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# Public interest and the three dimensions of judicial review

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## Introduction

One of the most striking features of judicial review in the UK is the extent to which the term ‘the public interest’ is used by the courts when resolving different points of law. Historically, use of the term can perhaps be traced to the doctrine of public interest immunity that suffused the earlier conception of Crown privilege,<sup>1</sup> but it is since the procedural reforms of the late 1970s that the term has become almost a constant within the case law.<sup>2</sup> At one level, this has been a direct consequence of the reforms themselves, as aspects of the judicial review procedure have been said to safeguard the broader public interest in efficient public administration.<sup>3</sup> But there has been a range of other factors that have equally led to an increased use of the term, whether in relation to procedural law or substantive law. These have included ongoing development of a common law principle of legality that emphasises the public interest in vindicating the rule of law in any case in which a public authority has acted unlawfully.<sup>4</sup> Also relevant have been European standards on the limitation of fundamental rights, as well as international instruments like the Aarhus Convention that binds the UK and European Union (EU) on the shared matter of the environment.<sup>5</sup>

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1 *Conway v Rimmer* [1968] AC 910; *Rogers v Secretary of State for the Home Department* [1973] AC 388; and *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531.

2 On the reforms see H W R Wade and C F Forsyth, *Administrative Law* (10th edn, OUP 2009), ch 18.

3 See Lord Woolf, *Protection of the Public: A New Challenge* (Steven & Sons 1990) 12–15; and, regarding delay, *O'Reilly v Mackman* [1983] 2 AC 237 and eg *Re Quinn's Application for Leave* [2010] NIQB 100 [14].

4 *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644, Lord Diplock. On the common law principle, see J Jowell, ‘The Rule of Law and its Underlying Values’ in J Jowell and D Oliver (eds), *The Changing Constitution* (7th edn, OUP 2011) ch 1.

5 The text of the Aarhus Convention is available at <[www.unece.org/env/pp/documents/cep43e.pdf](http://www.unece.org/env/pp/documents/cep43e.pdf)>.

Such increased references to the public interest reflect a constitutional reality that often places judicial review at the intersection of national, supranational and international legal norms. Although individual cases will inevitably be specific to their own facts and law, it is axiomatic that the wider body of judicial review case law now has three main dimensions – common law, European law, international law – and that these can coincide in particular cases. Where there is such coincidence, the courts may refer to the public interest as it is conceived of by the common law or by European law and/or international law. While such references can raise difficult questions about the nature of the public interest that is being appealed to – questions that become more complex when European law or international law is in issue – they provide a clear example of how far modern judicial review must accommodate different (and sometimes competing) legal norms. They also suggest that there is a need for nuance when considering the common law principle of legality that links the public interest to the rule of law, as the applicable legal norms will sometimes have been formulated at the European or international levels.

The corresponding aim of this article is to illustrate how references to the public interest can traverse the three dimensions of judicial review and to identify a conceptual framework for understanding those references. At the level of illustration, the article focuses on the example of public interest litigation whereby pressure groups, representative bodies and statutory organisations can enjoy liberal access to courts for purposes of bringing proceedings in their own names or intervening as third parties in ongoing disputes.<sup>6</sup> Although the genesis of public interest litigation in the UK courts lies very much in the common law dimension of judicial review, it will be seen that European law and international law now also make demands about liberal access to the courts for a range of (not always connected or complementary) reasons. This is thus one area where there is a pronounced interaction of norms, and the article suggests that that interaction can be understood as an outworking of ‘global administrative law’.<sup>7</sup> According to the global administrative law thesis, national courts are directly and indirectly involved in a number of legal networks that pursue accountability as a core value in contemporary global governance. While the thesis was originally concerned with the development of legal principles in an administrative space above the level of the state, it is now also associated with a global legality principle that is defined by a pluralist interaction of national, supranational and international legal orders.<sup>8</sup> The article uses that thesis to examine instances of the intersection of norms in public interest litigation, where common law approaches to procedure have been key to facilitating the demands of European law and/or international law. The article likewise draws upon the idea of an emerging global legality principle to contextualise some UK court rulings on the substantive issues that have arisen in public interest cases, for instance, on the protection of fundamental rights and the limits to the discretion that may be exercised by public decision makers.

The analysis begins with a section that considers some of the different meanings of the public interest and the various ways in which the UK courts may refer to the term. It then considers the example of public interest litigation and, in that setting, the nature of the common law, European law and international law dimensions to judicial review. The final

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6 *Axa General Insurance Ltd v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868; *Re E (A Child)* [2008] UKHL 66, [2009] 1 AC 536; and eg M Kirby, ‘Deconstructing the Law’s Hostility to Public Interest Litigation’ (2011) 127 LQR 537.

7 B Kingsbury, N Krisch and R Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15.

8 J-B Auby, *La globalisation, le droit et l’État* (2nd edn, Montchrestien 2010).

section and the conclusion develop the point about the analytical worth of global administrative law and the interface between the public interest and the principle of legality.

### Locating ‘the public interest’

Perhaps the first – self-evident – point that should be made about the public interest is that it is a concept that lacks precise definition and which has been the subject of polarised debate about its meaning and content.<sup>9</sup> Although there have inevitably been a number of strands to the debate, the prevailing theme has been the legitimacy or otherwise of a presumed political community with shared values such as sustains the public interest. For instance, commentators who have been critical of the concept have noted the artificiality of ideas of political community and so on when suggesting that the concept has ‘fundamentally undemocratic’ implications for autonomous individuals.<sup>10</sup> The argument here has been that the public interest is anti-libertarian in thrust as it can result in the otherwise valid preferences of individuals being subjected to those of falsely constructed majority communities.<sup>11</sup> However, such concerns about majoritarianism have been countered by alternative models that adopt a communitarian logic when accommodating individual interests within those of wider society.<sup>12</sup> While such modelling has begged obvious questions about how to gauge the public interest within polities that have a variety of cross-cutting individual and sectional interests, as well as those that may appear irreconcilable, it has nevertheless emphasised the existence of complementary interests among members of society. Answers to the obvious questions have therefore been found in ‘preponderance’, ‘unitary’ and ‘common interest’ theories that situate individual interests within that of a broader collective and emphasise the normative worth of the public interest.<sup>13</sup>

A further approach has centred upon the public interest as procedural in form. For Bozeman, writing about the interconnection between public values and the public interest, this approach marks the compromise position of those who could not ‘accept a normative view of public interest but [were] not ready to altogether abandon the concept’.<sup>14</sup> Elemental to this approach is an understanding that the virtue of government lies not in its assumed ability to represent shared values but rather in ‘the multiplicity of points of access it affords for the manifold conflicting interests which necessarily arise’ in society.<sup>15</sup> Government, on this approach, is therefore about reconciling interests through deliberation and debate and about having procedures that can yield agreed – or certainly acceptable – policies and outcomes. Indeed, while an emphasis on procedure also raises doubts about majoritarianism<sup>16</sup> and about how to ensure coherent reasoning in respect of substantive choices,<sup>17</sup> the procedural approach recognises that individuals necessarily interact with one another within the framework of broader society. On this view, the public

9 For overviews of the debates, see B Bozeman, *Public Values and Public Interest* (Georgetown UP 2007) ch 1; R C Box, ‘Redescribing the Public Interest’ (2007) 44 *Social Science Journal* 585; M Feintuck, *The ‘Public Interest’ in Regulation* (OUP 2004) ch 1; and V Held, *The Public Interest and Individual Interests* (Basic Books 1970).

