DEFINING ENGLISH NON-JUSTICIABILITY USING FOUNDATIONS AND TAXONOMY

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Abstract

Justiciability is an English term that is used to refer to the limits of the courts' power to conduct judicial review. For example, issues of national security are famously outside the limits as to what the courts should be able to decide. Justiciability in England remains an inadequately defined principle, particularly for those not accustomed to the common law method. The Independent Review of Administrative Law is a current review of judicial review in the United Kingdom, and has included in its scope a question of whether justiciability is ripe to be considered for reform. To properly consider a reform, one must first properly understand the underlying principles, which can be difficult in the case of justiciability. Precious few have investigated English justiciability using a foundational or taxonomical method. This article seeks to do just that.

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1. Introduction

The judicial review of administrative actions plays a crucial role in a functional State apparatus by allowing an independent arbiter to assess the legality of those actions. Citizens benefit from having an independent outlet to resolve claims of illegality and State abuses of power, and States benefit from the increased legitimacy that the presence of the independent judiciary creates. Its importance should not be understated. However, not every administrative decision ought to be overseen by the courts in the same manner. The courtroom decision-making process is inappropriate for some types of political decision, which need to consider and implement public opinion. Overuse of judicial review can lead to undemocratic and technically flawed results.[1] For this reason, the scope of what is reviewable by the courts in common law countries is restrained by the concept of justiciability, which is primarily determined by the courts.[2] Its ideal scope is difficult to state due to the number and complexity of influential factors. Due to the complexity of influences, the foundations and taxonomy of justiciability in the United Kingdom are often unsatisfactory, which has caused misunderstandings of its principles at all levels. It is also confusing to those outside the common law tradition, since justiciability was based entirely on common law over many years. Solving the question of the ideal scope of justiciability requires that the foundations and taxonomy of justiciability be clearly stated.

In England, the scope of judicial review has changed over time. As Lord Wilberforce argued, although the consistency that precedent provides is valuable, the scope of judicial review need

[1] See E. Jordao, S. Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, 66 Admin. L. Rev. 1 (2014).

[2] See *R (Prolife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185, 240.

not stand still.[3] It is free to develop organically as any other type of law. The last half of the twentieth century saw the scope of judicial review widen considerably,[4] and it has recently been widened further by the legislature by enacting the *Human Rights Act 1998*. That enactment allows judicial review on the basis of individual rights. Further amendment is foreseeable. Paragraph 2 of the ongoing Independent Review of Administrative Law (IRAL)[5] in the United Kingdom has posed the following question:

> "Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government".

However, if there is to be any development in the scope of judicial review, it must be in a principled manner, and not for its own sake.

This article will posit a theory of the justiciability of administrative actions as it currently stands in the United Kingdom. The first part of this article outlines the foundations of judicial review, which are twofold. After all, we cannot know the limits of judicial review if we do not properly understand its basis. First, judicial review in the UK is based in the constitutional principles of separation of powers, the rule of law and democracy. Secondly, judicial review is based on empirical evaluations as to the institutional benefits it provides, such as by ensuring correct underlying practices and by opposing the problems with a liberal democratic mindset. This provides the basis from which judicial review occurs, ideally universally covering all administrative decisions. However, as is well known, justiciability has its limits. The second part of the article identifies the correct taxonomy of the rationales for non-justiciability in the UK, which divides non-justiciability into constitutional and institutional incompetence. The accuracy of taxonomy is crucial since it leads to individual consideration of the foundations for each category of non-

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[3] See *R v Inland Revenue Commissioners; ex Parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 631.

[4] See *R v Hull University Visitor, ex Parte Page* [1993] AC 682, 709.

[5] See Terms of Reference at *https://assets.publishing.service.gov.uk/media/5f27d3128fa8f57ac14f693e/independent-review-of-administrative-law-tor.pdf*.

justiciability. The difference in the grounds of non-justiciability, which is discussed further in the third part of this article, means that the courts ought to be determining each ground distinctly, using a two-step process.

The third part of this article synthesises the theory with the recognised grounds of judicial review in the UK. This part aligns each category of non-justiciability with the foundation of judicial review that it contradicts. This creates an objective contradiction that public law must grapple with. Constitutional incompetence is based on constitutional ideals, which interact with the constitutional underpinnings of judicial review. The argument presented will be that the constitutional ideals of rule of law and democracy precede the executive's power. Therefore, while constitutional incompetence nullifies the separation of powers basis of judicial review, the rule of law and democracy bases are not nullified. As a result, the grounds of review based on rule of law and democracy ought to remain available: namely improper purpose, legitimate expectation, procedural fairness and adequate provision of reasons. On the other hand, institutional incompetence is based on empirical observations, which interact with the institutional foundations of judicial review. The constitutional arguments have no role to play since institutional incompetence is based on an empirical question of whether the courts are able to competently conduct judicial review in respect of a particular category decision. The argument will be that the institutional factors that weigh against each other ought to be balanced to reveal whether, in respect of each ground of judicial review, the virtues or vices of reviewing a decision on that ground ought to prevail. This article will argue that the irrationality, unreasonableness, improper purpose, legitimate expectations, procedural fairness and adequate provision of reasons remain open.

The approaches generally taken towards questions of the scope of judicial review in the UK are most often based on practical implications and respect for the other arms of government. The importance of this article is that it approaches the questions using foundations and taxonomy; it steps back to view justiciability in the UK as a whole from a distance. Foundational and taxonomical elements are seemingly unimportant to the courts on an individual case level. However,

determining the proper scope of judicial review requires analysing those foundational and taxonomical elements. The result of this approach is a minor broadening of the courts' power by allowing review for unreasonableness for decisions where the court lacks institutional competence. Where the courts lack constitutional competence, this article suggests that review for procedural fairness and adequate reasons for decision ought to be open, subject to public interest immunity, even if the fairness test would generally militate against the provision of reasons.

2. Foundations of Judicial Review

Judicial review relies for its existence upon its constitutional and institutional foundations, which are closely interrelated. As will become clear, each supports the broadening of the scope of judicial review by combatting non-justiciability.

2.1. Constitutional Foundations of Judicial Review

The United Kingdom famously possesses a constitution in unwritten form. Judicial review is derived from that unwritten constitution through the support of three interrelated constitutional principles: separation of powers, democracy and rule of law.[6]

2.1.1. Separation of Powers

Lord Diplock stated in *Duport Steel*[7] that the constitution "is firmly based upon the separation of powers", and that parliamentary sovereignty defines the UK separation of powers.[8] In the UK, legislative supremacy is the most important part of the concept of constitutionalism. The constitution holds that Parliament is supreme, thus producing a monolithic view of sovereignty.[9] Judicial review has its primary foundations in the doctrine of parliamentary sovereignty [10] because it is

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[6] See M. Elliott, *The Constitutional Foundations of Judicial Review* (2001), 247.

