that public authorities, unlike private individuals, are tasked with using their statutory powers for the public good. Equating public authorities with private individuals prevents us from holding them accountable to individuals whom they may have injured. While public bodies can be held accountable to a certain extent in judicial review for their acts and omissions, this accountability does not translate to an award for damages for the affected claimant.

This sub-section has focused in some detail on the tort of negligence to demonstrate the difficulties that claimants face in obtaining compensation from public authorities in private law. It has shown that the courts have vacillated between applying additional control devices to address the special status of public authorities and adopting a purely private law approach towards public authority negligence. The latter approach goes some way in ameliorating the difficulties by individual claimants as it prevents public authorities from being rendered immune from private law suits. However, this approach is still problematic for it fails to recognize certain differences between public authorities and

[58] [1996] AC 923, 943-944.
[59] [1996] AC 923, 946.

private individuals, as is evidenced in the way that recent cases have tackled liability for omissions.

B. Breach of Statutory Duty and Misfeasance of Public Office

Constraints of space prevent a detailed examination of other tortious claims that are available against public authorities such as breach of statutory duty and misfeasance of public office. However, both of these torts are still incapable of filling the existing gap in the protection of individual interests under the good administration framework. Briefly, the courts have adopted an extremely restrictive approach towards the tort of breach of statutory duty. A claim for breach of statutory duty will only be successful where it can be shown as a matter of statutory construction, that the statutory duty was imposed for the protection of a limited class of the public, and that Parliament intended to confer upon members of that class a private right of action for breach of duty[60].

These are extremely high thresholds to pass as evidenced by the case of *Cullen v Chief Constable of the Royal Ulster Constabulary*[61], in which the detainee's right of access to a solicitor was deferred without any reasons provided, in contravention of Section 15(9)(a) of the Northern Ireland (Emergency Provisions) Act 1987. The House of Lords dismissed the action on the grounds that the claimant had suffered no harm and judicial review would have afforded the claimant an effective remedy. Given that the claimant was denied access to a solicitor in this case, it is difficult to understand how he could be expected to have made a timely application for judicial review. If the courts are unwilling to uphold an action for breach of statutory duty when an important fundamental right is at

[60] *X (minors) v Bedfordshire CC* [1995] 2 AC 633, 731 (per Lord Browne-Wilkinson).
[61] [2003] 1 WLR 1763.

stake, it is clear that few claimants will find success pursuing the breach of statutory duty route.

Similarly, the tort of misfeasance in public office is unlikely to provide an avenue for success for many claimants, given that it does not provide a remedy for unlawful action by public authorities or even for maladministration or gross incompetence[62] on the part of public bodies. Rather, it enables a claimant to seek redress from a public official in exceptional cases, where there has been an abuse of public power by a public officer which is motivated by bad faith. Bad faith in this context encompasses cases of targeted malice, in which the public officer's conduct was specifically intended to injure a person as well as cases where a public officer does not have an honest belief that her act is lawful[63]. The high threshold posed by bad faith coupled with the fact that the tort is only actionable on proof of material damage[64], means that it will be extremely difficult for an individual to succeed under this cause of action.

C. The Availability of Damages under the HRA

At first glance, the availability of damages under the HRA seems to strengthen the protection of individual interests under the framework of good administration, as it offers claimants an alternative, easier route to claiming compensation for unlawful administrative action than private law. Indeed, the courts have in some cases declined to expand the common law tort of negligence on the ground that the claimants would be entitled to compensation under the HRA for breach of their ECHR rights[65]. In *Jain v Trent Strategic Health Authority*, the appellant nursing home proprietors challenged the health authority's

[62] Donal Nolan, 'A Public Law Tort: Understanding Misfeasance in Public Office' in Kit Barker, Simone Degeling, Karen Fairweather and Ross Grantham (eds) *Private Law and Power* (Hart Publishing 2017) 180.
[63] *Three Rivers District Council v Governor and Company of the Bank of England* (No 3) [2003] 2 AC 1.
[64] *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395.
[65] *Van Colle v Chief Constable of the Hertfordshire Police* [2009] 1 AC 225 (HL); *Jain v Trent Strategic Health Authority* [2009] 1 AC 853.

decision to obtain an order cancelling their nursing home registration without notice. While recognizing that there was a '*serious injustice…which deserved a remedy*'[66], the House of Lords refused to develop the duty of care doctrine and award damages to the appellants, on the grounds that the appellants would have had a remedy under the HRA if the challenged decision post-dated 2 October 2000[67]. Baroness Hale stated that the HRA '*is expressly designed to offer individuals a remedy, if need be in damages, against public authorities which act incompatibly with their Convention rights*'[68].

Unfortunately, the courts have not seized the opportunity afforded to them under S8 of the HRA to develop a principled approach to damages that is capable of addressing the personal nature of human rights violations. Instead, the courts have adopted a restrictive approach to the award of damages under the HRA; one that commentators have argued is not even mandated by the terms of the statute[69]. This restrictive approach is evident in *Anufrijeva v Southwark LBC*[70] , in which the Court of Appeal dismissed an appeal brought by asylum-seekers for damages under S8 of the HRA. The appellants alleged that their respective local authorities had breached their rights to private and family life under Article 8, as due to maladministration, the authorities failed to comply with their statutory duty to provide benefits to which the appellants were entitled. Although the Court of Appeal found that there were no violations of the appellants' Article 8 rights, Lord Woolf went on to discuss the different role that damages play in claims involving public law rights and he suggested that damages under the HRA should be seen as '*a remedy of "last resort*"'[71].

[66] *Jain* ibid 870.
[67] The HRA came into force on this date.
[68] [2009] 1 AC 853, 870.
[69] Varuhas (n 1) Chapter 5; Richard Clayton, 'Damage Limitation: The Courts and the Human Rights Act Damages' [2005] PL 429.
[70] [2004] QB 1124.
[71] ibid 1155.

Additionally, Lord Woolf adopted an '*interest balancing approach*'[72], and held that when deciding whether to award compensation, the court must draw a balance between the interests of the victim and those of the public as a whole[73]. Lord Woolf provided a number of reasons in support of a modest award of damages for breaches of positive obligations under Article 8, including the fear that payments of substantial damages will deplete the limited public resources available for other needs of the public and the concern that it could create an impression that asylum-seekers are profiting from their status thus bringing the HRA into disrepute[74].

The limited role that Lord Woolf accords to damages under the HRA coupled with his proposed interest-balancing approach highlights the difficulties that individuals face in obtaining compensation when their rights have been violated. Lord Woolf indicated that it would be rare for the court to find that a public body had breached a positive obligation under Article 8 through maladministration. Thus, holding that an individual's right to damages should be further circumscribed in favour of policy considerations which the courts are ill-equipped to assess and which are usually not backed by empirical evidence[75], prevents the effective protection of individual rights.

The courts have also highlighted the importance of modelling the award of HRA damages on the awards granted by the European Court of Human Rights ('the Strasbourg court'). Thus, in *R* (*Greenfield) v Secretary of State for the Home Department*[76], which concerned a claim for damages for violations of Article 6, the House of Lords held that it was '*to Strasbourg that British courts must look for guidance on the award of damages*'[77].

[72] Varuhas (n 1) 324.
[73] [2004] QB 1124, 1154.
[74] Varuhas (n 1) 324.
[75] ibid 383-390.
[76] [2005] 1 WLR 673.
[77] ibid 677.

This approach seems to cohere with S8(4) of the HRA which requires the court to take into account the principles applied by the Strasbourg court in relation to Article 41 of the ECHR, when making a determination as to whether to award damages or the amount of the award.

However, the House of Lords in *Greenfield* went even further and rejected a submission that the courts should apply domestic scales of damages when exercising their powers under S8 of the HRA, reasoning *inter alia* that the HRA is not a tort statute. Similarly, the Supreme Court in *R* (*Faulkner) v Secretary of State for Justice*[78], held that S8(3) and (4) had introduced into the law a '*novel remedy…which is described as damages but is not tortious in nature*'[79]. Lord Reed further stated that in developing the remedy of damages under S8 of the HRA, the courts should be guided '*primarily by any clear and consistent practice of the European Court'*[80]. The decisions in *Greenfield* and *Faulkner* prevents any guidance from being derived from domestic law, despite the fact that there is nothing in the HRA which mandates the adoption of such an exclusionary approach[81].

The problem with aligning the damages award under the HRA with the approach taken in Strasbourg ('the mirror approach'[82]) is that, as many critics have pointed out, the Strasbourg jurisprudence lacks clarity and coherence, which makes it difficult for lower courts and tribunals to ascertain the relevant principles.[83] Furthermore, Varuhas questions whether the Strasbourg's court remedial practice is capable of serving as a suitable model for domestic institutions, given that the Strasbourg court's approach is influenced by its status as '*a subsidiary, supranational institution'*[84]. It is clear therefore that there are

[78] [2013] 2 AC 254.
[79] ibid 291 (per Lord Reed).
[80] ibid 294.
[81] Varuhas (n 1) 238-241.
[82] Jenny Steele, 'Damages in Tort and Under the Human Rights Act: Remedial or Functional Separation?' [2008] CLJ 606, 610-612.
[83] Clayton (n 69); Varuhas (n 1) 268-279.
[84] Varuhas ibid 6.

glaring flaws in the protection of individual rights under the current system of judicial review.