10 The term was used by H R Smith: see *Democracy and the Public Interest* (University of Georgia Press 1960) 27.

11 A balance that led some to argue for the abolition of the term: see eg C E Cochran, ‘Political Science and “The Public Interest”’ (1974) 36 *Journal of Politics* 327.

12 See generally Held (n 9).

13 *Ibid.*

14 Bozeman (n 9) 93.

15 G A Schubert, *The Public Interest: A Critique of the Theory of a Political Concept* (Glencoe Free Press 1960) 136.

16 A Lijphart, *Thinking about Democracy: Power Sharing and Majority Rule in Theory and Practice* (Routledge 2007) especially chs 7 and 8.

17 See J Bell, ‘Public Interest: Policy or Principle’ in R Brownsword (ed), *Law and the Public Interest* (Franz Steiner Verlag 1993) 30.

interest is what emerges from deliberative processes that occur within democratically legitimated institutions.<sup>18</sup>

Whatever the strengths and weaknesses of such models, they permeate various well-known features of UK public law. This is true, for example, of the procedural approach and the UK constitution's emphasis on representative democracy.<sup>19</sup> Although other (written) constitutions may note the nexus between 'the people' and 'the State'<sup>20</sup> – the latter being the 'formal expression and visible symbol of the "public interest"'<sup>21</sup> – UK constitutional law has historically lacked such theorising and has centred, instead, on the place of the Crown and its relationship with the Westminster Parliament.<sup>22</sup> This has led to some discussion about the nature of the interests that the Crown itself can represent,<sup>23</sup> but it has also, and more famously, resulted in the Westminster Parliament's elevation to a position of unique prominence within the constitution.<sup>24</sup> Moreover, while it is true that the doctrine of parliamentary sovereignty no longer enjoys unqualified judicial support<sup>25</sup> – causal considerations include devolution, Europeanisation and globalisation – the doctrine remains sourced in the idea that the Westminster Parliament is legally sovereign because its authority derives from the legitimating force of the electorate.<sup>26</sup> Seen in this way, the Westminster Parliament becomes a deliberative forum that brings together the competing interests within society; reconciles those interests through the legislative process; and consolidates the accepted outcomes in Acts that the courts regard as sovereign.

Appeals to ideas of 'community' can then be found in much of administrative law. At one level, this might be thought inevitable given the functions that administrative law is sometimes said to perform. Although the absence of a state tradition entails that UK law here too is significantly different from some other legal orders,<sup>27</sup> the body of administrative law that developed in the previous century was argued, by some, to centre upon the reinvention of society through the provision of public goods.<sup>28</sup> This, famously, is the realm of Harlow and Rawlings' 'green-light' theory of administrative law and it corresponds, at its height, with an understanding that public authorities exercise power on the basis of 'considerate altruism'.<sup>29</sup> Such altruism requires public bodies to consider the interests of individuals affected by their decisions, but it also, and just as importantly, means that 'public bodies have no rights or interests of their own and must exercise their powers . . . for the

18 See further I O'Flynn, 'Deliberating about the Public Interest' (2010) 16(3) *Res Publica* 299.

19 See generally P Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (2nd edn, Hart Publishing 2012) ch 5.

20 See eg Arts 4–11 of the Irish Constitution, 1937; and D Clarke, 'Nation, State and Nationality in the Irish Constitution' (1998) 16 *ILT* 252.

21 The term is W Friedmann's: see 'The Changing Content of Public Interest: Some Comments on Harold D Lasswell' in C J Friedrich (ed), *Nomos V: The Public Interest* (Atherton Press 1967) 80, 84.

22 N MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP 1999) ch 3.

23 See eg M Loughlin, 'The State, the Crown and the Law' in M Sunkin and S Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (OUP 1999) 33; and T Nairn, *The Enchanted Glass: Britain and its Monarchy* (Routledge 1988).

24 J Goldworthy, *Parliamentary Sovereignty: Contemporary Debates* (OUP 2010); and *The Sovereignty of Parliament: History and Philosophy* (OUP 1999). Compare V Bogdanor, 'Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty' (2012) 32 *OJLS* 179.

25 *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, 302 [102], Lord Steyn.

26 P Craig, *Public Law and Democracy in the United Kingdom and United States of America* (OUP 1990), ch 2.

27 J Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP 2000).

28 C Harlow and R Rawlings, *Law and Administration* (3rd edn, CUP 2009), 31–37.

29 D Oliver, *Common Values and the Public–Private Divide* (Butterworths 1999) 5.

general good'.<sup>30</sup> The prevailing imagery is therefore of public bodies acting for the good of society as a whole and in the pursuit of only 'lawful and relevant grounds of public interest'.<sup>31</sup> Indeed, it is for this reason that strict procedural requirements in judicial review have been said to be justified, as they are understood to provide a heightened degree of certainty in public administration that thereby benefits society as a whole.<sup>32</sup> The courts have similarly referred to the 'interests of the community' when justifying, on grounds of 'public policy', a restrictive and remarkably durable line of case law on the negligence liability of public authorities.<sup>33</sup>

'Red-light', or 'control', theories of administrative law also make mention of the public interest, although uses of the term here can vary.<sup>34</sup> At their core, such theories posit that the sovereign legislature has entrusted public authorities with power and that the primary function of administrative law is to ensure that the exercise of such power observes the limits set by Parliament.<sup>35</sup> This originally meant that control was synonymous with the *ultra vires* doctrine, but the courts have long since extended public law protections into the non-statutory field in disputes that have involved 'a matter of public interest in the sense that [they have] an impact on the public generally and not merely on an individual or group'.<sup>36</sup> This has been one aspect of the much commented upon expansion of the common law since the 1960s,<sup>37</sup> which has also involved increased recognition and protection of common law fundamental rights.<sup>38</sup> That protection initially took the form of 'anxious scrutiny' of executive decisions but it is now largely governed by the complementary principles that have emerged under the Human Rights Act 1998.<sup>39</sup> Prominent among these is the idea that there is a 'public interest' in recognising individual rights as this gives the law a normative grounding that can act as a brake on the abuse of governmental power.<sup>40</sup> However, also prominent is a line of reasoning that accepts that proportionate limitations may be placed upon qualified rights where the limitations pursue a legitimate ground of public interest within the meaning of the European Convention on Human Rights (ECHR) (for instance,

30 Oliver (n 29); and see further D Oliver, 'Psychological Constitutionalism' (2010) 69 CLJ 639, 640–44. But compare M Douglas, *How Institutions Think* (Syracuse UP 1986).

31 *R v Tower Hamlets LBC, ex p Chetnik Developments* [1988] AC 858, 872, Lord Bridge, quoting W Wade, *Administrative Law* (5th edn, OUP 1982) 355–56. See also M Elliott, 'Judicial Review's Scope, Foundations and Purposes: Joining the Dots' [2012] NZLR 75, 79.

32 Woolf (n 3) 12–15.

33 *Eg Brooks v Metropolitan Police Commissioner* [2005] UKHL 24, [2005] 1 WLR 1495, 1510, Lord Steyn. See, to similar effect, *Mitchell v Glasgow City Council* [2009] UKHL 11, [2009] 1 AC 874; *Jain v Trent SHA* [2009] UKHL 4, [2009] 1 AC 853; *Van Colle v Chief Constable of Hertfordshire; Smith v Chief Constable of Sussex* [2008] UKHL 50, [2009] 1 AC 225; *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373; *Gorringe v Calderdale MBC* [2004] UKHL 15, [2004] 1 WLR 1057; and *Hill v Chief Constable of West Yorkshire* [1989] AC 53. But compare *Smith, Ellis and Allbutt v MOD* [2013] UKSC 41.