[7] *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 157.

[8] See also R. Masterman, *The Separation of Powers in the Contemporary Constitution* (2011), 23.

[9] Id., at 20.

[10] See M. Elliott, *The Constitutional Foundations of Judicial Review*, cit. at 6, 10.

unconstitutional for the courts to fail to uphold legislation. Elliott describes this basis of judicial review as the theory of ultra vires. According to that theory, judicial review is the means by which the courts protect the legislative will by ensuring the executive acts in accordance with it. Without judicial review, the executive would not be accountable for acting in accordance with the legislative will. It does not matter that the courts are unelected, since judicial review is merely the vehicle of enforcement of the legislature's express will; the judicature does not make its own decisions per se. It is important to note, however, that the ultra vires doctrine cannot be the only basis for judicial review since the judiciary has the power to review decisions made under non-legislative powers.

2.1.2. Rule of Law

The UK constitution also prescribes the rule of law. At a fundamental level, the constitution is based on it.[11] However, the rule of law should not be mistaken for the court inventing obligations to impose idealistically upon the other arms. The rule of law is not based on common law; its basis is the executive's historic embedding of the rule of law by convention. The executive submits to such constraints to obtain the benefits of doing so.[12] For example, it is indispensable for public order and coordinating activities.[13] It thus covers all arms of government, arguably overriding legislative supremacy.[14] Unsurprisingly, the courts' power is also limited by the rule of law.[15] The problem then becomes defining the rule of law, since its definition is contentious. However, it is clear that it must require that, as accounted for by Fuller, the system possesses legality, which requires it to have generality, be prospective, consistent and have possibility of being complied with.[16] However, rule of law goes

[11] Id., at 20.

[12] See S. Holmes, *Lineages of the Rule of Law*, in J.M. Maravell (ed.), *Democracy and the Rule of Law* (2009), 20.

[13] See M. Kramer, *Objectivity and the Rule of Law* (2009), 102.

[14] See W. Wade, C. Forsyth, *Administrative Law* (11th ed., 2014), 28.

[15] See Lord Woolf, *Droit Public-English Style*, PL 68 (1995).

[16] See D. Dyzenhaus, *Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review*, in C. Forsyth (ed.), *Judicial Review and the Constitution* (2000), 161.

further than legality.[17] Whilst not universally agreed, there are those who argue that the rule of law is a morally neutral ideal that requires all government actions to have legitimate public purposes,[18] and that, as Allan points out, government actions are not inconsistent with substantive equality before the law.[19] Jowell argues that the ensuring of the rule of law is the central reason for judicial review,[20] for which the courts have responsibility. Elliott argues that the rule of law is the basis for the review of prerogative powers; in other words, it broadly fills the gap left by the ultra vires doctrine.

2.1.3. Democracy

The above constitutional doctrines are supplemented by democracy, which is a relative newcomer to the UK constitution. Citizen participation, and hence democracy, is underpinned by the provision of information.[21] Judicial review is often criticised for being undemocratic, the claim being that, in effect, it is a means by which political decisions are made by judges who are unelected and unaccountable.[22] However, such a view derives from a mistaken view of both democracy and judicial review. Actually, democracy requires judicial review. First, democracy requires legislative supremacy, which, as discussed above, judicial review facilitates. Secondly, democracy requires that administrative decision makers provide public reasons for decisions. In turn, administrative decisions must be justifiable. This provides an avenue of accountability to the legislature but also directly to citizens. Reasons allow the public to properly understand decisions and hold the government accountable for decisions it disapproves of. The requirement for reasons serves

[17] See M. Kramer, *Objectivity and the Rule of Law*, cit. at. 13, 144.

[18] See D. Dyzenhaus, *Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review*, cit. at 16, 162.

[19] Id., at 161.

[20] See J. Jowell, *The Rule of Law Today*, in J. Jowell, D. Oliver (eds.), *The Changing Constitution* (1994), 73.

[21] See *Kennedy v The Charity Commission* [2015] 1 AC 455, [1].

[22] See C.A. Gearty, *The Paradox of United States Democracy*, 26 U. Rich. L. Rev. 259 (1991).

transparency and demands there exist a right to be heard.[23] Thus, democracy is a constitutional basis for the corresponding grounds of judicial review. Thirdly, judicial review ensures in an independent manner that the executive's adoption of majoritarianism does not damage democratic values such as autonomy.

2.2. Institutional Foundations of Judicial Review

The above constitutional bases for judicial review posit desirable characteristics, an obvious example being the strengthening of democracy. However, there are other related benefits that the judicial process offers the political system. They are "institutional benefits" since it is the existence of the judiciary as an institution that causes these empirical benefits. It is these benefits that are said to have catalysed the recent trend of juridicisation of the political system.[24]

Most liberal democracies hold elections every 3-5 years, which provokes a short-term focus in politicians, whose primary aim is to be re-elected. Judicial review works to offset the short-term focus of liberal democracies by ensuring administrative decisions adhere to continuing values[25] that have been historically determined by the elected arms of government, such as the prevention of discrimination against particular groups. The upshot is that judicial review counters political pressures to disregard the law, and also rectifies unforeseen breaches of the law, since elected branches cannot foresee every application of a policy.[26] However, not only does judicial review resolve actual legal breaches, it also increases the legitimacy of the government to have independent body oversee it.[27] Ostensible legality is also important.

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[23] See E. Jordao, S. Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, cit. at. 1.

[24] See A. Banfield, G. Flynn, *Activism or Democracy? Judicial Review of Prerogative Powers and Executive Action*, 68 Parliam. Aff. 135 (2015).

[25] See J. Fox, M. Stephenson, *Judicial Review as a Response to Political Posturing*, 105 Am. Polit. Sci. Rev. 398 (2011).

[26] See J. Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1370 (2005).

[27] See C. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 Duke L. J. 525 (1989).

Judicial review has further positive consequences. Having judicial review overseeing decisions forces decision makers to mimic the judicial review process.[28] This precipitates a change in practice,[29] by forcing decision makers to carefully consider each application of their power, and by forcing them to seek broad public input in policies.[30] The change in practices becomes custom, by having a spillover effect to those decisions that the judiciary cannot review. [31] Having decision makers undertake a more rigorous process routinely is clearly desirable.