3. A Positive Case for Awarding Damages in Judicial Review: Elevating the Protection of Interests Under Both Limbs of the Framework of Good Administration

Having explored some of the problems with the current remedial regime, this section examines how the provision of damages in judicial review would elevate the protection of individual interests and the public interest in controlling public power. Firstly, the recognition of damages liability in judicial review may facilitate better administrative practices and inculcate greater respect for individual interests amongst public authorities. As mentioned above, a frequently asserted objection against holding public authorities liable for damages is that it would place these authorities in a detrimentally defensive frame of mind. Setting aside the fact that there is no empirical evidence to ground such an assertion[85], it is worth noting that there is actually some data which suggests that the fear of public authorities engaging in defensive practice is overinflated.

Halliday et al, conducted a set of empirical studies on how local authorities in Scotland and Ireland managed the liability risks associated with the provision of a public road maintenance service[86]. They found that most public authorities were not excessively risk averse and did not simply stop engaging in activities that would give rise to liability. Interestingly, they reported that there were a few Irish authorities which actually carried out '*pro-active cyclical road inspections to detect defects and undertake repairs*'[87]. Thus,

[85] Law Commission (n 51) Appendix B.
[86] Simon Halliday, Jonathan Ilan and Colin Scott, 'The Public Management of Liability Risks' [2011] OJLS 527.
[87] Halliday et al ibid 540.

in some instances, the fear of liability could motivate public authorities to go beyond the bare minimum required of them.

In the US context, Epp carried out a comparative study of local government reform efforts in policy areas such as policing and sexual harassment, and found that in the late 1970s and early 1980s, there were improvements in the way police departments and government human relations departments created and enforced policies concerning the use of force and sexual harassment respectively[88]. Epp attributes these improvements to newly energized activist movements and liability lawyers impelling agencies to confront problems of abuse that were long ignored, and also to the growing recognition amongst managers that legal claims *'represented fundamental threats to their public and professional legitimacy'*[89]. Rather than producing a chilling effect on public administration, the threat of damages liability served as an impetus for much-needed reform.

The above suggests that the availability of damages in judicial review may lead to better administrative practices and may instill in public authorities a greater appreciation for individual rights. Indeed, Epp reported that local government officials had expressed to him that liabilities had made their agencies safe and more respectful of rights and liberties[90]. Of course, this section is not arguing that the recognition of damages liability will *inevitably* lead to better administrative practices. The point is that there is just as much, perhaps more, empirical evidence to suggest that damages liability will have such an effect as there is to suggest that damages liability will cause public authorities to act defensively.

It could however be argued that even if damages liability does not cause public authorities to act defensively, it will certainly impact their finances. The money has to come

[88] Charles R Epp, *Making Rights Real: Activists, Bureaucrats and the Creation of the Legalistic State* (University of Chicago Press 2009).
[89] ibid 1-2.
[90] ibid 226.

from somewhere and for every claimant who receives damages, there will likely be other individuals who will be affected by the consequent cut in public services. Several points can be made in response to this objection. Firstly, as Varuhas points out, it is relatively unusual for monetary awards to be paid from funds earmarked from frontline services[91]. Rather, such awards are more likely to be covered by insurance or paid out of '*contingency or reserve funds which are separate from day-to-day operating budgets*'[92].

Secondly, it is worth noting that non-pecuniary remedies in judicial review may also entail the expenditure of public funds[93]. Cane highlights the '*knock-on*'[94] effects of a judgment holding that a claimant should have been given a hearing. He observes that it may require the administrative decision-maker to reactivate the decision-making process and perhaps spend more on making the second decision than was spent on making the first. If the courts were consistently barred from providing relief on the basis that there would be ramifications for public expenditure, it is difficult to see how individual interests under the first limb of the framework of good administration will be adequately protected.

It is questionable whether the courts in considering whether to recognize some form of damages liability in judicial review, should be so heavily constrained by financial considerations which they are ill-equipped to assess. Indeed, Cane cautions against the courts allowing their attitude to public law damages to be unduly influenced by the fact that damages involve public expenditure, as '*doing so, relieves the government of the need to make important decisions about how public money should be allocated as between making amends for past failures and improving matters for the future*'[95]. The focus of the

[91] Varuhas (n 1) 368.
[92] ibid.
[93] Peter Cane, 'Damages in Public Law' [1999] Otago Law Review 489, 495-496; Varuhas (n 1) 373.
[94] ibid 496.
[95] Cane (n 93) 515; Varuhas (n 1) 372.

judges should be on whether the availability of damages in judicial review will ensure that the interests under both limbs of the framework of good administration will be better protected. Cane is entirely right to suggest that the courts should expand the public law of damages if it is consistent with legal principles, leaving it '*to the executive and the legislature to react if they think that public law damages liability has become too extensive'*[96].

It is submitted that the courts should take this next step and add damages '*to the catalogue of public law remedies*'[97] as it would fill a lacuna in the current remedial regime. In particular, it enables an individual to be compensated for a loss that she has suffered as a result of an unlawful administration action, where she is unable to meet the criteria for a private law cause of action. It may help remedy the unfairness experienced by individuals like the applicants in *R v Knowsley Metropolitan Council Ex Parte Maguire*[98], who were unlawfully refused hackney carriage licences by the council.

The council in *Maguire* sent letters to the applicants indicating that they would be licensed if they complied with certain requirements, such as purchasing a specific type of vehicle and fitting an approved taximeter. The applicants went to considerable expense to fulfill these criteria and although they were subsequently granted licenses, they suffered loss as they had useless vehicles in the garages between the time when the licenses ought to have been granted and when they were finally granted. However, the court held that the applicants' claim for damages failed because there was no general right to damages for maladministration and the applicants were unable to show that they had claims in contract, negligence and the tort of breach of statutory duty. *Maguire* reveals the limitations of

[96] Cane ibid 516; Varuhas ibid.
[97] Cane (n 93) 493.
[98] 90 LGR 653.

private law causes of actions and it shows that an individual may be left completely without a remedy in judicial review, despite suffering loss as a result of an unlawful administrative action.

Finally, the addition of damages to the remedial regime provides the courts with the necessary tools to address situations in which a conflict arises in relation to the protection of individual interests and the wider public interest in controlling public power. The focus here is on the conflict of interests exemplified by ultra vires representations. The traditional position taken by the courts is that a representation by a public authority could only give rise to a legitimate expectation if '*it lay within the powers of the local authority both to make the representation and fulfil it*'[99]. Judges have expressed concern that binding public authorities to an unlawful representation would destroy the ultra vires doctrine by allowing public bodies arbitrarily to extend their powers[100]. Furthermore, it may have negative ramifications for third parties[101].

There are however several problems with the orthodox approach. As Craig points out, the refusal to enforce ultra vires representations does not really help prevent the unlawful extension of power by public officials. Thus, he argues that in rare cases where a public official has intentionally extended her power, the rule that ultra vires representations are unenforceable '*strikes at the wrong person, the innocent representee, rather than the public official*'[102], while in the more common case of inadvertent extension of power, '*any deterrent effect upon the public officer will be minimal'*[103]. Craig also casts doubt on the

[99] *R (Bibi) v Newnham LBC* (No 1) [2002] 1 WLR 237, 249 (per Schiemann LJ).
[100] *R v Ministry of Agriculture, Fisheries and Food ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714, 731 (per Sedley LJ). Interestingly, the HMRC appears to have diverged from the orthodox approach and have suggested that it is possible for it to be bound to its representation where a significant fairness hurdle has been met and the applicant has suffered detrimental reliance: see Stephen Daly, 'Recent Developments in Tax Law: Vires Revisited' [2016] PL 190.
[101] S Hannett and L Busch, 'Ultra Vires Representations and Illegitimate Expectations' [2005] PL 729.
[102] Paul Craig, 'Representations by Public Bodies' (1977) 93 LQR 398, 420.
[103] ibid.

proposition that third parties will inevitably be detrimentally affected when an unlawful representation is enforced, noting that there are circumstances in which the detriment to the public does not outweigh the harsh effect upon the individual and where it would be more just to allow the loss incurred by an unlawful representation '*to be spread through those who benefit from performance of the public duty*[104]'.

This issue of whether it is fair for an innocent representee to bear the cost of an unlawful representation was highlighted in *Stretch v United Kingdom*[105]. The applicant had purchased a 22-year lease which required him to erect buildings at his own expense, and which conferred an option to renew for another 21 years; an option that the applicant later sought to exercise. After the negotiations for the renewal of the lease had proceeded to an advanced stage, the local authority informed the applicant that the renewal option could not be exercised because its predecessor lacked the legal capacity to grant it. While the Court of Appeal ruled in favour of the public authority, Peter Gibson LJ observed that it seemed unjust that public bodies were able to '*take advantage of their own errors to escape from the unlawful bargains which they have made'*[106].

The Strasbourg court however found in favour of the applicant, holding that the applicant had a legitimate expectation of exercising the option, which constituted a 'possession' under Article 1, Protocol 1 ('A1P1') of the ECHR. The Strasbourg court found that the rigid application of the ultra vires doctrine in the case at hand failed to respect the principle of proportionality. The court awarded the applicant damages under Article 41 of the ECHR on the grounds that there was a disproportionate interference with the applicant's peaceful enjoyment of his possessions.

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[104] Craig (n 43) 22-044.
[105] [2003] ECHR 320.
[106] *Stretch v West Dorset District Council* (1999) 77 P & C.R. 342, 353.

While not all legitimate expectations will be capable of being categorized as possessions under A1P1, the Strasbourg Court's judgment suggests that damages may provide a solution to addressing the inequities arising from ultra vires representations. Indeed, the Court of Appeal in *Rowland v Environment Secretary*[107], made obiter observations to the effect that an unlawful representation may give rise to a legitimate expectation[108], and May LJ suggested that there may be cases where a public authority has created an expectation and '*the only relief possible may be by way of a claim for compensation'*[109]. Unfortunately, later cases have reverted to the orthodox approach[110] and the Privy Council has suggested that the more relaxed approach to unlawful representations put forward in *Rowland* should be confined to cases involving Convention rights[111].