34 On red-light theory, see Harlow and Rawlings (n 28) 22–25.

35 See P Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012) 4–16.

36 *Re McBride's Application* [1999] NI 299, 310, Kerr J. See further G Anthony, *Judicial Review in Northern Ireland* (Hart Publishing 2008) 40–42.

37 See eg C F Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing 2000).

38 M Fordham, 'Common Law Rights' [2011] 16 JR 14.

39 *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, 531, Lord Bridge; T Hickman, *Public Law after the Human Rights Act* (Hart Publishing 2010); and B Dickson, *Human Rights and the UK Supreme Court* (OUP 2013) ch 2.

40 See eg *Derbyshire CC v Times Newspaper Ltd* [1993] AC 534 discussing the public interest in freedom of expression. On rights and the abuse of power see Craig (n 35) 16–27.

national security, public order, health or morals etc).<sup>41</sup> Such reasoning, which has some parallel under the derogation provisions of the Treaty on the Functioning of the European Union (TFEU)<sup>42</sup> and in the EU Charter of Fundamental Rights,<sup>43</sup> again appeals to the imagery of community by noting that ‘the fundamental rights of individuals are of supreme importance but . . . are not unlimited: we live in communities of individuals who also have rights’.<sup>44</sup> There is, in the result, a dual use of the public interest in rights discourse that carries a presumption in favour of rights but which acknowledges ‘the duties of everyone to the community and . . . [the need] . . . to secure and protect respect for the rights of others’.<sup>45</sup>

Attempts to balance the rights of individuals with those of the community can, however, lead to criticisms of majoritarianism, for instance, where the balance is too often struck in favour of the community or, more pointedly, legislative or executive choices.<sup>46</sup> Here, the common law has previously sought to protect individuals by noting that their rights can intersect with the interests of third parties and that those third-party interests, in turn, may form part of the broader public interest.<sup>47</sup> Such complementarity of interests suggests a high degree of nuance in judicial reasoning, but it must nevertheless cede, in a concrete dispute, to a choice between the rights of the individual and the interests of the wider public. Faced with that choice, it is well known that courts will regard the context to a dispute as ‘everything’ and that the balance to be struck will depend on the rights that are involved and the type of decision or act that affects them.<sup>48</sup> To borrow from Laws LJ’s much-cited judgment in *International Transport Roth*, the courts can thus be expected to be more interventionist where individual rights are stated in terms that are unqualified and where the decision under challenge has been taken by an unelected official or even a minister who is also answerable to a legislature.<sup>49</sup> However, where the choice is that of the legislature itself - whether at Westminster or at the devolved levels - judicial restraint may, though not necessarily will, be writ large.<sup>50</sup>

Of course, the scope for challenges to legislative choices, or certainly those of the Westminster Parliament, is one of the most prominent out-workings of the European law

41 See, illustratively, Arts 8-11 ECHR. But see A McHarg, ‘Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights’ (1999) 62 MLR 671.

42 Eg Art 36 TFEU: ‘The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.’

43 Viz. in Art 52. On the Charter’s status and reach in UK law see Case C-411/10, *NS v Home Secretary* [2012] 2 CMLR 9 and eg *Rugby Football Union v Viagogo Ltd* [2012] UKSC 55; [2012] 1 WLR 3333.

44 *Brown v Stott* [2003] 1 AC 681, 707–08, Lord Steyn.

45 *Ibid.*

46 See *Re P* [2008] UKHL 38, [2009] 1 AC 173; and eg L Lustgarten and I Leigh, *In from the Cold: National Security and Parliamentary Democracy* (Clarendon Press 1994). For a critical analysis of early case law under the Human Rights Act 1998, see R A Edwards, ‘Judicial Deference Under the Human Rights Act’ (2002) 65 MLR 859.

47 *Singh v Immigration Appeal Tribunal* [1986] 1 WLR 910.

48 *R v Home Secretary, ex p Daly* [2001] UKHL 25; [2001] 2 AC 532, 548, Lord Steyn

49 *International Transport Roth GmbH v Home Secretary* [2003] QB 728, 765ff.

50 *Ibid.*; and see *James v UK* (1986) 8 EHRR 123, 142, ECtHR recognising in the context of legislation interfering with property rights that ‘the notion of “public interest” is necessarily extensive’. See also *Axa General Insurance Ltd v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868. But, for an instance of intervention, see *R (F) v Secretary of State for the Home Department* [2010] UKSC 17, [2011] 1 AC 331 (Sexual Offences Act 2003, s 82, declared incompatible with Art 8 ECHR).

dimension of judicial review.<sup>51</sup> The significance of that dimension is examined in more detail below, but the point to be noted at this stage is that challenges to the public interest choices of the Westminster Parliament, at least within the procedural meaning of the term, are underpinned by norms that have been defined in other deliberative and judicial fora. While this begs the question of the model of the public interest that predominates in those fora – there have historically been concerns about the quality of deliberation in the EU institutions<sup>52</sup> – the intersection of norms nevertheless means that the choices of the Westminster Parliament no longer automatically prevail (at least within the context of EU membership).<sup>53</sup> That reality has since led to the European Union Act 2011 that refines the basis of EU membership, but, even though the Act modifies the mechanisms for further transfers of power to the EU, it does nothing to limit the current reach of EU law or, indeed, the common law's ascription of primacy to it.<sup>54</sup> More tellingly, some commentators have doubted whether it is even feasible to ring-fence national powers in the manner envisaged by the European Union Act 2011, precisely because contemporary patterns in governance mean that there are unavoidable points of intersection between national, supranational and international norms.<sup>55</sup> There is, in the result, a 'divided sovereignty' in the UK whereby claims to the public interest can be made both from within and outwith the domestic constitution.<sup>56</sup>

### Public interest litigation and the three dimensions of judicial review

Many of the above uses of the public interest have been displayed in the context of public interest litigation in UK courts. Public interest litigation, for these purposes, has been described above in terms of liberal access to courts for pressure groups, representative bodies and statutory organisations that wish either to bring proceedings in their own names or to intervene as third parties in ongoing disputes.<sup>57</sup> Within this, pressure groups etc. and the courts may have different reasons for favouring public interest litigation, even if their reasons may overlap on the facts of a given case. For instance, pressure groups and so on may wish to bring, or intervene in, proceedings precisely because they claim to be acting on a matter of public interest such as the environment, poverty, or fundamental rights.<sup>58</sup> However, while this links public interest litigation to wider policy areas and governmental

51 *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603. See, in respect of the legislative choices of the devolved legislatures, Government of Wales Act 2006, ss 94 and 108; Northern Ireland Act 1998, s 6; and Scotland Act 1998, s 29.

52 See generally P Craig and G de Búrca, *EU Law: Text Cases and Materials* (5th edn, OUP 2011) chs 5 and 6. And, for an earlier account of the EU's processes, see A Moravcsik and A Sangiovanni, 'On Democracy and "Public Interest" in the European Union' in W Streeck and R Mainz (eds), *Die Reformierbarkeit der Demokratie. Innovationen und Blockaden* (Campus Verlag 2002) 122.