3. Foundations and Taxonomy of Non-Justiciability

Non-justiciability is a slippery term of uncertain reference.[32] Broadly speaking, it refers to a case that contains an issue "inherently unsuitable for judicial determination by reason only of its subject-matter" [33]. But there has been confusion as to the taxonomy of the rules that render an administrative decision non-justiciable.

There are two distinct grounds of non-justiciability that limit the courts' competence to review administrative decisions. The two categories were most famously described by Jeffrey Jowell[34] as being the courts' constitutional competence and their institutional competence. First, a decision will be non-justiciable under the ground of constitutional competence if it is outside the courts' powers according to the constitutional separation of powers. For example, the court is not constitutionally competent to review matters affecting Britain's relations with foreign States.[35] Constitutional incompetence "is pre-eminently an area in which

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[28] See A. Cohen, *Independent Judicial Review: A Blessing in Disguise*, 37 Int'l Rev. L. & Econ. 218 (2014).

[29] See M. Fordham, *Judicial Review Handbook* (4th ed., 2004), 112.

[30] See E. Jordao, S. Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, cit. at. 1.

[31] See N. Almendares, P. Le Bihan, *Increasing Leverage: Judicial Review as a Democracy-Enhancing Institution*, 10 Quart. J. Polit. Sci. 357 (2015).

[32] See *Thomas v Mowbray* [2007] HCA 33, [105] (Gleeson C.J.).

[33] *Khaira v Shergill* [2014] UKSC 33, [41].

[34] J. Jowell, *Of Vires and Vacuums: The Constitutional Context of Judicial Review*, PL 448 (1999).

[35] *Khaira v Shergill*, cit. at. 33, [37].

the responsibility for a judgment that proves to be wrong should go hand in hand with political removability"[36]. On the other hand, the ground of institutional competence is about the recognition of the limits of judicial expertise.[37] As the Supreme Court stated in *Carlile*:[38]

> "It does not follow from the court's constitutional competence to adjudicate … that it should decline to recognise its own institutional limitations".

The Supreme Court in Carlile confirmed that institutional competence was "not a constitutional limitation"[39]. The courts will lack institutional competence over decisions applying wide-ranging issues of general policy that affect a large number of people[40] and decisions requiring an account of an infinite number of considerations. Each ground of non-justiciability will be discussed in greater detail later in this article.

There has been confusion about the taxonomy of non-justiciability. The Queen's Bench has on occasion failed to distinguish between the two types[41] and the Supreme Court has shown some reluctance to separate them.[42] Similar ambiguity also exists in the United States[43] and Australia. Even when the two categories have been recognised, there is confusion as to their boundaries, since they are closely related.[44] However, the grounds are distinct. In *R (Conway) v Secretary of State for Justice*,[45] the Court of Appeal confirmed the difference between the two grounds, identified that there is large overlap between the two and explained that the trial justice did not sufficiently reflect the

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[36] *R (Lord Carlile) v Secretary of State for the Home Department* [2014] UKSC 60, [32].

[37] See *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin), [55].

[38] *R (Lord Carlile) v Secretary of State for the Home Department*, cit. at 36, [32].

[39] Ibid.

[40] *R v Secretary of State for Education and Employment; Ex parte Begbie* [1999] 1 WLR 1115, 1131.

[41] See *R (Gentle) v Prime Minister* [2007] QB 689.

[42] See *R (Lord Carlile) v Secretary of State for the Home Department*, cit. at 36, [32].

[43] See *Baker v Carr*, 369 US 211 (1962) (Brennan J.).

[44] See E. Fisher, *Is the Precautionary Principle Justiciable?*, 13 Eur. Law J. 321 (2001).

[45] [2017] EWCA Civ 275, [33].

distinction. A misunderstanding of the proper taxonomy has produced consequences, because the two grounds of non-justiciability allow a different ambit of judicial review[46] and use distinct tests to determine its application. Importantly, they ought to have been allowed to develop separately. A natural result of the proper taxonomy is that the courts should be investigating each ground distinctly. This claim is in accordance with the strongest and most recent authorities. The House of Lords decision in *Secretary of State for the Home Department v Rehman*,[47] which has been praised by the Supreme Court as the most authoritative analysis on non-justiciability,[48] applied a two-step process by stating:

> "However broad the jurisdiction of a court or tribunal … it is exercising a judicial function and the exercise of that function must recognise the constitutional boundaries between judicial, executive and legislative power. Secondly, the limitations on the appellate process. They arise from the need, in matters of judgment and evaluation of evidence, to show proper deference to the primary decision-maker".

In *Rahmatullah v Ministry of Defence and Foreign and Commonwealth Office*,[49] the Court of Appeal applied the two-step approach in determining the non-justiciability claim:

> "We consider that the claims … are clearly justiciable … There is here no requirement to adjudicate on questions of policy in the absence of "judicial or manageable standards" suitable for application by the courts. There is nothing constitutionally inappropriate in a court in this jurisdiction applying the local law to determine the lawfulness of the claimants' detention".

The Court of Appeal applied the two-step process advocated by this article. This supports the idea that the institutional and constitutional grounds are distinct. The detailed descriptions below of each respective ground will further prove their distinctness.

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[46] See E. Fisher, *Is the Precautionary Principle Justiciable?*, cit. at 44, 322.

[47] [2003] 1 AC 153.

[48] See *R (Lord Carlile) v Secretary of State for the Home Department*, cit. at 36, [26].

[49] [2015] EWCA Civ. 843, [323]. See similar in *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs*, cit. at 37.

3.1. Constitutional Incompetence

Courts have long acknowledged their jurisdictional limits on the basis of constitutional competence. The earliest known case is the 1460 case of *Duke of York's Claim to the Crown*.[50] The courts' limits to review on the basis of constitutional competence became more formally developed 150 years later. Despite the fact that it had been established just three years earlier that it was the courts, and not the King, which had responsibility for the ultimate resolution of the disputes,[51] the King's Bench of the High Court held in 1610 that, at that time, the King had a prerogative power to prevent dangers that cannot later be prevented, and to make proclamation "upon pain of fine and imprisonment".[52] However, it was within the powers of the court to find as void the King's proclamations that are against law and reason. In other words, the King's acts of discretion pursuant to prerogative powers are for the King, but the court can review whether the prerogative power exists and what the scope of that power is.