Compensating individuals for ultra vires representations prevents public authorities from being bound to unlawful representations while it prevents individuals from having to bear the burden of a public authority's unlawful representations. This approach recognizes that it may not always be possible to substantively protect an individual's expectation, but it prevents an individual from being left completely without a remedy as a result of a public authority's unlawful promise. A number of commentators have supported the use of monetary compensation in the context of ultra vires representations[112]. As Forsyth points out, compensating an innocent representee is not the same as upholding an ultra vires representation, rather it simply recognizes '*that the undoubted fact of the representation*

[107] [2005] Ch 1.
[108] ibid 55 (per Mance LJ).
[109] ibid 49.
[110] Elliott and Varuhas (n 52) 231-232; *R (Albert Court Residents' Association) v Westminster City Council* [2011] EWCA Civ 430; *Rainbow Insurance Company Ltd v The Financial Services Commission (Mauritius)* [2015] UKPC 15.
[111] *Rainbow Insurance Company Ltd* ibid.
[112] Yasser Vanderman, 'Ultra Vires Legitimate Expectations: An Argument for Compensation' [2012] PL 85; William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press 2009).

may be an element in establishing that compensation should be paid'[113]. The crucial point is that the courts still possess the remedial discretion to refuse a grant of compensation to a claimant where the public authority conclusively demonstrates that compensating the claimant for her loss would put too much of a strain on the public purse. It should be noted however that any supposed strain on public funds in the case of ultra vires representations is caused by the public authorities' unlawful actions, thus it is incumbent upon these authorities to ensure they have proper legal authority when they act.

4. Damages under the Framework of Good Administration

Part Four examines how the issue of damages should be approached under the framework of good administration. It is submitted that a fault-based model of liability (loosely based on the Law Commission's reform proposal) will help safeguard the interests under the second limb of the framework, by ensuring that public bodies are held accountable for serious misuses of power. However, it is argued that this model of liability may not be appropriate for interests falling under the first limb of the framework, namely legitimate expectations and human rights, and therefore a different approach to damages should be adopted in these cases.

A. Compensation for Invalidity

Before discussing the above-mentioned reform proposals, another option for reform should be briefly considered. As discussed above, there is currently a lacuna in the law, which prevents individuals from obtaining compensation in judicial review when they have suffered loss as a result of an unlawful administrative action. At first glance, an obvious

[113] Wade and Forsyth ibid 455.

solution would be to hold that any unlawful administrative action which causes loss to an individual(s) gives rise to a *prime facie* right to compensation.

However, the problem with this approach lies in the '*breadth of the ultra vires doctrine*'[114]. A public authority may be found to have acted unlawfully for a number of reasons including breaching minor procedural justice norms, erroneously interpreting a statute or for taking into account an irrelevant consideration[115]. It will not always be easy for public authorities to decipher the meaning of complex statutory provisions given that judges themselves struggle with the vagaries of statutory language. The Privy Council observed in *Dunlop v Woollahra Municipal Council*[116] that it took the judge in the lower court '*20 closely reasoned pages of judgment and the citation of some two score of authorities to reach the conclusion that he did'*[117]. There is therefore a danger that if illegality is a sufficient condition for damages liability, public authorities may become liable to pay substantial amounts of compensation for '*excusable errors of law*'[118]. Such an approach might hamper public authorities from carrying out their public duties, and may jeopardize the interests under the second limb of the framework of good administration.

B. Formulating a Model of Fault-Based Liability under the Framework of Good Administration

Another option to be considered, is the reform proposals put forward by the Law Commission which are modelled on the EU's approach to state liability[119]. According to the Law Commission, damages should be recoverable in judicial review where three

[114] Craig (n 43) 30-071.
[115] ibid.
[116] [1982] AC 158.
[117] ibid 172.
[118] Law Commission, *Remedies against Public Bodies: A Scoping Report* (2006), para 3.62.
[119] Law Commission (n 51); Tom Cornford, 'Administrative Redress: The Law Commission's Consultation Paper' [2009] PL 70. Craig has also suggested that liability for damages in the UK should be modelled on the EU approach to state liability: Paul Craig, 'Once More unto the Breach: The Community, the State and Damages Liability' (1997) 113 LQR 67, 90-94.

elements are fulfilled, namely where the relevant statutory regime intended to confer a benefit upon the claimant, there is serious fault on the part of the public body, and the general causation principles applicable in tort are satisfied. In relation to the serious fault requirement, the Law Commission proposed that the courts consider a number of factors and look for a significantly aggravated level of fault. These factors include:

(i) the risk and likelihood of harm involved in the conduct of the public body ('the risk element'),

(ii) the seriousness of the harm caused,

(iii) the cost and practicability of avoiding harm,

(iv) the knowledge of the public body at the time that the harm occurred that its conduct could cause harm and whether it knew or should have known about vulnerable potential victims ('the knowledge element'),

(v) the social utility of the activity in which the public body was engaged when it caused the harm, the extent and duration of departures from well-established good practice,

(vi) the extent to which senior administrators had facilitated the failure(s) in question[120].

It is argued that recognizing fault-based liability along the lines of that proposed by the Law Commission, may help enhance the protection of interests under the framework of good administration, particularly the public interest in controlling public power. The focus on fault highlights the fact that the inquiry is largely defendant-centered and that it is concerned with severe misuses of public power. However, a number of significant adjustments will need to be made to afford sufficient protection for the interests under both

[120] Law Commission (n 51) para 4.146.

limbs of the framework of good administration. The following sub-sections will briefly consider which aspects of the model should be retained, discarded or modified.

(i) The Causation Element

The causation criterion put forward by the Law Commission will be dealt with very briefly first, as it is argued that it should be retained. Thus, the claimant must be able to establish that the public authority's action resulted in the damage complained of and that the damage in law is not too remote a consequence of the public authority's misconduct[121]. The Law Commission rightly proposed applying general tort principles in relation to the causation element. These well-developed principles are familiar to judges and are already applicable in relation to the liability of public authorities in negligence. Furthermore, the causation element may allay concerns of damages liability exerting undue strain upon public funds as it restricts liability to those who have actually been harmed by the public authority's conduct.

(ii) The Conferral of Benefit Requirement

To a certain extent, a parallel may be observed between the ECJ's 'conferral of rights' test[122] and the Law Commission's requirement that the relevant statutory regime must have intended to confer a benefit upon the claimant. However, the Law Commission rightly recognized that the remedy of damages should not be limited to a narrow class of rights[123]. The Law Commission maintained that the wider category of 'benefits' is still capable of restricting the ambit of damages claims against public authorities and provided some examples as to when this test would not be satisfied, such as when a regulatory

[121] Law Commission (n 51) para 4.168.
[122] ibid para 4.136; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany and R v Secretary of State for Transport ex parte Factortame Ltd* [1996] ECR I1029.
[123] Law Commission ibid para 4.137.

scheme's objective purpose is to safeguard interests of a different kind than the claimant's[124].

There are however a couple of problems with this criterion. Firstly, it is unduly restrictive as it is confined to statutory schemes. This is problematic given that as the Law Commission themselves recognize, '*not all public power derive from or are governed by statute'*[125]. Secondly, as Cornford points out, the 'conferral of benefit' criterion still excludes a large number of cases in which damages seem to be warranted. He discusses the examples put forward by the Law Commission of the injustice that flows from an individual's inability to receive damages for administrative wrongs and accurately observes that in some of them, the legislation could not possibly be construed as conferring a benefit upon the claimant. Thus, when discussing the case of an individual losing his job because he is mistakenly placed on a child abuse register[126], Cornford argues that the power to place a person on the register exists to protect children who may be abused, not to benefit persons who might be placed on it[127].

In light of the problems discussed above, should the 'conferral of benefits' criterion be modified or discarded altogether? Cornford argues that a solution to these problems might be to adapt a formula that has been used '[i]*n the EU institutional context,* [where] *it has often been said that liability arises from* [a]*"serious breach of a rule of law for the protection of the individual*"'[128]. He therefore suggests focusing the inquiry on whether

[124] ibid 4.138-139.
[125] Cornford (n 119) 84; Law Commission ibid para 4.134.
[126] Law Commission ibid para 4.28. This particular example was drawn from the case of *R v Norfolk County Council Ex parte M* [1989] QB 619.
[127] Cornford (n 119) 84.
[128] ibid 84. Cornford does not cite any authority for this proposition. It is worth noting that the exact phrase used in the older cases is '*serious breach of a superior rule of law for the protection of the individual'*: see Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL v Council and Commission* [1978] ECR 1209 [4]; Case 104/89 *Mulder v Council & Commission* [1992] ECR 1-3061 [12]. Cornford does cite *Mulder* when discussing the type of rules which give rise to liability in EU law, but he does not explain why he omitted the word 'superior' from his 'formula'. More recent case law suggests a 'fusion' between the conditions of member state liability and the liability of EU institutions, with the Court of Justice of the European Union

there has been an infringement of a '*rule of public law for the protection of the individual*'[129]. He defines rules of public law as encompassing both statutory rules governing the relation between public authorities and individuals and the judge-made rules of administrative law[130]. Cornford's approach is significantly less restrictive than that proposed by the Law Commission. However, there is still a degree of ambiguity surrounding which rules of public law might be regarded as being designed for the protection of individuals. Does the protection of individuals have to be the sole or primary objective underpinning the relevant rule? To some extent, all rules of public law might be said to protect individuals, whether directly or indirectly.