53 Compare Human Rights Act 1998, ss 3–4, and eg Representation of the People Act 1983, ss 3–4; *Hurst v UK (No 2)* (2006) 42 EHRR 41; and *Smith v Scott* (2007) CSIH 9.

54 *Thoburn v Sunderland CC* [2003] QB 151. For commentary on the Act, see P Craig, 'The European Union Act 2011: Locks, Limits, and Legality' (2011) 48 CMLR 1915 and M Gordon and M Dougan, 'The United Kingdom's European Union Act 2011: "who won the bloody war anyway?"' (2012) 37 ELRev 1.

55 The leading commentary on the point remains M Hunt, *Using Human Rights Law in English Courts* (Hart Publishing 1997) chs 1–3; and for the patterns in governance see A Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (OUP 2007).

56 For the term 'divided sovereignty' see *R (Jackson) v Attorney-General* [2006] 1 AC 262, 302 [102], Lord Steyn.

57 See further Kirby (n 6). For discussion of what can constitute a 'public interest group', see JUSTICE/Public Law Project, *A Matter of Public Interest: Reforming the Law and Practice on Interventions in Public Interest Cases* (JUSTICE/Public Law Project 1996) 8–9.

58 See J Miles, 'Standing in a Multi-Layered Constitution' in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003) ch 15.



choices that affect society or ‘the community’, the courts have emphasised that they facilitate proceedings brought by pressure groups and so on because of the need to ensure that governmental decision makers act lawfully. Although this can give rise to controversy when judicial decision-making fringes upon matters of policy,<sup>59</sup> the courts have noted that there can be merit in constraining decision makers even in those cases where no individual has been directly affected by a decision.<sup>60</sup> On this (red-light) view, the public interest lies in the rule of law and a robust common law principle of legality.

In terms of the three dimensions of judicial review, the move towards public interest litigation has historically had its origins very much in the common law dimension. However, as the European law and international law dimensions of judicial review have become ever more prominent, the dynamics that drive public interest litigation have changed. This has been true not just in terms of the matters of the public interest that pressure groups and so on may appeal to – fundamental rights and the environment again providing obvious examples – but also in terms of related demands about the need for pressure groups and so on to have liberal access to the courts. It is thus here that the intersection of norms is to be found, and where global administrative law enjoys an explanatory force.

### THE COMMON LAW DIMENSION

The common law’s approach to public interest litigation centres upon procedural matters of standing, costs and third-party interventions. In relation to standing, it is well known that the courts have long interpreted the ‘sufficient interest’ requirement in judicial review broadly and that groups such as the Child Poverty Action Group, Greenpeace and the World Development Movement have enjoyed liberal access to the courts<sup>61</sup> (some organisations also have a statutory power to bring proceedings).<sup>62</sup> This is where debate about the role of the courts has been at its most pronounced, as a liberal standing regime has opened the courts to applications that may ultimately be motivated by broader policy concerns rather than particular points of law. While few would doubt that there is a moral force to the causes associated with many pressure groups and so on, the doctrinal argument is that such groups are partisan and that there will often be rational, competing views about how to address the claimed matter of public interest. For some commentators, the inevitable concern is that the courts can thereby become a forum for disputes that a procedural model of the public interest would place elsewhere.<sup>63</sup>

Costs in the context of public interest litigation are associated with so-called protective costs orders (PCOs) that cap the liabilities of applicants in proceedings which may

59 See generally C Harlow, ‘Public Law and Popular Justice’ (2002) 65 MLR 1.

60 *R v Somerset CC, ex p Dixon* [1998] EnvLR 111, 121, Sedley J; and *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386, 395, Rose LJ.

61 See, respectively, *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2012] EWHC 2579 (Admin), [2012] ACD 109; *R v HM Inspectorate of Pollution, ex p Greenpeace Ltd (No 2)* [1994] 4 All ER 329; and *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386. Compare, most famously, *R v Secretary of State for the Environment, ex p Rose Theatre Trust Co* [1990] 1 QB 504. For commentary, see P Leyland and G Anthony, *Textbook on Administrative Law* (7th edn, OUP 2013) 201–06; and R Rawlings, ‘Modelling Judicial Review’ (2008) 61 CLP 95, 98–103.

62 See eg Northern Ireland Act 1998, s 71(2A)–(2C), and *Re Northern Ireland Human Rights Commission’s Application* [2012] NIQB 77. See too the powers of the Equality and Human Rights Commission in the Equality Act 2006, s 30, and eg *R (Equality and Human Rights Commission) v Prime Minister* [2011] EWHC 2401; [2012] 1 WLR 1389.

63 Harlow (n 59); and J A G Griffiths, ‘The Political Constitution’ (1979) 42 MLR 1.

otherwise be discontinued for financial reasons.<sup>64</sup> As will be seen below, this is one area in which there is a pronounced interplay between the three dimensions of judicial review, specifically in the context of environmental proceedings. However, the common law itself does not limit PCOs to the environmental setting, and they may be granted in any proceedings that raise an issue of ‘general public importance’ which ‘the public interest’ requires the court to hear (proceedings for these purposes may be brought either by a representative body and so on, or by an individual).<sup>65</sup> While these are not the sole criteria that the courts consider on an application for a PCO – others include the respective financial positions of the parties; whether the applicant has any private interest in the proceedings; and whether the applicant’s lawyers are acting on a pro bono basis<sup>66</sup> – they are an obvious correlate of the law that has developed around standing. Indeed, to the extent that it was initially thought that PCOs would issue only ‘exceptionally’, the Court of Appeal in England and Wales has since said that this is not an additional criterion and that the judicial task in any case remains one of isolating issues of ‘general public importance’ that are in the public interest.<sup>67</sup> Whether that can be done is ‘a question of degree and a question which the ... [case law] ... would expect judges to be able to resolve’.<sup>68</sup>

Third-party, or public interest, interventions obviously engage pressure groups and so on in a different, less costly exercise, as an intervener purports either to supplement the arguments advanced by one of the parties to the proceedings and/or to bring wider points of law to the attention of the court.<sup>69</sup> In this context, the partisan nature of the intervener should be less remarkable than it (potentially) is in respect of standing, as the legal issues in the case will have been identified by a private individual who has been affected by the (in)action of a public authority (unless, that is, the proceedings have been initiated by another representative body).<sup>70</sup> Whether interventions will be accepted is ultimately a matter for the discretion of the court<sup>71</sup> – albeit that some groups enjoy a statutory power to apply to intervene<sup>72</sup> – and the judicial understanding is that an intervener’s ‘fund of knowledge or particular point of view will enable [it] to provide the [court] with a more rounded picture than it would otherwise obtain’.<sup>73</sup> This has been said to require that

64 The leading case remains *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600, as revisited in *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749, [2009] 1 WLR 1436. And see Liberty, *Litigating the Public Interest: Report of the Working Group on Facilitating Public Interest Litigation* (Liberty 2006).

65 *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600, 2624 [74].

66 *Ibid.* Although, on the issue of private interest, see *Re Thompson’s Application* [2010] NIQB 38; and, on pro bono representation in England and Wales, see the Legal Services Act 2007, s 194, and the Legal Aid, Sentencing, and Punishment of Offenders Act 2012, s 61.

67 *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749, [2009] 1 WLR 1436, 1446 [24], Waller LJ.

68 *Ibid.*; and for application, see eg *R (Technoprint plc) v Leeds City Council* [2009] EWHC 3832 (Admin). But compare *R (Action Against Medical Accidents) v General Medical Council* [2009] EWHC 2522 (Admin).