The modern limits to constitutional competence are different. The House of Lords in *Council for Civil Service Unions v Minister for the Civil Service*[53] decided that the fact a decision is an exercise of a prerogative power does not mean it is necessarily unreviewable, though the subject matter of prerogative power means it often has that effect. The House of Lords has long held that it is the subject matter of the administrative decision that renders it beyond court's constitutional competence. [54] Those subject matters are those that should be dealt with by the democratic limbs of government, because they are grave and affect many people.[55] The more purely political a question is, the more it will be suited for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller will be the potential role of the court.[56] It is simply not within the

[50] (1460) 5 Rot. Parl. 375.

[51] *Prohibitions del Roy* (1607) 12 Co. Rep. 63.

[52] *Case of Proclamations* (1610) 12 Co. Rep. 74.

[53] [1985] 1 AC 374.

[54] See *R v Secretary of State for the Home Department, ex Parte Hosenball* [1977] 1 WLR 766.

[55] See *Marchiori v Environment Agency* [2002] EWCA Civ. 3, [38].

[56] See *A v Secretary of State for the Home Department* [2005] 2 AC 68, [29].

courts' constitutional function to decide the legality of such decisions.[57] For example, authorities demonstrate that decisions within the following areas are outside of the courts' constitutional competence:

- Decisions in relation to deployment of armed forces;[58]
- Decisions to enter into treaties;[59]
- National defence policy;[60]
- Foreign affairs;[61] and
- State spending on health, education and police.[62]

This article has already outlined that the separation of powers in the form of legislative supremacy is a basis that judicial review relies upon. The House of Lords in *Rehman* confirmed that it is the separation of powers that is the basis of constitutional incompetence.[63] It is entrusted to the executive and is thus outside legislative supremacy and the judicial discretion that such oversight would require in the circumstances. The House of Lords has also held that constitutional incompetence does not mean the matter cannot proceed, rather that the court cannot determine the considerations relevant to the impugned decision.[64] The proper scope of review will be discussed later in this article.

3.2. Institutional Incompetence

Non-justiciability based on institutional competence is less well-known, partly due to it being a far newer ground; this is perhaps the source of the confusion about the dichotomy. In short, the institutional incompetence doctrine applies when the courts are asked to review a decision that they lack the ability to measure

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[57] See *Ex Parte Molyneaux* [1986] 1 WLR 331, 336.

[58] See *Allbutt Ellis Smith v MOD CA* [2011] EWHC 1676; *Chandler v Director of Public Prosecutions* [1964] AC 763. See a similar position in the United States: *Johnson v Eisentranger*, 339 US 789 (1950).

[59] See *Blackburn v Attorney-General* [1971] 2 All ER 1380.

[60] See *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, [50], [53]; *Marchiori v Environment Agency*, cit. at 55.

[61] See *Council for Civil Service Unions v Minister for the Civil Service*, cit. at 53.

[62] See *R (Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, [23].

[63] See *Secretary of State for the Home Department v Rehman*, cit. at. 47, [50]-[53].

[64] See *Council for Civil Service Unions v Minister for the Civil Service*, cit. at 53, at 406 (Scarman L.J.).

properly. The courts have recognised this limitation on their own abilities. In *R (Lord Carlile) v Secretary of State for the Home Department*,[65] the Supreme Court stated:

> "Such cases often involve a judgment or prediction of a kind whose rationality can be assessed but whose correctness cannot in the nature of things be tested empirically".
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> The Court continued in the same paragraph:
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> "A recognition of the relative institutional competence of the executive and the courts in this field is a pragmatic judgment and not a constitutional limitation, it is consistent with the democratic values which are at the heart of the Convention".

The judiciary lacks institutional competence when it lacks manageable judicial standards, by which the decision can be judged.[66] That may be because the decision is overly complex on account of the multiplicity of factors, or because it is simply a value judgment. The boundary of when this will apply is very difficult to draw.[67] Some examples may prove helpful. The courts have held that the doctrine will apply in relation to matters of macro-economic policy.[68] Many such decisions that apply the institutional competency test would often also fail the constitutional competence test. However, the relevant point for institutional competency is that macro-economic policy decisions often have too many factors for the court to consider and the court cannot properly understand the considerations. That is why institutional competence prohibits courts from reviewing polycentric decisions to spend money in one way instead of another.[69] Further, the decision maker will have advice and a perspective that the courts do not.[70] For the same reasons, the court lacks institutional competency in respect of decisions that

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[65] [2014] UKSC 60, [32].

[66] See *States of Guernsey v Secretary of State for Environment, Food and Rural Affairs* [2016] EWHC 1847, [67]-[69].

[67] See *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [101].

[68] See *Ex parte Hammersmith and Fulham LBC* [1991] 1 AC 521; *Ex parte Nottinghamshire County Council* [1986] AC 240.

[69] See J. Jowell, *Of Vires and Vacuums: The Constitutional Context of Judicial Review*, cit. at 34.

[70] See *R (Geller) v Secretary of State for the Home Department* [2015] EWCA Civ. 45.

are made in "the national interest", and in respect of those decisions that require a degree of speculation of the actions of humans.[71] Similarly, the House of Lords noted in *Gouriet v Union of Postal Workers*,[72] in relation to a decision made by the Attorney-General in the public interest, that "the decisions to be made as to the public interest are not such as courts are fitted or equipped to make", and thus non-justiciable. Further examples are the entrusting of decisions to revenue commissioners, who have "unique knowledge of fiscal practices and policy" [73] and administrators who are entrusted with regulatory and welfare schemes.[74] In respect of human rights review, the Supreme Court has twice held that it is institutionally incompetent to determine if a law criminalising assisted suicide contravened ECHR.[75] As the above examples demonstrate, this doctrine covers those areas that rely on political and diplomatic areas, rather than neutral principles of law.[76] The result of being deemed non-justiciable on the basis of institutional incompetence is that the court must accept the assessment made by the political branch.[77]

Non-justiciability due to institutional competence should not be mistaken for the mere deference that is given to the elected arm of government in complex cases. Deference refers to the judiciary granting the decision maker a margin of appreciation, a scope of latitude.[78] The decision maker thus possesses a broader scope of discretion. Importantly, deference is not a complete submission to the executive by the judiciary; the relationship continues to be defined by mutual respect.[79] The degree of respect to the legislature varies on a sliding scale, depending upon the subject matter.[80] On the other hand, the institutional competence

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71 See *A v Secretary of State for the Home Department*, cit. at 56, [29].

72 [1978] AC 435 (Lord Wilberforce).

73 *R v Inland Revenue Commissioners; ex Parte Preston* [1985] AC 835, 864.

74 *Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430, [56].