Rather than trying to find a substitute for the 'conferral of benefit' requirement, it is submitted that this criterion should be abandoned altogether as it serves no useful purpose. The inherent limitations of the 'conferral of benefits' criterion is evident when one considers the way that the analogous requirement has been tackled in the EU context. It has been noted that the Court of Justice of the European Union ('CJEU') regularly fails to engage with the 'intention to confer rights' criterion in a meaningful way, tending instead '*to adopt a checklist…approach*'[131] to this requirement. There is a possibility that the UK courts might adopt a similarly blasé approach to the 'conferral of the benefits' requirement, thus stripping it of any useful role.

Arguably, the CJEU's failure to engage critically with the 'conferral of rights' criterion does not inevitably lead to the conclusion that the criterion itself (or any permutation of it) is useless. Indeed, Dougan suggests that this criterion is '*the crucial*

('CJEU') applying the 'conferral of rights' test rather than the criterion discussed above: see Case C–352/98 P *Laboratoires Pharmaceutiques Bergaderm SA and Goupil v Commission* [2000] ECR I–5291 [41]-[42]; Case T–16/04 *Arcelor SA v European Parliament and Council* [2010] ECR–II 21 [141].

[129] ibid 84.

[130] ibid 85.

[131] Michael Dougan, 'Addressing Issues of Protective Scope within the *Francovich* Right to Reparation' [2017] European Constitutional Law Review 124, 125.

gateway that…define[s] *the parameters of Member State liability*'[132]. Similarly, it might be argued that some version of this test is necessary to define the boundaries of public authority liability in the domestic context. It is submitted however that there are other criteria capable of performing this role more effectively. The 'conferral of rights' and the 'conferral of benefits' tests both evince restrictive conceptions of the type of interests that warrant protection via an award of damages. At the same time, there is a risk that these tests might become overly abstract, causing them to function as little more than '*requirement*[s] *to be ticked off on a checklist'*[133].

The requirement of a causal link and the formulation of a clear fault or breach standard are more useful in helping to delineate the boundaries of public authority liability. As mentioned above, the causation element prevents a public authority from being held liable for misuses of power, where the claimant is unable to show that she has suffered losses as a result of the public authority's conduct. In addition, as the following sub-section argues, the formulation of a clear fault or breach standard, will help specify the type of public authority misconduct capable of giving rise to damages liability, and will also prevent public authorities from being held liable for minor infractions. The CJEU case law on member state liability also indicates that a 'serious breach' requirement may be a more effective instrument in limiting liability than the 'conferral of rights' criterion, given that the vast majority of claims fail because the claimant is unable to establish the former requirement[134].

Removing the 'conferral of benefits' requirement will also help protect the interests under both limbs of the framework of good administration. On one hand, it helps ensure

[132] ibid 137.
[133] ibid.
[134] Tobias Lock, 'Is Private Enforcement of EU Law Through State Liability a Myth? An Assessment 20 years after Francovich' (2012) 49 CMLR 1675, 1688-1689.

that a broader range of interests are capable of being protected. On the other hand, it also helps focus the inquiry on the public authority's misuse of power and on holding the public authority accountable for its conduct via damages.

(iii) The Serious Fault Criterion

This element of the Law Commission's model also requires significant modification. On one hand, the adoption of a serious fault requirement helps address the above-discussed concern regarding the breadth of the ultra-vires doctrine by preventing public authorities from being held liable for damages for minor or inconsequential mistakes. Indeed, the high threshold set by 'serious fault' may allay concerns that damages liability will put a huge strain on the public purse. Furthermore, the concept of fault targets egregious misuses of power, and in that sense, helps protect the interests under the second limb of the framework of good administration.

On the other hand, the Law Commission's construction of the 'serious fault' criterion is flawed. In its consultation paper, the Law Commission suggested that a '*finding of unlawfulness by the court would create the potential for damages*'[135]. It is clear however that the public law notion of illegality and the grounds of judicial review play little role in the Law Commission's definition of fault. Instead, the fault criterion is defined solely by reference to the set of miscellaneous factors discussed above. Cornford highlights the ad hoc quality of the factors which make up the notion of fault under the Law Commission's model, arguing that they are not the result of any serious attempt to define the general circumstances in which public authorities should be held liable[136].

[135] Law Commission (n 51) para 4.98.
[136] Cornford (n 119) 81.

The indeterminacy of the fault criterion arises from the Law Commission's attempt at combining elements from the tort of negligence (which they observe is '*essentially fault based*'[137]) with their own version of the 'sufficiently serious breach' standard employed in EU law. Evidence of the influence of the tort of negligence can be seen in the inclusion of the risk and knowledge elements in the list of factors defining fault. The relevance of the ECJ's development of the state liability concept is evident in the Law Commission's suggestion that further guidance on a test based on 'serious fault' can be derived from the ECJ's test on 'sufficiently serious' breach[138]. While declining to use the same terminology adopted by the ECJ, the Law Commission observed that the test for 'sufficiently serious' is in reality a test for fault on the part of the relevant Member State[139].

The problem with this amalgamation of principles of negligence and state liability is that it produces a fault standard lacking in structure and clarity for it operates without specific reference to pre-existing rules of either public law or negligence[140]. It is significant that the language of breach is utilized in the tort of negligence and in the context of member state liability in EU law; it helps focus the inquiry on the legal norm or principle which has been departed from. In the case of negligence, the question is whether the defendant has breached the *duty of care* owed to the claimant, while in the case of member state liability under EU law, the question is whether the breach of a particular *rule of EU law* is sufficiently serious. Under the Law Commission's model, the inquiry is less clearly defined as the focus is not on whether an identifiable legal norm has been infringed, but on the vaguer question of whether '*it is clear that the public body, having regard to the* [above-

[137] Law Commission (n 51) para 4.144.
[138] ibid para 4.148.
[139] ibid.
[140] Cornford (n 119) 74.

discussed] *factors, should not have acted in the manner that caused harm to the claimant*'[141].

Indeed, the factors put forward by the Law Commission seem to be more useful in gauging the seriousness of the public body's infraction than in defining the notion of fault itself. Factors such as the extent of departure from good practice and the seriousness of the harm caused are capable of highlighting the severity of the public body's wrong, but they offer little clarification as to what constitutes wrongful administrative conduct in the first place. Further confusion and ambiguity may also arise from the Law Commission's use of these factors both to define 'fault' and to distinguish 'mere fault' from 'serious fault', the latter apparently being established when the public body's conduct engages the factors in an aggravated manner. The Law Commission cited as an example of 'serious fault' where the potential harm to the citizen is particularly grave[142]. However, as mentioned above, the seriousness of the harm caused is also one of the factors which make up the fault criterion. The indeterminate nature of the factors proposed by the Law Commission could potentially render 'mere fault' indistinguishable from 'serious fault'.

It is worth noting that the ECJ also utilizes a list of factors when assessing the breach issue. Unlike the Law Commission, the ECJ formulated a distinct test for 'sufficiently serious breach', namely where a Member State or an Union institution has '*manifestly or gravely disregarded the limits of its discretion*'[143]. The factors proposed by the ECJ (which include *inter alia* the clarity and precision of the infringed rule, the measure of discretion left to the national authorities and whether any error of law was excusable[144])

[141] Law Commission (n 51) para 4.147.
[142] ibid.
[143] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany and R v Secretary of State for Transport ex parte Factortame Ltd* [1996] ECR I1029 [55].
[144] ibid [56].

help indicate when the test for sufficiently serious breach will be met. The ECJ's approach creates little risk of the standards of fault and serious fault being conflated. It suggests that a list of factors may play a more valuable role in determining the seriousness of a public body's departure from a legal norm or standard than in defining the standard itself.

Having discussed at length the problems with the Law Commission's construction of the serious fault standard, we are now better placed to consider how this criterion might be modified. It is submitted that rather than relying on a fault standard that is not tied directly to either public law or negligence, the relevant standard should be based on the grounds of judicial review[145]. As regards the relevant terminology, the concept of 'serious breach'[146] may offer greater clarity than 'serious fault', insofar as it helps focus the inquiry on whether there has been a serious breach of a rule of law. In this context, a breach of a rule of law refers to the claimant successfully making out a ground of judicial review. In contrast to the Law Commission's construction of fault, the proposed approach has the benefit of clarifying the kind of administrative failure that triggers damages liability. Wedding the basis of liability closely to the grounds of judicial review renders damages liability a valuable addition to the catalogue of judicial review remedies.

Having formulated a clearly defined and distinct standard for breach, it is easier to look for an 'aggravated' or enhanced level of breach, when determining the seriousness of a public body's misconduct. This criterion is difficult to apply when the same factors are being used to both establish the presence of fault and to gauge the seriousness of the fault. However, under the proposed approach, the requirement of seriousness could simply be

[145] Cornford similarly suggests that a fault standard based on public law unlawfulness would be preferable to the standard of fault proposed by the Law Commission: Cornford (n 119) 82.
[146] This terminology mirrors that used by the ECJ, but as discussed below, there are a number of differences between the ECJ's approach to sufficiently serious breach and the approach proposed in this chapter.

interpreted as looking for '*the presence, in a more extreme form, of the failings and ill-effects involved*'[147] in the public body's infringement of a rule of law.