69 *Re Northern Ireland Human Rights Commission* [2002] UKHL 25, [2002] NI 236 noting, among other things, the different roles of an intervener and *amicus curiae*. On interveners, see further M Fordham, ‘Public Interest Interventions in the Supreme Court: Ten Virtues’ [2010] 15 JR 18; and JUSTICE/Public Law Project (n 57).

70 As in eg *Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety* [2005] NI 188, interventions made by, among others, the Roman Catholic Church and the Society for the Protection of the Unborn Child.

71 See eg RSC r 26.

72 Eg *Re Northern Ireland Human Rights Commission* [2002] NI 236 and Northern Ireland Act 1998, s 71(2B). See too the Commissioner for Children and Young People (NI) Order 2003, art 14(1)(b).

73 *Re E (A Child)* [2008] UKHL 66, [2009] 1 AC 536, 542 [2], Lord Hoffmann. On the limitations of traditional *inter partes* proceedings, see J Allison, ‘The Procedural Reason for Judicial Restraint’ [1994] PL 452.

interveners avoid mere repetition of points which have already been made by the parties and that they focus, instead, on additional matters that will assist the court.<sup>74</sup>

### THE EUROPEAN LAW DIMENSION

One area of law in which interventions have featured particularly prominently – and which marks a crossover between the common law and European law dimensions of judicial review – is that concerned with human rights.<sup>75</sup> Although human rights proceedings can also include arguments about fundamental rights at common law,<sup>76</sup> the majority of cases are now heard under the Human Rights Act 1998 as read with the relevant provisions of the ECHR.<sup>77</sup> In that latter setting, public interest litigation has assumed a more truncated meaning, as section 7 of the Human Rights Act 1998 precludes actions by representative bodies and so on save where they themselves are ‘victims’ within the meaning of Article 34 ECHR or where statute permits such actions.<sup>78</sup> That said, the fact that pressure groups etc. are able to intervene as third parties allows them to make submissions about the interface between national legislative and administrative choices and the body of case law that has been developed by the European Court of Human Rights (ECtHR). While that case law famously includes a ‘margin of appreciation’ doctrine that gives national authorities considerable latitude in their treatment of qualified rights, interveners can still address the normative importance of rights and whether the ECHR recognises a public interest justification for limiting rights in a particular case.<sup>79</sup> In some instances, interventions may influence a court towards the conclusion that even an Act of the Westminster Parliament cannot be reconciled with particular rights and that a ‘declaration of incompatibility’ should issue.<sup>80</sup>

Litigation within the rubric of EU law is more complex, largely because of the role that the national courts play within the EU’s broader judicial architecture. Here, UK courts perform an essentially dual function whereby they can hear public interest challenges to acts of the EU institutions as well as to national legislative and administrative choices that are argued to contravene EU law. In terms of challenges to acts of the EU institutions, it is well established that pressure groups etc. have only restricted rights of access to the General Court and that proceedings should instead be brought in national courts, which may subsequently refer a matter of legality to the Court of Justice of the European Union (CJEU) under Article 267 TFEU.<sup>81</sup> While this is a state of affairs that has been much criticised<sup>82</sup> – the scope for direct actions has since also been partly liberalised by the Treaty

74 *Re E (A Child)* [2008] UKHL 66, [2009] 1 AC 536, 542 [2], Lord Hoffmann. See too *Re White’s Application* [2000] NI 432, 445.

75 See generally E Metcalfe, *To Assist the Court: Third Party Interventions in the UK* (JUSTICE 2009).

76 See eg *Ahmed v HM Treasury* [2010] UKSC 2 and 5, [2010] 2 AC 534, considered below.

77 See both Hickman and Dickson (n 39).

78 See eg *Re Committee for the Administration of Justice’s Application* [2005] NIQB 25. For an example of legislation giving bodies the power to bring proceedings see Northern Ireland Act 1998, s 71(2A)–(2C), and *Re Northern Ireland Human Rights Commission’s Application* [2012] NIQB 77.

79 But, for a critical account of the ECtHR case law, see McFarg (n 41).

80 Eg *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, declaration of incompatibility between the Anti-terrorism, Crime and Security Act 2001, ss 23–24, and Arts 5 and 14 ECHR, Liberty intervening.

81 T de la Mare and C Donnelly, ‘Preliminary Rulings and EU Legal Integration: Evolution and Stasis’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 363, 385–86. Direct actions are now governed by Art 263(4) TFEU.

82 See, most tellingly, Advocate General Jacob’s Opinion in *Case C-50/00 Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

of Lisbon<sup>83</sup> – it corresponds with a constitutional arrangement whereby national courts augment the work of the CJEU and the principles it has developed.<sup>84</sup> That arrangement also informs the role that UK courts play when hearing challenges to national legislative and administrative choices, where the supremacy and direct effect doctrines require that EU law prevails over any conflicting norm of national law.<sup>85</sup> The resolution of this latter type of challenge may again require a national court reference to the CJEU under Article 267 TFEU,<sup>86</sup> and it may at other times require that the national court engages in *de facto* review of the constitutionality of Acts of the Westminster Parliament.<sup>87</sup> When engaged in review of that kind, the national court will essentially ask whether a deliberative choice of the Westminster Parliament is consistent with externally defined constitutional norms.<sup>88</sup>

The outstanding example of such review in public interest proceedings remains *R v Secretary of State for Employment, ex parte Equal Opportunities Commission*<sup>89</sup> (EOC). The EOC here argued that various provisions of the Employment Protection (Consolidation) Act 1978 were contrary to some of EU law's non-discrimination rules because they granted preferential employment protection rights to full-time workers, a majority of whom were men, as opposed to part-time workers, a majority of whom were women. Granting the application for judicial review, the House of Lords held: that the EOC had had 'sufficient interest' to bring the proceedings because of its statutory duty to work towards the elimination of discrimination; that the seminal *Factortame* case had made possible the review of Acts of the Westminster Parliament in the EU context; and that the Secretary of State had been unable to offer any objective justification for the discriminatory measures under challenge. On this outcome, the common law's open approach to standing elided with the core doctrines of EU law to produce a declaration that the Act of 1978 was incompatible with EU law's sex equality rules.

### THE INTERNATIONAL LAW DIMENSION

The nature of the international law dimension can be illustrated with reference to the Aarhus Convention that was noted, above, in the introduction. This is a Convention that is of application only within the broader European region (including at the level of the EU) but which was drafted under the auspices of the United Nations Economic Commission for Europe (UNECE), drew inspiration from principle 10 of the United Nations' Rio Declaration on Environment and Development, and has been described as of 'global' significance.<sup>90</sup> Its central premise is the shared public interest in adequate protection of the environment, and it contains wide-ranging provisions on access to information on environmental matters, public participation in decision-making, and access to justice where

83 Art 263(4) TFEU. But, for continued criticism, see S Marsden, 'Direct Public Access to EU Courts: Upholding Public International Law via the Aarhus Convention Compliance Committee' (2012) 81 *Nordic Journal of International Law* 175.

84 *de la Mare and Donnelly* (81).

85 Case 16/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; Case 6/64 *Costa v ENEL* [1964] ECR 585; and Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

86 As in eg Case C-388/07 R (*Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*) [2009] ECR I-1569.

87 *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603.

88 *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603 and *Thoburn v Sunderland CC* [2003] QB 151.