75 *Pretty v DPP* [2001] UKHL 61; *R (Nicklinson) v Ministry of Justice*, cit. at 67.

76 See A. Banfield, G. Flynn, *Activism or Democracy? Judicial Review of Prerogative Powers and Executive Action*, cit. at 24, 139.

77 See *Gerhardy v Brown* [1985] 159 CLR 70, 138.

78 See *Re McGlinchey* [2013] NIQB 5, [21].

79 See *Re Johnstone* [2017] NIQB 33, [48].

80 See *R (Countryside Alliance) v Attorney-General* [2007] 1 AC 719, [45]; *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, [69].

ground is still a demarcation of functions and not deference.[81] In effect, it is a submission by the judiciary. It is the point where the decision cannot be reviewed at all.[82] Although both are based on the complexity of the decision before the decision maker, institutional competence is not the courts granting the decision maker an especially broad scope of discretion, rather is the decision being completely outside the realm of what the judiciary may review.

Institutional competence has gained heightened importance since the enactment of human rights legislation into UK law. Section 6 of the *Human Rights Act 1998* mandates that courts adjudicate on infringements of human rights by public authorities, which removes the constitutional competence ground of non-justiciability when that enactment applies. This is also the position in Canada.[83] However, two recent Supreme Court cases have demonstrated that, in the United Kingdom at least, that area is still subject to the ground of institutional competence.[84] After all, even though the courts have been granted jurisdiction to determine a question of fact under that legislation, the courts still have limits to what they are able to do. Although constitutional competence is foregone, the court is sometimes still ill-placed to determine the question at hand. Masterman points out that this is yet another means by which we can see that the constitutional and institutional bases of non-justiciability are distinct.[85] The above said, Conor McCormick points out a recent trend amongst the courts of adopting other reasons to reject applications for judicial review of decisions made by the Attorney-General,[86] which perhaps denotes a general narrowing of the institutional competence basis, or at least a reluctance amongst the courts to apply it.

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[81] See *A v Secretary of State for the Home Department*, cit. at 56, [29]; *R (Prolife Alliance) v British Broadcasting Corporation*, cit. at 2, 240.

[82] See *R (Lord Carlile) v Secretary of State for the Home Department*, cit. at 36, [32].

[83] See *Black v Canada (Prime Minister)* (2001) 199 DLR (4th) 228 (CA).

[84] See *R (Nicklinson) v Ministry of Justice*, cit. at 67, [166]; *R (Lord Carlile) v Secretary of State for the Home Department*, cit. at 36, [32].

[85] See R. Masterman, *The Separation of Powers in the Contemporary Constitution*, cit. at 8, 91.

[86] See C. McCormick, *Reviewing the Reviewability of the Attorney-General for Northern Ireland*, PL 22 (2018).

4. The Objective Contradictions and their Resolution

The analysis thus far clearly demonstrates that there exists a set of objective contradictions. First, there are constitutional reasons for the existence of judicial review, which oppose the constitutional underpinnings for limiting judicial review in respect of particular categories of decision through the constitutional ground of non-justiciability. They are seemingly incompatible constitutional principles that cannot both be maximised. Secondly, there are institutional benefits to judicial review, which pull against the empirical factors that underpin the institutional incompetence ground of non-justiciability. Such incompatible institutional observations also cannot both be maximised. These contradictions are distinct. There is little point pitting institutional factors against constitutional factors.

When investigating justiciability, the court starts with an assumption that decisions are generally reviewable and then asks whether the decision at hand falls within the categories of exception within either ground of non-justiciability. If so, the court applies the exception. In effect, the court appropriately adopts a categorical approach to resolve the respective contradictions. The subject matters that render a decision non-justiciable have long been fixed as a matter of constitutional law and will not be contested by this article. However, the common law rules that shape which grounds of judicial review can be undertaken by the courts in respect of non-justiciable decisions do not appear to have been formed with consideration of the respective contradictions. This article will now investigate each contradiction to determine which grounds of review ought to remain when the courts are asked to review a decision that fits within the respective categories of non-justiciability.

4.1. Constitutional Competence

The constitutional competence ground of non-justiciability raises a contradiction between the constitutional foundations of judicial review and the constitutional basis for limiting it. Resolving the contradiction must involve investigating the competing constitutional norms for the purposes of identifying whether, in respect of non-justiciable decisions constitutionally assigned to the executive, there is any constitutional basis for

some of the grounds of judicial review that can overcome the constitutional grounds for restricting such review.

The constitutional support for constitutional incompetence is in the separation of powers. As explained by the House of Lords in Rehman, the purpose behind non-justiciability is the upholding of separation of powers.[87] That is because those decisions are designated to the role of the executive, since that is a body with direct political accountability to the people. This has two effects on justiciability. First, it provides a positive basis for applying the doctrine. Secondly, this reasoning destroys some foundations for judicial review of these decisions. In short, the separation of powers basis for judicial review falls away completely when the doctrine of constitutional incompetence is applied. Thus, separation of powers cannot be a basis to maintain judicial review in such circumstances. However, that does not mean there is no basis for any judicial review. There remain two other bases: the rule of law and democracy, which the courts have not grappled with through discussion of constitutional priorities. One of two deductions might be made from the courts' silence on these points. First, it might be deduced that the separation of powers basis for the doctrine simply cannot be overcome by any countervailing considerations. Therefore, there is no point considering any other factors. Secondly, it could be deduced that both the rule of law and democracy as constitutional principles are subordinate to the separation of powers as a constitutional doctrine. In other words, the separation of powers precedes democracy and the rule of law. However, both of these deductions are untenable. An investigation into the nature of democracy and the rule of law demonstrates that they actually oversee the powers being exercised by the executive in non-justiciable decisions. Thus, they continue to provide a basis for judicial review.

Lord Hope contentiously argued in *Jackson v Attorney-General* [88] that the legislature does have limits. Legislative sovereignty is not absolute. While that is a controversial statement, there is a reasonable argument to support it. Of course, it by no

[87] See *Secretary of State for the Home Department v Rehman*, cit. at. 47, [50]-[53].
[88] [2006] 1 AC 262, [120].

means suggests that the courts can strike down legislation.[89] Elliott has observed that Parliament derives its power as sovereign from democracy as an ideal and consequently argued to this effect that since Parliament derives its power from democracy, the principles of democracy logically must override legislative supremacy.[90] Democracy must not derive from the legislature, but must be located above it. Though, of course, it is not the power of the legislature, but that of the executive that is relevant. The executive power is inferior and answerable to the legislative power. The legislature can redefine and shape the executive powers, even prerogative powers. So, logically, if democracy precedes legislative powers, then similarly it must precede executive powers. Thus, it must be the case that the principles of democracy are above the executive powers exercised in non-justiciable decisions, whatever their source. This means that the separation of powers cannot be a reason to limit judicial review without consideration of its democratic foundations.