A better option would be to identify a number of factors that should be taken into account when determining whether there has been a serious breach. Although a necessary condition for liability under the proposed approach is the claimant successfully making out a ground of review, it is not a sufficient condition as it only indicates that there has been a breach of a rule of law. Further clarity is needed as to the type of extreme administrative failings that would constitute 'serious breach'. This section will not endeavor to formulate an exhaustive or definitive list of factors that have to be taken into account by the court, but it puts forward a preliminary list that may be useful and which is based on some of the factors suggested by the CJEU (in connection with the 'sufficiently serious breach' criterion[148]) and the Law Commission. These factors include:

(i) The clarity and precision of the infringed rule[149];

(ii) The amount of discretion left by the rule in question to the public authority[150];

(iii) Whether or not the relevant error of law is excusable[151];

(iv) The seriousness of the harm caused to the individual[152];

(v) The extent and duration of the administrative failure in question.[153]

To sum up, the Law Commission's fault standard should be replaced with a concept of breach based on the grounds of judicial review. In considering whether the public

[147] Cornford (n 119) 82.
[148] Craig, who has argued that damages liability for public authorities should be modelled on the CJEU's approach to state liability, has similarly suggested that some of the factors utilized by the CJEU may be useful when developing a national counterpart to the serious breach criterion: Craig (n 119) 94.
[149] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany and R v Secretary of State for Transport ex parte Factortame Ltd* [1996] ECR I1029 [56].
[150] ibid.
[151] ibid.
[152] Law Commission (n 51) para 4.146.
[153] ibid.

authority's conduct constitutes serious breach, the court should look for more extreme instances of failings and consequences involved in the public body's infringement of a rule of law. This section has also put forward a preliminary list of factors indicating the kind of extreme administrative failure that might amount to serious breach.

(iv) Summary of Proposals for Fault-Based Liability

This section has put forward a model for fault-based liability, that is loosely based on the Law Commission's model. It has however proposed several significant modifications to the Law Commission's framework. Firstly, it has suggested discarding the 'conferral of benefit' requirement altogether, as it fails to play a useful role in limiting liability and it evinces an overly restrictive conception of the type of interests that merit protection via damages. Secondly, it has been argued that the Law Commission's serious fault standard is too indeterminate and should be replaced with a serious breach standard. In order to help highlight the type of extreme administrative failure that would constitute 'serious breach', a preliminary list of relevant factors has been put forward. The only feature of the Law Commission's model that has been maintained without any modification is the requirement for there to be a causal link between the public body's misconduct and the claimant's harm. It has been argued that the Law Commission took the right approach in suggesting that the ordinary causation principles for tort is applicable in this context.

C. Damages in Cases involving Human Rights and Legitimate Expectations

The previous section put forward a model of fault-based liability that aimed to protect the public interest under the second limb of the framework of good administration by focusing on serious misuses of public power and holding public bodies accountable for such abuses via compensatory damages. However, this framework of damages may be ill-suited for certain interests falling under the first limb of the framework of good administration, namely human rights and legitimate expectations. The importance of human rights

mandates a claimant-centred approach, which focuses on the violation of the individual's right(s), and not on whether the public authority's misuse of power is serious enough to warrant an award of damages. As mentioned above, the serious fault threshold is framed in such a way as to limit liability where possible, and it places the burden of proof on the claimant to demonstrate that this high threshold has been met. Such an inquiry affords insufficient protection to individuals whose rights have been violated.

A fault-based liability model may also be an unsuitable where legitimate expectations are concerned. Chapter Three explained why legitimate expectations constitute important individual interests under the first limb of the framework of good administration and it explored the close similarities between legitimate expectations and private law concepts of contract and estoppel. These private law concepts may offer more useful guidance in formulating the proper approach to damages in legitimate expectations cases than a fault-based liability model. The following sub-sections put forward some suggestions as to how the issue of damages should be addressed in cases involving human rights and legitimate expectations respectively.

(i) Damages in Cases involving Human Rights

Varuhas suggests that the approach to human rights damages should be modelled on that developed within vindicatory torts such as false imprisonment and battery, which are torts actionable per se (TAPs)[154]. He argues that the law of damages in tort serves as an appropriate model, given that both TAPs and human rights law protect common fundamental interests, and share similar doctrinal features as evidenced by their common approaches to standing and the fact that both are actionable per se, in the sense that claimants do not have to demonstrate that the alleged interference left them worse off[155].

[154] Varuhas (n 69).
[155] Varuhas (n 1) 82-89.

He also takes the view that the law of damages in tort law '*provides a developed and generally coherent body of principles and a robust methodology to draw on'*[156].

Varuhas' detailed examination of the tort framework and how it offers effective protection to fundamental interests is clear evidence of how principles of private law can be utilized to enhance the protection of individual interests. However, a problem with Varuhas' approach is that it does not accord much role for judicial remedial discretion. This is unsurprising given his critique of the interest-balancing approach taken in *Anufrijeva* and his view that human rights law and judicial review are two distinct areas of law.

The difficulty with divorcing human rights law from judicial review is that as mentioned in Chapter One, it disregards the interrelation between the protection of rights and the control of public power, specifically the fact that the proper exercise of public power requires that rights be respected[157]. As discussed in Chapter One, Craig criticizes the distinction that Varuhas draws between individual interests and the public interest, arguing that the public interest in the effectuation of the aims of legislation is not severable from the interests of the individuals that the legislation is intended to serve[158].

While this thesis has argued that conceptual borrowing is a useful exercise, it has also asserted that private law principles may need to be modified to ensure that the public interest in the control of public power is properly safeguarded. Similarly, although the remedial approach adopted in relation to TAPs may offer enhanced protection for human rights, the courts should still be able to exercise their remedial discretion when it is clear

[156] Jason Varuhas, 'A Tort-Based Approach to Damages under the Human Rights Act' [2009] 72 MLR 750; Vauhas (n 1) Chapters Two and Three.
[157] Paul P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press 2015) 264, 269.
[158] ibid 262.

that there is an important public interest at stake. There may be a way for us to adopt the best features of the TAPS' remedial approach without jeopardizing important public interests.

Notwithstanding his critique of the interest-balancing approach, Varuhas suggests that if an interest-balancing approach to damages were to be adopted, it should prioritise the interest in vindicating the right, and there should be a presumption in favour of relief while arguments for denial of relief should be heavily scrutinized and substantiated by evidence[159]. It is submitted that the tort-based framework of damages should incorporate this version of the interest-balancing approach. As far as quantum is concerned, Varuhas insists that quantum should not be subject to balancing as it would require deviation from the principle of full compensation. However, such a rigid approach to quantum is incompatible with the framework of good administration, which requires the courts to consider the public interest in the control of public power. The courts may need to exercise their discretion and deviate from the principle of full compensation where there is substantial evidence of funds being diverted from an important public service or where the interests of a third party will be adversely affected by a substantial payout.

(ii) Damages in Cases involving Legitimate Expectations

Chapter Three of this thesis discussed the close similarities between legitimate expectation cases involving promises ('Promise Cases'), contract law and estoppel. However, a key difference between contract law and legitimate expectations is that damages is the primary remedy in contract law, rather than specific performance. Although the courts in judicial review have not shied away from specific performance as they frequently provide substantive relief for substantive legitimate expectations, they have not

[159] Varuhas (n 1) 473.

really addressed the question of whether damages would be a suitable form of relief in these cases. It is argued that damages should supplement existing judicial review remedies in this context, and that it should serve as an alternative to substantive relief where appropriate.

Should an award of damages in the context of legitimate expectations seek to protect an individual's expectation or reliance interest? In contract law, the primary measure for damages for breach of contract is the 'expectation interest', thus damages are designed to put the claimant in the position that she would have been in had the contract been performed[160]. Williams suggests that expectation damages '*may be an appropriate avenue for the law of almost-contractual legitimate expectations to explore*'[161]. She observes that while in some instances, awarding expectation damages may be more expensive than one of the other methods of protecting legitimate expectations, there are other cases in which it may be more economically efficient.

However, there may also be a need to protect the reliance interests of individuals, where they have incurred expense or loss as a result of relying on a public authority's representation. The issue of whether a claimant should be compensated for wasted expenditure incurred as a result of a frustrated legitimate expectation is highlighted in the case of *R (Nurse Prescribers Ltd) v Secretary of State for Health*[162]. The claimant entered into a contract for the supply of saline solution on the understanding that the Department of Health would not alter its policy on restricting nurse prescribers to generic products. Although Mitting J found that the claimant's legitimate expectation had been frustrated, he declined to grant any relief. He held that a claim of compensation for the frustration of a

[160] H.G. Beale, *Chitty on Contracts*: *Volume One* (33th edn, Sweet and Maxwell, 2018) 26-024.
[161] Rebecca Williams, 'The Multiple Doctrine of Legitimate Expectations' [2016] LQR 639, 645. Chapter Three discusses Williams' categorization of legitimate expectations in more detail.
[162] [2004] EWHC 403 (Admin).

legitimate expectation was not available directly in judicial review proceedings, and that there was no reliable or just measure to assess what compensation the Department of Health, might upon reconsideration of the decision, consider itself obliged to pay.

Based on the facts of the case, Mitting J's refusal of compensation is understandable. The claimant had not informed the Health Department of its intended expenditure and the claimant only had a procedural legitimate expectation that he would be notified if the Health Department changed its policy. However, it is submitted that in a suitable case, the recognition of damages for reliance loss would go a long way in mitigating the harshness and injustice faced by an individual who has relied on a public authority's representation.

The courts should be entitled to protect both reliance and expectation interests in legitimate expectation cases. This discretion to grant damages should encompass both ultra vires and intra vires representations. In determining whether to protect an individual's expectation interest via an award of damages, the courts should ensure that the damages award would not be more expensive than affording substantive relief as this may put a strain on the public purse. The courts should also have the discretion to protect an individual's reliance interest where she has incurred wasted expenditure as a result of a frustrated legitimate expectation.