89 [1995] 1 AC 1.

90 R McCracken and G Jones, 'The Aarhus Convention' [2003] JPL 802, quoting the former UN Secretary General, Kofi Anan.

public authority decisions are under challenge.<sup>91</sup> Within this, the role that pressure groups etc. can play is explicitly recognised, albeit as subject to each party's procedural rules on standing,<sup>92</sup> and the Aarhus Convention requires that remedies should be 'adequate and effective' and access to them 'fair, equitable, timely and not prohibitively expensive'.<sup>93</sup> Questions of adherence are overseen by a Compliance Committee that can act on a submission that is made by a party to the Aarhus Convention, a referral that is received from the Secretariat to UNECE, or a communication from a member of the public (including a pressure group).<sup>94</sup>

Implementation of the Aarhus Convention in the UK has been achieved primarily through the modification of EU Directives and corresponding national implementing measures.<sup>95</sup> In terms of its content, the 'prohibitively expensive' provision has given rise to the most case law both in the UK courts themselves and, as regards the UK as a party to the Aarhus Convention, before the Compliance Committee.<sup>96</sup> Much of that case law has inevitably centred upon the domestic approach to PCOs and the Supreme Court recently referred to the CJEU the question of how 'prohibitive expense' is to be assessed. The issue arose in *Edwards*,<sup>97</sup> which was a challenge to a grant of planning permission brought by a third-party private individual who had applied unsuccessfully for a PCO in proceedings in the House of Lords and who then challenged a costs order against her when the appeal was dismissed (the House of Lords had in the meantime been replaced by the Supreme Court). In considering how compliance with the Aarhus Convention was to be observed, the Supreme Court noted the competing options presented by a wholly *subjective* approach to costs (what can the applicant be expected to pay given his/her/its financial position?) as opposed to a wholly *objective* approach (what might the 'ordinary' member of the public be expected to pay in the circumstances of the case?). While Lord Hope thought that the balance might 'lie in favour of the objective approach',<sup>98</sup> he was ultimately of the view that the law was uncertain and that the meaning of the relevant Directives should be referred to the CJEU under Article 267 TFEU. The CJEU, in its ruling of 11 April 2013, stated that the appropriate test should include elements of both approaches.<sup>99</sup>

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91 For a wider, contextual account, see G Smith, *Deliberative Democracy and the Environment* (Routledge 2003).

92 Art 2(5).

93 Art 9(4). See further J Maurici, 'Aarhus and Access to Justice' [2011] 16 JR 253.

94 See <[www.unece.org/env/pp/ccbackground.html](http://www.unece.org/env/pp/ccbackground.html)>; and M Macchia, 'Legality: The Aarhus Convention and the Compliance Committee' in S Cassese et al (eds), *Global Administrative Law: The Casebook* (3rd edn, Institute for International Law and Justice, NYU 2012) III.A.1.

95 See eg Dir 2003/35/EC on public participation, implementing the access to justice requirements by inserting Art 10a into Dir 85/337/EEC on Environmental Impact Assessments and art 15a into Dir 96/61/EC on Integrated Pollution Prevention and Control. For corresponding modification of domestic regulations, see eg the Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2006, SI 2006/3295. And on the Convention's requirements on access to information see Council Dir 2003/4/EC and the Environmental Information Regulations 2004, SI 2004/3391 and the Environmental Information (Scotland) Regulations 2004, SSI 2004/520.

96 See Maurici (n 93) 253–74.

97 R (*Edwards*) v *Environment Agency* (No 2) [2010] UKSC 57, [2011] 1 WLR 79.

98 [2010] UKSC 57, [2011] 1 WLR 79, 91, para 31.

99 Case C-260/11 R (*Edwards*) v *Environment Agency*, NYR, available at <[www.bailii.org/eu/cases/EUECJ/2013/C26011.html](http://www.bailii.org/eu/cases/EUECJ/2013/C26011.html)>. And, on costs in England and Wales, see now also the Civil Procedure (Amendment) Rules 2013, SI 2013/262.

### Public interest litigation, legality and global administrative law

*Edwards* provides a clear example of how the three dimensions of judicial review can coincide in public interest litigation, as the Aarhus Convention had prompted the modification of the EU Directives, which then raised issues about the nature of PCOs in national law. At its most obvious, that coincidence took form in the range of legal requirements on the protection of the environment that the applicant relied upon when bringing the proceedings on that matter of public interest. However, the coincidence also had a more complex quality that relates to the common law's principle of legality and the courts' emphasis on the public interest in vindicating the rule of law. That point of emphasis had already led to a liberal procedural regime in UK courts independent of the demands of European law and international law, and the Aarhus Convention, in that sense, did not entail any reinvention of national principle and practice. Nevertheless, the fact that *Edwards* involved the courts in enforcing rules of law that had been formulated outside the UK constitutional order also revealed how matters of legality can be determined at the intersection of national, supranational and international norms. So, what is the nature of the contemporary legality principle that may be involved in such public interest litigation? And what is the role of the common law principle of legality in cases that transcend the three dimensions of judicial review?

The approach that literature on global administrative law takes to such questions starts from the premise that public power is exercised at a number of cross-cutting levels in contemporary society – mainly national, supranational and international – and that corresponding legal constraints emerge from within the different legal orders at those levels.<sup>100</sup> Within that, the global administrative law thesis regards relations between the legal orders as heterarchical in form, and it borrows from 'constitutional pluralism' when noting a degree of equivalence between the values that define the various orders.<sup>101</sup> This clearly departs from any account that would attribute a primary (hierarchical) role to international law, and it posits a number of interesting consequences that flow from the interaction of norms. One is that global administrative law becomes inextricably linked to constitutional values that exist in different legal orders and which include, most prominently, fundamental rights standards.<sup>102</sup> A second, admittedly exceptional, consequence is that there is scope for one legal order to reject a norm that has originated in another order, for the reason that the norm offends a constitutional value within the receiving system. This is famously – and controversially – what happened in the *Kadi* case when the CJEU reviewed the legality of

100 There is a wide body of literature that touches upon this point and others. See, most prominently, Cassese et al (n 94); G Anthony, J-B Auby, J Morison and T Zwart (eds), *Values in Global Administrative Law* (Hart Publishing 2011); J-B Auby (n 8); D Dyzenhaus, 'The Concept of (Global) Administrative Law' [2009] *Acta Juridica* 3; B Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *EJIL* 23; Kingsbury et al (n 7); S Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' (2005) 37 *New York University Journal of International Law and Politics* 663; G della Cananea, 'Beyond the State: The Europeanization and Globalization of Procedural Administrative Law' (2003) 9 *EPL* 565; A Aman Jr, 'The Limits of Globalization and the Future of Administrative Law: From Government to Governance' (2001) 8 *Indiana Journal of Global Legal Studies* 379; and C Harlow, 'European Administrative Law and the Global Challenge' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP 1999) 261. Compare A von Bogdandy, P Dann and M Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 *German Law Journal* 1375.

101 The leading account remains N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *MLR* 317. See too C Harlow, 'Three Phases in the Evolution of EU Administrative Law' in Craig and de Búrca (n 81) 439; and M P Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N Walker (eds), *Sovereignty in Transition* (Hart Publishing 2003) 501. Compare N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Post-National Law* (OUP 2010).