A similar argument may be made with respect to the priority of the rule of law over legislative supremacy. Trevor Allan argued that the importance of legislative supremacy is limited by the political morality of the constitution, which means it is matched by, and coexists with, the rule of law.[91] Lord Woolf stated that it was the courts' responsibility to uphold the values, such as the rule of law, which limit Parliament.[92] Once again, the executive, being subservient to the legislature, must logically be beneath the rule of law. Perhaps more persuasive and more direct is the notion that, ever since the Magna Carta in 1215, the executive has been forced to act in accordance with the rule of law, the executive, through the King, having made that concession itself. The rule of law is expressly entrenched within the UK constitution as a limit to executive power. While the rule of law provisions of the Magna Carta have no bearing on individual cases, they continues to require the State to act according to the

[89] See C. Forsyth, *Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review*, 55 Cambridge L.J. 122 (1996).

[90] See M. Elliott, *The Constitutional Foundations of Judicial Review*, cit. at 6, 58.

[91] See T.R.S. Allan, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism*, 44 Cambridge L.J. 112 (1985).

[92] See Lord Woolf, *Droit Public-English Style*, cit. at 15, 69.

rule of law.[93] Since the rule of law thus precedes the executive's powers, it must also precede any non-justiciability arguments based on the separation of powers. The separation of powers cannot be a reason to abandon judicial review without any consideration of its rule of law foundations.

This article earlier demonstrated that there are three key foundations for judicial review, each of which enables particular types or characteristics of judicial review. This article has now argued that rule of law and democracy foundations for judicial review remain on foot in respect of decisions where the courts lack constitutional competence, and that the rule of law and democracy override the counter-foundation, namely the separation of powers. It must follow that "non-justiciable" decisions must be still susceptible to judicial review, but only insofar as it can be supported by the democracy and rule of law foundations. Of course, the negation of the separation of powers basis means that the doctrine of ultra vires is ruled out. The grounds of judicial review based on the ultra vires doctrine become unavailable, such as irrelevant and relevant considerations and Wednesbury unreasonableness.[94] However, there are other grounds that remain available. Support for this argument can be found in the Court of Appeal in *R (International Transport Roth GmbH) v Secretary of State for the Home Department*.[95] In that case, Laws LJ stated that non-justiciable decisions are not immune from judicial review, because "that would be repugnant to the rule of law". By way of example, the courts can still review whether the power exercised actually existed. After all, democracy requires that the courts ensure that no power exceeds its constitutional bounds.[96] The availability of such review has never been in question. What is perhaps more contentious is that this article proposes that the improper purpose, legitimate expectation, procedural fairness and adequate provision of reasons grounds of review ought to remain open due to their foundations in the rule of law and democracy.

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[93] See *Mayor Commonalty and Citizens of London v Samede* [2012] WLR(D) 41, [30].

[94] See *R v Director, Government Communications Headquarters, ex Parte Hodges* [1988] COD 123.

[95] See [2002] EWCA Civ 158, [85].

[96] See *Marchiori v Environment Agency*, cit. at 55, [40].

The improper purposes ground of judicial review is supported by both the rule of law and democracy foundations. Even though the executive may be entrusted with a particular decision, it would completely undermine democracy and the rule of law if it could exercise that power for some purpose other than that for which the power exists. The rule of law requires that the State not improperly use the powers conferred on it for some illegitimate purpose that would constitute an abuse of power. Therefore, review for improper purposes must remain open. The Court of Appeal in *Marchiori v Environmental Agency* has agreed with this proposition, stating in obiter dicta that:[97]

> "There is no conflict between this and the fact that upon questions of national defence, the courts will recognise that they are in no position to set limits upon the lawful exercise of discretionary power in the name of reasonableness. Judicial review remains available to cure the theoretical possibility of actual bad faith on the part of ministers making decisions of high policy".

Although the application was dismissed, *Marchiori* supports the argument made by this article that constitutional incompetence merely wipes out one foundation of judicial review, along with all of the relevant grounds that rely upon it, and leaves the other foundations, and that which they support, intact.

The legitimate expectation ground of review affords two types of protection. First, the courts' enforcement of a substantive expectation by holding that authority to that expectation derives from the ground of irrationality. Accordingly, it is based on ultra vires and accordingly negated in respect of non-justiciable decisions. Secondly, the procedural requirement imposed upon public authorities to make fair decisions by providing an opportunity to be heard, where it disappoints a legitimate expectation, is clearly founded in the rule of law. Such review falls within the rule of law requirement for formal equality. There is mixed case law as to whether this ground is reviewable in practice. The courts have held, even in respect of decisions relating to national security, that where a legitimate expectation is created from an express statement or regular practice, the government is

[97] Ibid. See also *Jahromi v Secretary of State for the Home Department* [1996] Imm AR 20, 26.

required to consult if it wishes to deviate from that legitimate expectation.[98] On the other hand, an earlier case held that the unfairness created by legitimate expectation was overridden by national security since the disclosure to the affected person was not in the interests of national security.[99] The court noted in the latter case that the decision would have been unfair if it had not been overridden by national security. However, according to the argument made by this article, that decision is incorrect. The legitimate expectation ground is reviewable irrespective of the nature of the impugned decision. However, that merely refers the decision makers to consider what disclosure is fair in the circumstances. Upon consideration of fairness, national security plays a significant role in minimising or completely militating against any disclosure, which is justiciable in the courts, though it often remains subject to public interest immunity. The practical outcome is that national security information will generally not be disclosed. However, it requires the balancing process nevertheless. The key difference is that the balancing test performed by the decision maker remains reviewable by the courts, subject to public interest immunity.

For similar reasons as above, as Lord Millett has stated, the rule of law also provides foundations for review based on procedural fairness.[100] The courts have held that there is no requirement to consult and invite representations from affected persons if to do so would disclose information about national security. The hearing rule does not apply in such circumstances.[101] On the other hand, the House of Lords held that review for procedural fairness was open for Jamaica, since procedural fairness is specified in Jamaica to be a constitutional right.[102] But one must question how that is different to the UK since the rule of law, which includes procedural fairness, is a constitutional obligation upon the United Kingdom government. As in the case

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[98] See *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [81]-[100].