5. Conclusion

This chapter has demonstrated that the current remedial regime does not provide adequate protection of individual interests under the framework of good administration. It has argued that the availability of compensation through private law causes of actions and the HRA does not go far enough in terms of protecting individuals who have suffered loss as a result of unlawful administrative action. Recognizing some form of damages award in judicial

review may elevate the protection currently afforded to interests under both limbs of the framework of good administration as it may facilitate better administrative practices and help fill the lacuna in the current remedial regime. It also provides the courts with more remedial options, thus enabling the courts to address situations in which a conflict arises in relation to the protection of individual interests and the wider public interest in controlling public power.

Although it is beyond the scope of this thesis to provide a comprehensive framework for damages in judicial review, several suggestions have been put forward. This chapter has argued that a fault-based model of liability will help safeguard the interests under the second limb of the framework, by ensuring that public bodies are held accountable for serious misuses of power. Thus, this chapter has explored how the Law Commission's framework for fault-based liability might be successfully modified to enable this objective to be fulfilled. However, a fault-based model of liability may not be appropriate for interests falling under the first limb of the framework, namely legitimate expectations and human rights. Therefore, the final part of this chapter considered the proper approach that should be taken in relation to damages in cases involving legitimate expectations and human rights.

CONCLUSION

This thesis has shown that there are problems with both rights-based and bifurcation accounts of public law. Rights-based theories of public law prevent the courts from holding public bodies accountable for misuses of power where no individual has been adversely affected, while bifurcation theorists underestimate the difficulty of separating individual interests from the public interest objectives of legislation. A better way of conceptualizing judicial review is to recognize that it is concerned with both protecting individual interests and preventing the misuse of public power. To properly address these normative concerns, this thesis has formulated a double-pronged framework of good administration that facilitates more focused scrutiny of the relevant interests in a judicial review claim.

The first limb of this framework is designed to protect a claimant's individual interests. To avoid excluding important interests, the term 'individual interests' has been construed as an open-ended, non-exhaustive category encompassing claimant-centric interests. In contrast, the second limb of the framework of good administration targets the misuse of public power, and enables claimants to vindicate the collective interest of the public in the control of public power. While the protection of individual interests may sometimes adversely impact the public interest, it cannot be denied that the proper exercise of public power requires that individual interests are adequately safeguarded. The interrelation of the interests under the two limbs of the framework is complex, nuanced and merits further analysis.

In seeking to enhance the protection of interests under the framework of good administration, this thesis has investigated whether techniques and principles from other areas of law may offer valuable guidance. In so doing, this thesis has adopted a more

nuanced and flexible approach towards the public-private divide; an approach that facilitates judicious conceptual borrowing.

Maintaining a rigid dichotomy between public and private law is neither necessary nor desirable. As evidenced by the privatisation and contracting out of traditionally governmental functions, the relationship between public and private law has become increasingly intertwined. That is not to say that there are no important differences between public and private law. However, instead of treating these differences as barriers to conceptual borrowing, this thesis has carefully examined whether the application of private law principles in judicial review (and vice versa) is normatively justifiable and whether the differences between these two areas of law can be accommodated. Viewed holistically, the framework of good administration, with its flexible approach towards the public-private divide, functions as a juridical tool that shapes the approach to be taken towards procedural issues of standing and waiver, administrative discretion and remedies.

As far as the concepts of standing and waiver are concerned, the twin objectives of the framework of good administration highlight the need for an approach that is capable of protecting *both* individual interests and the public interest in the control of public power. Indeed, having in Chapter Two compared how issues of standing and waiver are addressed in criminal law and private law, it is clearer still that judicial review fits neither the 'public wrongs' nor the 'private rights' model completely. While the absence of a standing doctrine in criminal law (an area of law that is concerned primarily with public wrongs) facilitates the promotion of the public interest in the prosecution of crimes, there is the risk that individual autonomy may be undermined by the court's reluctance to extend the concept of waiver to actions deemed to be 'public wrongs'. Moreover, the Director of Public Prosecutor's discretion to discontinue private prosecutions at any time indicates that the complainant's interests will always be subordinate to the public interest. Focussing solely

on addressing public wrongs may therefore result in the inadequate protection of individual interests.

In contrast, greater importance is placed on individual autonomy in private law, as only those individuals whose interests have been affected are allowed to bring legal claims and as private parties have the freedom to choose to relinquish their rights. However, if judicial review were to adopt the private law approach to standing, it would entail isolating unlawful acts from legal challenge where no individual interests have been affected. Furthermore, public interest considerations are not usually taken into account when the doctrine of waiver is applied in the private law context. Thus, a system that is concerned primarily with the protection of private rights, may place less importance on fulfilling public interest objectives.

To ensure that the rules on standing satisfies both limbs of the framework of good administration, the courts should distinguish between two types of claims, namely those brought with the intent of protecting the personal interests of an individual(s) and claims which are concerned with safeguarding the public interest. In the case of the former, where the applicant's interests are not affected, the courts should consider whether the applicant is representing someone with a personal interest in the claim with their consent or whether the claim was brought on behalf of those who are unable to assert their own interests and in circumstances in which it is not possible to obtain their consent. If the applicant is purporting to act on behalf of the public interest, the court should only grant standing if the applicant is able to satisfy two conditions, namely the application raises an issue of public importance and the applicant is genuinely concerned with the issues raised in the application.

It is also possible to accommodate the doctrine of waiver within the framework of good administration. The doctrine enhances individual autonomy by allowing claimants to make their own decisions concerning their rights. Furthermore, the public interest in a properly functioning judicial system may support the application of the doctrine of waiver where it facilitates the efficient administration of justice. In determining whether there has been a valid waiver of an individual's rights, the court should consider whether there is a voluntary, informed and unequivocal election by the litigant not to claim a right or raise an objection that is open to her to claim or raise. The court should also ensure that upholding the waiver is compatible with the public interest in the proper exercise of public power.

The framework of good administration also facilitates deeper examination of issues relating to administrative discretion. It enables us to consider how the protection of individual interests might impinge upon the discretionary freedom of public authorities. An area ripe for analysis in this respect, is the law on substantive legitimate expectations. On one hand, substantive legitimate expectations exemplify the type of claimant-centric interests that warrant additional judicial protection under the first limb of the framework of good administration. As evidenced by its natural justice and estoppel roots, the development of the doctrine of legitimate expectations has involved an amalgamation of public law and private law principles. While the doctrine of legitimate expectations has largely outgrown its natural justice roots, the core principle that the doctrine has extracted from estoppel is the importance of holding public authorities to their representations. As demonstrated in Chapter Three, there are good normative reasons grounded in the concepts of trust and vulnerability for holding public authorities to their word. Indeed, when applied properly, substantive legitimate expectations fulfil an important and distinctive role in judicial review by protecting the trust reposed in the representations of public authorities.

On the other hand, the enforcement of substantive legitimate expectations can also impede the ability of public authorities to change and alter policies in the public interest. This problem is further exacerbated by the uncertain boundaries of the doctrine of legitimate expectations. To ensure that the discretionary freedom of public authorities is not unduly fettered, the doctrine of legitimate expectations should be confined to cases in which there is a need to protect the trust reposed in the representations of public authorities. The normative imperative of the protection of trust is strongest in cases where a public authority seeks to resile from a promise that it has made to an individual(s) ('Promise Cases'). However, societal disparities mean that there will be some individuals who will have no recourse but to simply place their trust in a policy statement as they lack the means to either procure a promise or demonstrate the existence of one. As such, the additional protection afforded by the doctrine of legitimate expectations may exceptionally be warranted where acute issues arise from a public authority's departure or change of policy, such as where a claimant has relied on a policy and has been induced to believe that the policy would be applied in her case or where the claimant has an application, claim or transaction that is in progress when the policy changes.

Unfortunately, the doctrine of legitimate expectation's efficacy in protecting the trust reposed in the representations of public authorities has been hampered by the uncertainty surrounding the doctrine's requirements. To eliminate this uncertainty, Chapter Three devised a more structured approach towards the doctrine of legitimate expectations based on modified principles of contract and estoppel. This approach requires the court to begin every legitimate expectations inquiry by determining whether the public authority has made a clear and unambiguous representation to an individual or to a finite and identifiable class of individuals. The court should then establish whether the claimant has relied on the

public authority's representation or whether she has undertaken some form of obligation in exchange for the representation.

Although the reliance and exchange of obligation components of the test reflect the influence of the estoppel doctrine and the contractual principle of consideration, both of these elements have been adapted for the public law context. For instance, claimants are not required to demonstrate the existence of reliance (detrimental or otherwise) due to the difficulties that this criterion poses for vulnerable individuals with limited means. Instead, proof that the claimant positively did not know of the public authority's representation would be fatal to her claim. Similarly, while the existence of an exchange of obligation emphasises the importance of the claimant's interest, a recipient of a gratuitous promise from a public authority may still be entitled to procedural protection of her expectation due to the vulnerability of her position in relation to the public authorities and the need to protect the trust reposed in the representations of public authorities.

The requirements of a clear, unambiguous representation, consideration and reliance help distinguish the applicant's claim from the general public and they indicate that the applicant possesses an important individual interest that warrants additional protection under the first limb of the framework of good administration. Once the claimant has satisfied these elements of a legitimate expectation claim, the reviewing court has to carefully scrutinize the public authority's justifications for departing from this expectation. At this stage of the inquiry, the court should ensure that a proper balance is struck between protecting the claimant's legitimate expectation and safeguarding the public interest in the control of public power. Where public interest considerations militate against the substantive enforcement of a legitimate expectation, the court should consider other means of protecting the individual's interests, such as remitting the decision back to the initial

decision-maker, offering the applicant the opportunity to make representations or granting her damages instead.