102 G Anderson, *Constitutional Rights after Globalisation* (Hart Publishing 2005).

EU Regulations that implemented UN Resolutions that had been adopted without regard for, among other things, fair hearing guarantees (the Resolutions provided for the freezing of the financial assets of terror suspects whose names had been added to a sanctions list by a UN Committee).<sup>103</sup> While the CJEU was not competent to rule directly on the legality of the UN Resolutions, it emphasised its role as the guardian of values within the EU's constitutional space and on that basis held that the EU Regulations were invalid.<sup>104</sup> This is thus a third consequence of constitutional pluralism: the emergence of a legality principle that can include an indirect judicial control of decisions that have been taken beyond the jurisdiction of the court giving judgment.

Of course, it is the nature and content of that legality principle that is of most interest here. Normatively, the principle is grounded in global administrative law's pursuit of the value of accountability in global decision-making,<sup>105</sup> where it emphasises the link between the legitimacy of decision-making and rule of law requirements such as acting within powers, due process, reason-giving, proportionality and fundamental rights.<sup>106</sup> In a treaty-based system, such requirements may be found in textual requirements and/or in general principles of law,<sup>107</sup> and national courts may be obliged to review domestic legal acts with reference to those treaty standards (which may have an extraterritorial effect).<sup>108</sup> This is paradigmatic of the role played by the national courts of the EU's member states, where an occasional pluralist resistance to the demands of the supranational order can be contrasted with a much fuller acceptance of EU law's foundational doctrines and general principles of law.<sup>109</sup> However, it has also been noted that national court acceptance of those principles – as well as those in some other treaty systems – has been aided by the fact that many of the principles have been borrowed from the prior experience of national administrative laws.<sup>110</sup> Global administrative law in that way recognises an historical role for national conceptions of legality, as they will have helped to shape the legality principle that now exists in the supranational and international settings. A contemporary role for national conceptions is likewise envisaged in so far as they may interact with the legal norms of other orders as a result of the many indirect, or incidental, linkages within the global polity.<sup>111</sup>

Returning to *Edwards*, the legality principle that is involved in the case assumes a more complex quality. Certainly, the account that would be offered by international law orthodoxy – that the EU and UK were merely acting in the light of their obligations under the Aarhus Convention – would understate the significance of common law (and European) developments that pre-dated the Aarhus Convention's ratification. The point here, again, is

103 Cases C-402 and 415/05 *Kadi v Council and Commission* [2008] ECR I-6351. Compare the reasoning – though not the outcome – in Case T-85/09 *Kadi v Commission and Council* [2011] 1 CMLR 24. Compare, too, the approach of the ECtHR in *Al-Jedda v UK* (2011) 53 EHRR 23.

104 T Tridimas and J A Gutierrez-Fons, 'EU Law, International Law, and Economic Sanctions against Terrorism: The Judiciary in Distress?' (2008) 32 *Fordham International Law Journal* 660.

105 On which see C Harlow, 'Accountability as a Value for Global Governance and Global Administrative Law' in Anthony et al (n 100) 173.

106 See generally Kingsbury et al (n 7).

107 J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012).

108 M Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Hart Publishing 2009); and eg *Al-Skeini v UK* (2011) 53 EHRR 18.

109 On the instances of resistance see Craig and de Búrca (n 52) ch 9.

110 The seminal account is J Schwarze, *European Administrative Law* (2nd edn, Sweet & Maxwell 2006). See too P Birkinshaw, *European Public Law* (Butterworths 2003) ch 3; and, as regards the ECHR, D Leonardi, 'The Strasbourg System of Human Rights Protection: "Europeanisation" of the Law through the Confluence of the Western Legal Traditions' (1996) 8 *ERPL* 1139.

111 Auby (n 8); and J-A Scholte, *Globalisation: A Critical Introduction* (2nd edn, Palgrave Macmillan 2005).

that common law approaches to matters of standing, costs and interventions had already emphasised the public interest in vindicating the rule of law, where the relevant ‘rules of law’ had included EU measures in the field of the environment.<sup>112</sup> While the Aarhus Convention purported to embed liberal procedural regimes as a means for achieving more effective protection of the environment, its requirements arguably still did nothing more than complement well-established common law practices. On this view, the common law principle of legality became an active facilitator of international norms, rather than something that was subsumed by them.

The complexity of the legality principle can also be seen in *Ahmed v HM Treasury*.<sup>113</sup> This was a fundamental rights case in which JUSTICE intervened as a third party on the question of how the common law should protect rights. The specific issue in the case was the legality of Orders in Council that had been made under section 1 of the United Nations Act 1946 and which, as with the disputed EU Regulations in *Kadi*, gave effect to UN Security Council Resolutions on the freezing of the financial assets of individuals involved in terrorism. According to section 1 of the Act, Orders in Council could make such provision as appeared ‘necessary or expedient’ for the purposes of implementing UN Resolutions, and the government had thereby made the Terrorism (United Nations Measures) Order 2006 (the Terrorism Order) and the Al-Qaida and Taliban (United Nations Measures) Order 2006 (the Al-Qaida Order).<sup>114</sup> The Terrorism Order was duly quashed by the Supreme Court for the reason that it had included a test of ‘reasonable suspicion’ about an individual’s involvement in terrorism, which was held to have taken it beyond the wording of the corresponding UN Resolution and any argument that it had been ‘necessary or expedient’ to include the test. However, more remarkable was the Supreme Court’s ruling on the legality of the Al-Qaida Order, where article 3(1)(b) had been challenged as contrary both to the Human Rights Act 1998/ECHR and common law fundamental rights standards. Under article 3(1)(b), individuals whose names had been added to the UN sanctions list automatically had their assets frozen in the UK even though the UN listing process did not observe minimum fair-hearing guarantees such as the right of access to a court. While the Supreme Court rejected the argument that this rendered article 3(1)(b) unlawful under the Human Rights Act 1998 – the Court noted Article 103 of the UN Charter when holding that the ECHR was subject to the prior force of UN Resolutions<sup>115</sup> – it held that art 3(1)(b) was contrary to the common law’s legality principle. When doing so, it referred to the interpretive rule whereby general words in an Act of Parliament cannot provide a basis for an interference with fundamental rights, as such interference can be achieved only where Parliament uses express words to that effect or words that have that effect by way of necessary implication.<sup>116</sup> Noting that s 1 of the United Nations Act 1946 did not confer such a power upon the executive, the Supreme Court quashed article 3(1)(b) given its proximity to a procedural regime that was lacking minimum fair-hearing guarantees. The Supreme Court also refused a Treasury request for a suspension of the

112 *Eg R v Inspectorate of Pollution, ex p Greenpeace (No 2)* [1994] 4 All ER 329.

113 [2010] UKSC 2 and 5; [2010] 2 AC 534.

114 SI 2006/2657 and SI 2006/2952, respectively.

115 Following *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] AC 332; and see *Al-Jedda v UK* (2011) 53 EHRR 23. Art 103 of the UN Charter provides: ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’

116 See [2010] 2 AC 534, 626 [46], Lord Hope quoting *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, 575, Lord Browne-Wilkinson; and [2010] 2 AC 534, 646 [111], Lord Phillips quoting *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131, Lord Hoffmann.



remedies pending legislative amendment as that would ‘obfuscate the effect of its judgment’ by suggesting that the relevant provisions were in some way valid.<sup>117</sup>

*Ahmed* was inevitably a controversial ruling and Parliament soon enacted primary legislation that had the effect of overriding it.<sup>118</sup> Nevertheless, the case still provides an insight into the robust nature of the common law’s legality principle and its protection of, in this instance, the right of access to a court.<sup>119</sup> Although the Supreme Court chose not to situate its reasoning within the Human Rights Act 1998 and the analogical pluralism of the *Kadi* case – *Kadi* was read as specific to the EU legal order – its reliance on the common law principle of legality had essentially the same effect as the CJEU’s ruling. This thus marked a common law limitation to the flow of international norms and, even though the subsequent parliamentary intervention removed that limitation, the principle of legality apparently also countenances the review of an Act of the Westminster Parliament. This is the territory of the *Jackson* case in which Lord Steyn famously cautioned that: ‘[I]n exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts . . . [judges] may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.’<sup>120</sup> Marched to its logical conclusion, this would suggest that it is the common law principle of legality that lies at the very heart of the UK constitution, and that the principle’s global relevance should be seen in that light.