[99] See *Council for Civil Service Unions v Minister for the Civil Service*, cit. at 53

[100] See *Thomas v Baptiste* [1999] 3 WLR 249, 259.

[101] See *R v Secretary of State for the Home Department; ex Parte Fayed (No 1)* [1998] 1 WLR 763, 776; *Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Ltd* [2002] EWCA Civ 1409, [57] (Laws L.J.).

[102] See *Lewis v Attorney-General of Jamaica* [2001] 2 AC 50.

of legitimate expectations above, the argument made by this article is that procedural fairness remains justiciable in respect of non-justiciable decisions, but the execution of the hearing rule in the name of fairness may consider the national security interest as a strong weight against disclosure. Once again, the weighing of fairness would be reviewable by the court, subject to public interest immunity. This reasoning forces the decision maker and the courts to consider the seriousness of the rights of the individual, ensuring that they are not blindly ignored, even if the result is often the same. The High Court adopted equivalent reasoning in *AHK*, where it expressed that decision makers need not fulfill any duty to advise of concerns and accept submissions if to do so would disclose information about national security, because it "is a limit on what fairness requires in any particular case, recognised by the common law".[103] The High Court was indicating that national security always trumps the fairness deliberation. However, stating that so categorically undermines the process of judicial review that the rule of law requires.

The reasons for decision ground of review also ought to remain open. There is no common law obligation upon an administrative decision-maker to provide reasons for a decision, it being only grounded in statute. Though if reasons are given, they must be adequate in respect of non-justiciable topics.[104] That is because the decision maker has volunteered the obligation. However, the High Court has stated that the position in relation to the provision of reasons is the same as that of procedural fairness. Fairness dictates that reasons need not be provided if to do so would affect national security.[105] Reviewing a decision on the basis of the non-existence or inadequacy of reasons is supported by the democracy foundation for judicial review. Democracy requires that citizens understand why decisions are made by the State so that the citizens are able to take a critical stance on them. Accordingly, this article argues that the non-justiciability of a decision ought not to remove the courts' ability to review since the foundation for the review remains. The fairness test ought to be

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103 *AHK v Secretary of State for the Home Department* [2012] EWHC 1117, [26].

104 See *Secretary of State for the Home Department v Special Adjudicator* [1997] EWHC Admin 759, [41].

105 See *AHK v Secretary of State for the Home Department,* cit. at 103 [29].

reviewable, again subject to public interest immunity for the same reasons.

4.2. Institutional Competence

This article earlier outlined the rationale behind why the courts are said to lack institutional competence in respect of particular categories of decisions. The approach of the courts, which have the role of determining the question of justiciability, appears to be one of "there are benefits to reviewing decisions such as this one, but we simply cannot review this decision", without consideration of the benefits that judicial review produces. For example, in *Lord Carlile*, the Supreme Court evaluated institutional competence in detail, yet at no point cited the benefits of the court actually performing the judicial review. It simply explained the reasons why it could not review the impugned decision in that case. However, institutional competence is not a simple "we cannot". The courts, such as the High Court in *Rideh*, [106] have labeled the term as "relative institutional competence", which denotes that the approach is actually "it would better if we did not", because the executive is better placed than the courts. In light of this observation, combined with the benefits available to performing judicial review, the scope of judicial review should strike a balance between deference to those with technical knowledge and review for transparency.[107] There is scope for a typical balancing process since there are vices and virtues in place that weigh against each other in what this article earlier labeled the objective contradiction. It seems odd to forego the virtues since balancing is possible, and in any given category of decisions it may be more prosperous for, say, democracy to have the decision reviewed despite a relative incompetence. The result is that even if judges are not better at making the impugned decision, it does not mean they should not have power to make it.[108] The balancing ought not to take place in the application level, but at the rule-forming level. The courts lack institutional competence to review decisions related to speculation as to future

[106] See *Secretary of State for the Home Department v Rideh* [2007] EWHC 804, [57].

[107] See E. Jordao, S. Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, cit. at. 1.

[108] See A. Harel, *Why Law Matters* (2014), 69.

human actions, high-level economic policy and consideration of the "national interest". Of course, the virtues and vices of reviewing such decisions will vary depending on what ground of review is being performed. The balance appears to weigh in favour of review for irrationality, unreasonableness, improper purpose, legitimate expectations, procedural fairness and adequate provision of reasons remaining open where the courts lack institutional competence.

Judicial review for irrationality ought to remain open in the face of institutional incompetence, which is in line with the law's current position.[109] The courts use a Socratic approach, which allows them to determine whether the reasoning adopted by the decision maker is irrational without overstepping their judicial function. The courts merely question the decision maker and can determine whether what it has presented is rational. Consequently, the argument that the executive is better placed falls away. Legitimacy is increased by the ensured rationality, and it appears likely that ensured rationality would have flow-on effects for broader decision-making.

The court also ought to be able to review for unreasonableness. The Supreme Court has held that institutional incompetence will mean that the courts can review the decision for neither proportionality[110] nor unreasonableness.[111] The lack of capacity for unreasonableness review is on the basis that the courts are not in a position to be able to set limits on the decision makers' discretion. An older decision of the Queen's Bench held that reasonableness covers all decisions, but it must be applied more cautiously, [112] which is in line with the position in Australia[113] and the United States.[114] The latter approach is correct according to the argument made by this article. Of course, this article concedes that in these types of decisions there must be an

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[109] See *R (Lord Carlile) v Secretary of State for the Home Department*, cit. at 36, [32]; *R (Gurung) v Ministry for Defence* [2002] EWHC 2463, [40].

[110] See *R (Nicklinson) v Ministry of Justice*, cit. at 67, [166].

[111] See *Marchiori v Environment Agency*, cit. at 55, [40].

[112] See *R v Ministry of Defence; ex Parte Smith* [1996] QB 517, 556.

[113] See *Maloney v The Queen* [2013] HCA 28; *Gerhardy v Brown*, cit. at 77, 138; *R v Poole; Ex parte Henry (No 2)* [1939] 61 CLR 634.