As evidenced by the analysis of the doctrine of legitimate expectations, the protection of individual interests under the first limb of the framework of good administration is capable of shaping and altering the exercise of administrative discretion. The exercise of administrative discretion is further circumscribed by the second limb of the framework of good administration, which requires discretionary power to be exercised in the public interest. In particular, the second limb of the framework prompts further consideration as to how the public interest in the control of public power might be better protected. To that end, Chapter Four of this thesis put forward a modified fiduciary approach that places additional safeguards on the exercise of public power. This approach is concerned with the decision-making processes of public authorities and it shows that while the framework of good administration operates largely as a juridical tool, it is also capable of positively influencing the way that public authorities carry out their duties.

In formulating the modified fiduciary approach, Chapter Four focused on four fiduciary duties in particular, specifically the no-conflict principle, the no-profit principle, the duty to act in good faith and the duty to act in the beneficiaries' best interests. The no-conflict and the no-profit principles form the crux of the fiduciary obligation of loyalty, and fulfil a prophylactic function by helping to prevent fiduciaries from being swayed by interest, rather than duty. In so doing, they help enhance and safeguard the decision-making processes of fiduciaries. The duties to act in good faith and in the beneficiaries' best interests however emphasize the other-regarding nature of the fiduciary obligation, and form the basis of the standards of conduct to which fiduciaries are expected to adhere.

With appropriate modification, fiduciary principles can be used to enhance the protection of the public interest under the second limb of the framework of good administration. Fiduciary principles can help set coherent standards of conduct for public authorities and elevate the relationship between public authorities and the public generally. When adapted for the public law context, the no-conflict and no-profit principles require public officials to act disinterestedly. The duty to act in good faith emphasises the importance of public officials acting honestly and transparently, while the duty to act in the beneficiaries' best interests reinforces the importance of public officials using their powers for the purposes for which they are intended. These standards are not onerous in nature but they can help increase the level of public trust, which in turn facilitates efficient administration.

Fiduciary principles can also improve the decision-making powers of public bodies and enhance the culture of justification in public law in relation to conflicting interests, by requiring public authorities to show that they have acted impartially and properly considered the competing interests of different classes of beneficiaries. This normative imperative to justify the treatment of divergent interests applies even when no human rights are involved. Indeed, the modified fiduciary approach can be seen as a positive normative framework that supplements the existing safeguards provided by the Human Rights Act 1998 ('HRA') and the public sector equality duty ('the PSED'). The PSED and the modified fiduciary theory help enhance the decision-making powers of public authorities, by requiring them to take stock of certain interests *before* carrying out their duties. Specifically, the former obligation requires a public authority to consider the need to eliminate unlawful discrimination while the latter requires a public authority to consider where there any conflicting duties or interests that will be affected by its exercise of power.

While fiduciary principles are capable of playing a useful role in setting coherent standards of conduct for public officials and enhancing the decision-making processes of public bodies, they have to be modified to cater for the peculiarities of the public law context. As public authorities regularly have to protect a multitude of interests, a flexible approach should be adopted in relation to the beneficiary question. Under this approach, the identity of the relevant beneficiary may change based on the terms of the statutory power exercised by a public body. Before exercising its statutory power or duty, a public body should carefully scrutinise the terms of the relevant statutory instrument to determine the specific sets of interest that the power or duty is designed to serve. The public body should be accorded a certain amount of discretion when carrying out this exercise, particularly where the terms of the statute are generic or ambiguous.

Engaging in this process of statutory interpretation will also enable the public body to identify the existence of any conflicting interests. It is worth highlighting that even in private law, fiduciaries can be authorized to act in situations of conflict and can be bound by interests beyond that of their beneficiaries. As there is a greater likelihood of there being conflicting interests in the public law context, it is relatively easy to infer the requisite authorization from the circumstances. Thus, the public body should determine whether the relevant statute expressly or impliedly prohibits it from exercising its discretionary power in favour of any class of person(s) apart from the class(es) stipulated in statute. Unless there is such a prohibition, the public body is authorized to act notwithstanding the presence of apparently conflicting interests. In the event that the public body has identified the existence of conflicting interests or obligations, it should carefully consider and evaluate the nature and extent to which these interests conflict. The public body should then investigate any possible courses of action capable of reconciling these conflicting interests without causing undue harm to any of the beneficiaries involved. It should also be prepared

to provide an explanation for its chosen course of action. Thus, when applied in the context of public law, the no-conflict principle translates into a requirement for a public body to justify its treatment of divergent interests.

In contrast to the flexibility required when adapting the no-conflict principle to the public law context, a strict approach should be adopted in relation to the no-profit principle. The prophylactic quality of the no-profit principle is even more significant in the public law context due to the far-reaching nature of the discretionary power exerted by public officials and the vested interest that citizens have in the proper performance of public officials' duties. Furthermore, the misuse of public funds by a public official is likely to have detrimental consequences on public trust and confidence.

There is little difficulty in modifying the duty to act in good faith and the duty to act in the best interests of the beneficiaries for the public law context. The former duty is negative in nature, and reflects the simple fact that public bodies do not have untrammelled discretion when exercising their powers. The latter duty does not generally mandate any specific action on the part of private law fiduciaries, and should not be interpreted as imposing positive obligations on public bodies either. Both of these duties emphasise the importance of public bodies using their power to further the public interest, and thus help protect the interests safeguarded under the second limb of the framework of good administration. Moreover, it is easier for a public authority faced with conflicting interests to discharge its justificatory onus by showing that it has acted in good faith and in the best interests of the beneficiaries of its statutory power.

This thesis' analysis of the doctrine of legitimate expectations and the formulation of the modified fiduciary approach show how private law principles may be used to shape the exercise of administrative discretion in a way that enhances the protection of interests

under both limbs of the framework of good administration. It is however worth recognizing that conceptual borrowing is capable of functioning as a two-way street, as insights gleaned from public law may also offer solutions to problems faced in private law. Take for instance, the issues surrounding the control of contractual discretionary power. Notwithstanding the importance of the freedom of contract principle, the control of contractual discretionary power is justified by the need to prevent commercial absurdity, the protection of the parties' reasonable expectations, and the prevention of abuses of power.

It is this concern with preventing the abuse of power that opens the door to valuable conceptual borrowing. A range of techniques have been developed within judicial review to address the misuse of discretionary power and with appropriate modification, these techniques are capable of addressing the type of abuses of power that may arise in the contractual discretion context. It is unsurprising therefore that the courts have utilized concepts such as *Wednesbury* unreasonableness[1] when controlling contractual discretionary power. As discussed in Chapter Five, judicial control of contractual discretionary power is effected through the court implying a term in a contract. This implied term requires a contractual party exercising discretionary power to act honestly and in good faith and to abstain from exercising this power arbitrarily, capriciously or unreasonably (in the *Wednesbury* sense).

Prior to *Braganza*, the court utilized the orthodox, substantive sense of *Wednesbury* unreasonableness when determining whether a contractual party had exercised its discretionary power unreasonably. Thus, the inquiry was centred on whether the contractual party's decision was so unreasonable that no other decision-maker could have

[1] *Associated Provincial Picture Houses v Wednesbury Corporation* [1947] 1 KB 223

reached it. There was little discussion in the contractual discretion case law of the evolution of the *Wednesbury* principle or the possibility of adopting variable standards of review in the contractual discretion context. While this conception of *Wednesbury* as a fixed, monolithic standard helps prevent the court from encroaching upon the discretionary freedom of the contractual decision-maker, it also performs the same purpose as the obligation to act in good faith and the prohibition against arbitrary and capricious conduct. It offers no additional safeguards against the misuse of contractual discretionary power.

The Supreme Court in *Braganza*[2] adopted a more expansive interpretation of *Wednesbury* unreasonableness, stating that the principle also requires the decision-maker to take relevant matters into account when making their decision. This imposes an additional limit on the exercise of contractual discretionary power; a safeguard that cannot be replaced by either the obligation to act in good faith or the prohibition against arbitrary and capricious conduct. However, there are some flaws with the Supreme Court's approach which stem from the court's lack of examination of the way that the rationality and relevance of considerations grounds operate in the public law context.

In particular, the broader, umbrella sense of unreasonableness has caused some uncertainty in judicial review as it blurs the boundaries between the illegality and irrationality grounds of review. Although the doctrine of relevant considerations typically falls under the illegality ground of review and is subject to hard-edged review, the broader interpretation of unreasonableness treats the relevance of considerations as a sub-set of the irrationality ground of review. The Supreme Court in *Braganza* made no reference to the relationship between the illegality and irrationality grounds of review, or to the differing standards of review that apply to both grounds. While Lord Hodge hinted that certain

[2] *Braganza v BP Shipping Limited* [2015] UKSC 17.

contracts and decisions may attract more intensive judicial scrutiny, there was no detailed discussion of the possibility of adopting variable standards of review in this context. There was also little examination of whether it is appropriate for the court to be the arbiter of the relevance of considerations in the contractual discretion context as well as the extent to which the courts are entitled to examine the weight of relevant considerations.

Chapter Five put forward a number of proposals that help resolve some of the uncertainty surrounding the *Wednesbury* principle and relevance of considerations in the contractual discretion context and which also enable the courts to utilize variable standards of review in cases involving the exercise of contractual discretionary power. The chapter made clear that where a contract confers discretionary power upon one party on a matter that affects both parties, the courts should imply a term governing the manner in which this discretion to be exercised. In the absence of an effective exclusion clause, this implied term will generally require that the relevant contractual party exercise its discretionary power in good faith and not in an arbitrary or capricious manner. These default standards strike an appropriate balance between protecting the parties' objective intentions, preventing commercially absurd outcomes and safeguarding the freedom of contract principle.