An equally controversial case – albeit for very different reasons – was *R (Corner House Research) v Director of the Serious Fraud Office*.<sup>121</sup> The claimant was here given standing to challenge a decision of the Director whereby he had discontinued an investigation into allegations of corruption in BAE System’s dealings with officials in Saudi Arabia. The investigation had been commenced on the basis of the Director’s powers under section 1(3) of the Criminal Justice Act 1987 as read with sections 108–10 of the Anti-terrorism, Crime and Security Act 2001 (the latter provisions giving effect to the UK’s obligations under the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997).<sup>122</sup> As the investigation progressed, the Saudi authorities made an explicit threat that they would withdraw cooperation with the UK on matters of anti-terrorism, and there were very real concerns within the UK government that this would put ‘British lives on British streets’ at risk.<sup>123</sup> The Director’s decision to discontinue was therefore taken with reference to ‘the public interest’ in ‘public safety’, and *Corner House* challenged that decision with reference to the competing public interest in upholding the rule of law. The claimant’s arguments were to succeed in the Divisional Court, which held that the Director had acted unlawfully by, in effect, surrendering his discretion in the face of the Saudi threat. However, the House of Lords allowed the Director’s appeal for reasons associated with the separation of powers doctrine. Having noted the breadth of the discretion that is generally entrusted to public prosecutors under UK law, the House of Lords emphasised the limited role that

117 [2010] 2 AC 534, 690 [8], Lord Phillips.

118 The Terrorist Asset-Freezing Act (Temporary Provisions) Act 2010 and the Terrorist Asset-Freezing Act 2010.

119 See too *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531. Compare *Tariq v Home Office* [2011] UKSC 35, [2012] 1 AC 452. See also *Bank Mellat v HM Treasury* [2013] UKSC 38 and [2013] UKSC 39.

120 *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, 302–03 [102]. See also Baroness Hale’s comments at [2006] 1 AC 262, 318 [159].

121 [2008] UKHL 60, [2009] 1 AC 756.

122 See now the Bribery Act 2010.

123 [2008] UKHL 60, [2009] 1 AC 756, 835 [14], Lord Bingham quoting from the evidence.

the courts should play when decisions are challenged by way of judicial review.<sup>124</sup> The House also noted that the facts of the case had placed the Director in an ‘impossible situation’ and that he had been entitled, in law, to make the decision to discontinue.<sup>125</sup> As Lord Bingham expressed it:

The Director was confronted by an ugly and obviously unwelcome threat. He had to decide what, if anything, he should do . . . The issue in these proceedings is not whether his decision was right or wrong . . . but whether it was a decision which the Director was lawfully entitled to make . . . In the opinion of the House the Director’s decision was one he was lawfully entitled to make. It may indeed be doubted whether a responsible decision-maker could, on the facts before the Director, have decided otherwise.<sup>126</sup>

There are perhaps two ways in which *Corner House* can be assessed. The first is to criticise it for equating the public interest in the rule of law with matters such as public safety, as this diminishes the prior normative force of the legality principle. This is certainly a view that has been advanced in some commentary on the case<sup>127</sup> and, cast in terms of global administrative law, it might be said that *Corner House* detracted from the value of accountability that underlies the OECD Convention on Bribery. However, a second view would hold that the restraint that characterised the House of Lords ruling is to be welcomed as it is as elemental to the legality principle as is judicial intervention in appropriate cases. The point here, again, is that public interest litigation has the potential to ‘politicise’ the courts by requiring them to adjudicate on matters that will involve difficult value judgments and the mobilisation of political knowledge.<sup>128</sup> On this more benign reading, *Corner House* amounts to nothing other than a reminder that global administrative law itself needs to accommodate a separation of powers doctrine.

### Conclusion

This article began by noting that the term ‘the public interest’ occupies a central – if ill-defined – place in judicial review in the UK. Its corresponding analysis of public interest litigation across the three dimensions of judicial review has shown that UK courts now give effect to a legality principle that can both constrain decision makers within the UK and have implications for those outside it. While the genesis of the case law has been found very much in the common law’s approach to matters of standing, costs, and third-party interventions, it has been seen that the European and international law dimensions can also encourage – and, in some instances, demand – liberal access to the courts. This has resulted in cases coming before the courts where the points of law at issue have transcended the three dimensions of judicial review and required the courts to elaborate upon the requirements of legality in an era of global governance. When doing so, the courts have revealed much about the role that they might play in developing legal principles within an emerging body of global administrative law.

Of course, much of this presupposes the legitimacy of the link that the courts have made between ‘the public interest’ and the ‘rule of law’, and this is where criticisms of the case law may remain. Certainly, the fact that pressure groups and so on may associate the

124 [2008] UKHL 60, [2009] 1 AC 756, 840–41 [30–31], Lord Bingham citing, among others, *R v DPP, ex p Manning* [2001] QB 330; *R (Birmingham) v Director of the SFO* [2007] QB 727; and *Mobit v DPP of Mauritius* [2006] 1 WLR 3343.

125 [2008] UKHL 60, [2009] 1 AC 756, 848 [57], Baroness Hale.

126 [2008] UKHL 60, [2009] 1 AC 756, 844–5 [41–42].

127 J Jowell, ‘Caving in: Threats and the Rule of Law’ (2008) 13 JR 273.

128 Harlow (n 59).

public interest with particular policy preferences weakens the idea that public interest litigation will always be synonymous solely with the rule of law. Moreover, where pressure groups and so on rely upon European law and/or international law to challenge measures that may include Acts of the Westminster Parliament, this raises related concerns about how such norms are formulated and why they should prevail over deliberative choices that have been taken at the national level. This is largely a concern about the impact of elitism above the level of the state,<sup>129</sup> and it resonates with a much wider critique about the need for a revised, post-national model of democracy in a globalised era.<sup>130</sup> That said, global administrative law arguably offers some means for achieving accountability and control in that era, and it engages the UK courts both directly and indirectly in that endeavour. While there will always be scope for debate about whether judicial intervention is merited in a particular case – *Corner House* providing but one example – there can surely be no dispute about the imperative nature of the judicial review function. Any other perspective would only threaten the rule of law as a defining constitutional value.<sup>131</sup>

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129 J Morison and G Anthony, 'The Place of Public Interest' in Anthony et al (n 100) 215.

130 For possibilities, see G De Búrca, 'Developing Democracy beyond the State' (2008) 46 *Columbia Journal of Transnational Law* 101.

131 R (*Jackson*) v *Attorney-General* [2005] UKHL 56, [2006] 1 AC 262, 304 [107], Lord Hope; and Constitutional Reform Act 2005, s 1.