[114] See *Baker v Carr*, cit. at 43.

especially wide ambit of discretion awarded to the decision maker.[115] The Supreme Court has been clear about the premise that there must be a wide room for the exercise of judgment in questions such as national security and economic and social policy.[116] That cannot be contested, since, of course, the executive is better placed to determine the bounds of reasonableness, which, as is well known, constitute the width of decision a reasonable decision maker could come to. However, once again, the court can assess the bounds since it merely adopts a Socratic method to analyse the reasonableness of, and not replace, the original decision. The court only determines whether what the decision maker presents to it is reasonable, rather than declaring the scope of reasonableness. So the weight to be given to the vices of justiciability is relatively light. This is clearly outweighed by the weight in favour of reviewing. The reviewing for unreasonableness prevents the abuse of discretion. This in turn increases the legitimacy of government and its decisions, prevents abuses caused by political pressures, and is likely, to some extent, to positively influence wider decision making.

Decisions that are non-justiciable on the basis of institutional incompetence are still susceptible to judicial review on the basis of bad faith on the decision maker.[117] That is correctly so. On one side of the ledger, although the executive is in a better position to judge the impugned decision, it is not using that position properly. Consequently, the argument against justiciability falls away. In any event, the judiciary is able to competently determine whether a purpose is improper, which is the point of such review. On the other side of the ledger, the arguments in favour of justiciability are strengthened. Reviewing for bad faith consolidates the broader practice of ensuring that decisions are not made in bad faith, the decision is being judged by a judiciary that lacks political pressures to make such decisions for improper purposes, and it increases legitimacy if government must make decisions for proper purposes.

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115 See *R (Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2008] QB 289, [146]-[148].

116 See *Bank Mellat v Her Majesty's Treasury (No 2)*, cit. at 80, [93].

117 See *Ex parte Hammersmith and Fulham LBC*, cit. at 68, 596.

Review for relevant or irrelevant considerations is often one of statutory construction. To that extent, it can always remain justiciable since the legislature is specifying the relevant considerations, and not the court. The review in such a case is for whether jurisdiction existed at all. Outside of that, the approach of this article dictates that it ought to remain non-justiciable. Where the considerations are unspecified, courts cannot know the extent of the considerations that effect the decision. There is strong weight attached to the decision makers being better placed. The judiciary's inability means there can be few flow-on effects to broader decision making and little increase in the legitimacy to government decision making. There is some benefit to the decision being reviewed by a body that does not have political pressures to make decisions based on considerations it ought not to, but that would appear to be outweighed by the aforementioned factors.

Review for legitimate expectation, procedural fairness and provision of reasons can be dealt with together due to their similarities. In respect of each, the decision maker is not better placed to understand the procedural aspects than the court. Further, the benefits of allowing review for such proper procedural requirements have significant weight. There is pressure for government to take some action in economic or security crises,[118] and the reasons for such actions ought to be publicised as much as any other decision. Thus, review for these three grounds of review clearly ought to remain open in the face of institutional incompetence.

4.3. Engagement of Both Doctrines

Where the courts lack both constitutional and institutional competence in respect of a particular decision, the non-justiciability must apply cumulatively. However, it should be noted that constitutional incompetence prohibits all of the grounds that institutional incompetence does. Therefore, once a decision is deemed to be the subject of constitutional incompetence, its institutional standing is irrelevant. This article earlier espoused a two-step approach to justiciability. An

[118] See J. Fox, M. Stephenson, *Judicial Review as a Response to Political Posturing*, cit. at 25, 398.

observation of the respective scopes of the doctrines means that the first step ought to be constitutional competence.

5. Conclusion

The crucial role that judicial review of administrative actions plays in many jurisdictions is well recognised. However, it is also generally accepted that the judiciary has its limits, which must be incorporated into the scope of judicial review. Many factors affect the line where the judiciary's limit ought to be drawn, which makes the ideal scope of justiciability a complex notion. The complexity and historical changeability of the scope of justiciability means that a systematic approach ought to be undertaken to define justiciability correctly and provide a framework for further developments in the scope of justiciability. While particular outcomes may appear unlikely, one should never say never in the realm of judicial review.[119] As alluded to by Fordham, change is needed in shaping the parameters of judicial review, but it requires knowledge of its foundations combined with an element of creativity.[120]

This article has argued that the appropriate scope of justiciability in the United Kingdom should be determined by adopting a foundational and taxonomical approach. The proper taxonomy of legal doctrines is important in all areas of law. Similarly, while all areas of law ought to also consider their foundations, that is particularly so in relation to areas of public law, such as judicial review. Judicial review owes its existence to its constitutional and institutional foundations. It owes its limits of justiciability to corresponding constitutional and institutional incompetence. It is important to use the correct taxonomy of non-justiciability and distinguish these two grounds of non-justiciability since they are based on distinct reasons and work to militate against different foundations of judicial review.

Judicial review has its constitutional foundations in the separation of powers, rule of law and democracy. Each provides a constitutional basis for judicial review, though the scope of review each supports differs. However, the courts lack constitutional

[119] See *R v Panel on Takeovers and Mergers; ex Parte Fayed* [1992] BCC 524, 536.

[120] See M. Fordham, *Judicial Review Handbook*, cit. at 29, 667.

competence in respect of certain categories of administrative decisions, such as those that require judgment as to what is required for national security, because separation of powers dictates that such decisions ought to be left to the executive. Importantly, the executive's power to make such decisions is still subordinate to the rule of law and democracy. Therefore, constitutional incompetence cannot remove those grounds of review that are based on the rule of law and democracy, namely the improper purpose, legitimate expectation, procedural fairness and adequate provision of reasons grounds of review. The openness of those grounds of review still remains, subject to public interest immunity.

Judicial review also has foundations in the institutional benefits that it produces, such as the negating the vices associated with the liberal democratic process and the flow-on effects of legal decision making onto those decisions that are not subject to judicial review. However, those benefits are not always categorical. The courts lack institutional competence with respect to another category of decisions, which admittedly overlaps heavily with the category that produces constitutional incompetence, because the courts are not as well placed as the executive to evaluate the impugned decision. However, institutional incompetence must also fail to eliminate all grounds of review since it is based on merely an empirical observation of the ideal. Rather, the competing institutional observations ought to be weighed for each ground of review to determine whether that ground of review ought to remain available once a decision renders the courts institutionally incompetent. The balancing process reveals that the irrationality, unreasonableness, improper purpose, legitimate expectations, procedural fairness and adequate provision of reasons remain open, again subject to public interest immunity.

Non-justiciability in the UK is currently not a blanket prohibition on review of the impugned decision. However, the argument made by this article has the effect of widening justiciability. The practical effects of what this article has argued are that the constitutional incompetence ground of judicial review is developed to leave open review for procedural fairness and adequate provision of reasons. The institutional incompetence ground of non-justiciability is developed to leave open unreasonableness. These are important developments, but less

than the correct approach to justiciability, which is one based on foundations and taxonomy.