However, there may be situations where it may be necessary for the court to depart from this high threshold. A number of factors may affect the intensity of review, including the nature of the contractual relationship, the resources of the party and the type of decision that the decision-maker is tasked with making. Where the courts deem it appropriate to adopt review that is higher in intensity, it would be useful to employ the test employed by Lord Cooke in *R v Chief Constable of Sussex ex parte International Traders Ferry Ltd*[3], which asks whether the relevant decision is one that a reasonable authority could reach.

[3] [1999] 2 AC 418

As relevancy review is one of the more interventionist methods of controlling discretionary power, it should be confined to cases where there is an increased risk of misuse of power. Thus, before imposing an obligation upon a contractual party to take relevant considerations into account when making a decision, the court should consider a number of factors such as the nature of the contractual relationship and balance of power between the parties, the type of decision the contractual party is tasked with making, the language of the contract and the resources of both parties.

When ascertaining the relevance of considerations, the courts should focus on the terms and the overall purpose of the contract. In particular, the court should examine whether the contract expressly identifies the considerations that have to be taken into account by the contractual decision-maker. In the event that the contract has not expressly set out the considerations that need to be taken into account, the court should apply the implied term in fact test, and determine whether particular considerations have to be taken into account because it either represents the '*obvious, but unexpressed intentions*'[4] of the parties, or is necessary to give business efficacy to the contract. If it is found that the contractual decision-maker has turned their mind to considerations material to the decision, the court should only intervene if the weight attached to these considerations are *Wednesbury* unreasonable.

Chapter Five's examination of the contractual discretion case law demonstrates that the adoption of a less stringent approach to the public-private divide is capable of yielding benefits for private law as well as public law. Furthermore, it reinforces a point made in earlier chapters, namely that it is necessary to ensure that the imported concept is capable

[4] HG Beale, *Chitty on Contracts* (33rd edn Sweet and Maxwell 2018) 14-008. See also *Reigate v Union Manufacturing CO (Ramsbottom) Ltd* [1918] 1 KB 592, 605 (per Scrutton LJ); *Shirlaw v Southern Foundries* (1926) Ltd [1939] 2 KB 206, 227 (per McKinnon LJ).

of providing guidance in the relevant area of law and that the concept is modified to address the specific concerns of that area of law. This point is also borne out in the sixth and final substantive chapter of this thesis, which examined how the concept of damages may be usefully adapted and accommodated within the framework of good administration.

A major deficiency with the current system of remedies in judicial review is that it fails to offer adequate protection for individual interests. While prerogative remedies have historically been used to control governmental powers and may therefore facilitate the protection of the public interest under the second limb of the framework of good administration, they are unable to address the loss suffered by a claimant as a result of unlawful administrative action. An individual may be able to obtain compensation for such loss if she brings an action for damages under private law or the HRA. Unfortunately, these monetary remedies are not free from difficulties.

Space constraints precluded a detailed examination of the problems with initiating a private law claim for damages against a public authority. Chapter Six focused instead on the issue of public authority negligence, as it is emblematic of the difficulties that the courts experience when applying private law principles to public authorities. A study of the case law revealed that the courts have vacillated between formulating specific rules to address the special position of public authorities and applying orthodox principles of negligence to public authorities. Neither approach has yielded wholly positive results. The former approach creates too many hoops for a claimant to jump through and can render public authorities immune from liability. The latter approach on the other hand, can lead to the courts ignoring important differences between public authorities and private individuals.

There are also limitations with pursuing an award of damages under the HRA. The English courts have adopted a restrictive approach to damages liability under the HRA,

viewing it as a remedy of the last resort. Rather than developing a principled approach to damages that addresses the personal nature of human rights violations, the courts modelled their approach on the Strasbourg jurisprudence, despite its lack of clarity and coherence. This 'mirror approach' prevents the court from deriving guidance from other areas of domestic law, and from providing more robust protection to individuals whose rights have been infringed. The award of damages under the HRA is also heavily circumscribed by public interest considerations, with the courts frequently emphasising how substantial payments may deplete limited public resources.

Ultimately, the availability of compensation through private law causes of action and the HRA does not offer sufficient safeguards for individuals who have suffered loss as a result of unlawful administrative action. However, the recognition of some form of damages liability in judicial review can go a long way in elevating the protection of individual interests, by filling this lacuna in the remedial regime. Specifically, it will enable individuals to be compensated for losses suffered as a result of maladministration, even when they are unable to meet the criteria for a private law cause of action. The provision of damages in judicial review may also enhance the protection of the public interest under the second limb of the framework of good administration. While it is often asserted that the threat of damages liability may cause public authorities to act defensively, Chapter Six showed that there is empirical evidence to indicate that damages may actually facilitate better administrative practices and inculcate greater respect for individual interests among public authorities.

It is also important not to overstate the concern that damages liability may adversely impact public finances. In most cases, monetary awards are likely to be covered by insurance or by contingency funds, rather than from funds that are reserved for important public services. Moreover, non-pecuniary remedies in judicial review may also entail the

expenditure of public funds, yet this does not automatically bar the court from granting relief to a claimant. It is also questionable whether the courts should allow themselves to be so heavily constrained by financial considerations when determining whether to recognize liability for damages in judicial review, given that they are ill-equipped to assess such considerations. Judicial recognition of damages liability in judicial review is not irrevocable; the executive and legislature have the power to respond if they believe that it is too extensive.

The addition of damages to the current remedial regime also provides the courts with the tools needed to address situations in which there is a conflict between the two limbs of the framework of good administration. This is exemplified by cases involving ultra vires legitimate expectations. Compensating an individual claimant for an ultra vires representation prevents a public authority from being bound to an unlawful representation, but it also ensures that the claimant does not bear the burden of a public authority's unlawful action.

In light of the above reasons for making damages available within judicial review, Chapter Six devised an approach to damages that helps protect the interests under both limbs of the framework of good administration. With regard to the second limb of the framework of good administration, Chapter Six built upon and modified the Law Commission's reform proposals on damages liability in public law, putting forward a fault-based model of liability that is capable of ensuring that public bodies are held accountable for serious misuses of public power.

Under the proposed approach, the court must first determine whether there has been a serious breach of rule of law. In order to establish a breach of a rule of law, the claimant must successfully make out one or more grounds of judicial review. Among the factors that

the court may consider when gauging the seriousness of the breach are the clarity and precision of the infringed rule, the amount of discretion left by the relevant rule to the public authority, whether or not the relevant error of law is excusable, the seriousness of the harm caused to the individual and the extent and duration of the administrative failure in question. As observed in Chapter Six, this list of factors is non-exhaustive and is based on the factors suggested by the Court of Justice of the European Union (CJEU) and the Law Commission. Finally, there must be a causal link between the public body's misconduct and the claimant's harm.

A fault-based model of liability focuses on serious misuses of public power and helps hold public authorities accountable via compensatory damages. However, this model may not be appropriate for interests falling under the first limb of the framework of good administration. For instance, the 'serious breach' element is a high threshold for claimants to meet and it has been designed to limit liability. The defendant-centred nature of the inquiry affords insufficient protection for individuals whose rights have been infringed. As discussed in Chapter Six, Varuhas has suggested modelling the approach to human rights damages on the approach developed within vindicatory torts such as false imprisonment and battery.

Although Varuhas' proposal would offer greater protection to individuals than is currently available under the HRA, it does not leave much room for judicial remedial discretion. While courts should definitely not be swayed by unsubstantiated arguments alleging that damages will jeopardize important public interest goals, there still needs to be some safeguards in place to ensure that the interests under the second limb of the framework are not neglected. Varuhas has been critical of interest-balancing approaches to damages for human rights claims, but he notes that if such an approach were to be adopted, the interest in vindicating the right should be prioritised and there should be presumption

in favour of relief while arguments for denial of relief should be substantiated by evidence. This version of the interest-balancing approach would strike a proper balance between the two limbs of the framework of good administration.

A fault-based model of liability may also be inappropriate in cases involving substantive legitimate expectations. The conceptual roots of the doctrine suggest that some guidance may be derived from contract and estoppel. As discussed in Chapter Six, the primary measure for damages for breach of contract is the 'expectation interest', which is why contractual damages are designed to put the claimant in the position that she would have been in had the contract been performed. In some instances, awarding expectation damages may be more economically efficient than substantively protecting an expectation. However, it may also be necessary in some cases to protect the reliance interests of individuals, where they have incurred expense as a result of relying on a public authority's representation. Thus, the reviewing court should have the discretion to award either expectation or reliance damages based on the circumstances of the case at hand.

Concluding Thoughts

In summary, the framework of good administration encapsulates the twin objectives of judicial review, namely the protection of individual interests and the control of public power. Significantly, it provides courts and commentators with a structured and coherent framework to analyse the interrelation of these interests, and guides the approach to be taken towards procedural issues, administrative discretion and remedies in judicial review. By adopting a less stringent approach to the public-private distinction, the framework of good administration also facilitates a deeper examination of how judicious conceptual borrowing can enhance the protection of interests under both limbs of the framework.

A final point to consider is how the framework of good administration highlights possible avenues for future research and reform. For instance, it is worth undertaking a closer examination of the specific type of individual interests that fall under the first limb of the framework and considering how they should be protected. There is also much work to be done in excavating the public-private distinction, and exploring how other areas of law may benefit from conceptual borrowing. Ultimately, as this thesis has shown, it might be worthwhile to sacrifice conceptual purity for the sake of legal innovation.

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