In an interview published on 19 July 2020, the Prime Minister said: "What we are looking at is whether there are some ways in which judicial review does indeed go too far or does indeed have perverse consequences that were not perhaps envisaged when the tradition of judicial review began". Evaluate this proposition and explain your preferred view.

Introduction

No man ought certainly to be a judge in [...] any cause in respect to which he has the least interest or bias.[1]

In a July 2020 interview with the *Sunday Telegraph*'s Edward Malnick, marking the end of his first year as Prime Minister,[2] Boris Johnson answered questions on topics ranging from the Covid-19 pandemic to university pricing and the recently issued judgment in Shamima Begum's appeal.[3] Begum travelled to Syria in 2015 with two other teenage friends to join ISIL.[4] In 2019 Sajid Javid, then Home Secretary, revoked her British citizenship.[5] Referring to Begum's appeal, Johnson remarked that it seemed 'at least odd and perverse that somebody can be entitled to legal aid when they are not only outside the country, but have had their citizenship deprived for the protection of national security'. He promised to look into this, and at whether judicial review goes 'too far' or produces 'perverse consequences' not 'envisaged when the tradition […] began'.

This paper will offer context to Johnson's remarks, evaluate his rhetoric and explore the tendencies within his framing of judicial review. It will then examine judicial review itself

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[1] James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* (1788) (Penguin, 1987) pp. 447 – 448.

[2] Edward Malnick, 'Boris Johnson Exclusive Interview: We Will Not Need Another National Lockdown', *The Sunday Telegraph*, July 19th 2020, available online at: <https://www.telegraph.co.uk/politics/2020/07/18/boris-johnson-exclusive-interview-will-not-need-another-national/> accessed 21st July 2020.

[3] *Begum v Special Immigration Appeals Commission and the Secretary of State for the Home Department* [2020] EWCA Civ 918.

[4] David Barrett and Martin Evans, 'Three 'Jihadi Brides' From London Who Travelled To Syria Will Not Face Terrorism Charges If They Return', *The Telegraph*, 10th March 2015, available online at: <https://www.telegraph.co.uk/news/uknews/11461693/Sisters-of-the-missing-jihadi-brides-to-face-radicalisation-tests.html> accessed 2nd September 2020.

[5] Rohit Kachroo, 'IS Schoolgirl Stripped of UK Citizenship', *ITV News*, February 19th 2019, available online at: <https://www.itv.com/news/2019-02-19/shamima-begum-has-uk-citizenship-revoked-by-british-government-itv-news-learns/> accessed 21st July 2020.

and its place within the British constitutional order. Finally, I will respond to Johnson and appraise judicial review's place and role in contemporary Britain.

Contextualising the Prime Minister's remarks

Boris Johnson's Conservative Party won a majority in the 2019 General Election pledging to 'Get Brexit Done' and to 'Unleash Britain's Potential'.[6] Its manifesto promised:

> to look at the broader aspects of our constitution: the relationship between the Government, Parliament and the courts; the functioning of the Royal Prerogative; the role of the House of Lords; and access to justice for ordinary people.

The manifesto further committed to:

> update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government. [The Conservatives] will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays.[7]

These pledges illustrate the degree to which, if successful, the Government would re-assess fundamental features of the British constitutional order, stretching beyond just judicial oversight. But there have been rumblings heard about judicial review from both sides of the political divide for some time. In 2001, Labour's Home Secretary, David Blunkett, remarked on the 'farcical' circumstances in which it can take up to 10 years to extradite individuals known to have engaged in terrorist activities: 'removing the constant use of judicial review, which frankly has become a lawyers' charter' would not, he argued, 'remove the basic freedom to apply due process of law'.[8] In 2003, Prime Minister Tony Blair wanted to cut the appeals process in asylum claims and 'remove those who fail [...] without further judicial

[6] 'Election Results 2019: Boris Johnson Returns to Power with Big Majority', *BBC News*, 13th December 2019, available online at: <https://www.bbc.co.uk/news/election-2019-50765773> accessed 12th September 2020.
[7] The Conservative and Unionist Party, 'Conservative and Unionist Party Manifesto 2019', 24th November 2019, available online at: <https://www.conservatives.com/our-plan> accessed 12th September 2020.
[8] Andrew Sparrow, 'Blunkett Attacks Judiciary in Fight Over Terrorism', *The Telegraph*, October 4th 2001, available online at: <https://www.telegraph.co.uk/news/uknews/1358394/Blunkett-attacks-judiciary-in-fight-over-terrorism.html> accessed 16th August 2020.

interference'.[9] Speaking to the CBI in 2012, Prime Minister David Cameron noted the strong foundations of some judicial reviews but proposed reforms, remarking that many are 'completely pointless'.[10] In 2013 the Justice Secretary, Chris Grayling, whilst conceding the importance of judicial review, said it should not be a 'promotional tool for countless Left-wing campaigners'.[11] In 2015 Dominic Cummings, former director of 'Vote Leave' and now a senior advisor within Johnson's government, found a problem in the courts' setting the scope of judicial review without Parliamentary oversight, predicting this would cause a 'mega clash' between Parliament and the courts.[12] In early 2020 the then Attorney General Geoffrey Cox described 'widespread concerns throughout our society […] as to whether judicial review is being used in a manner, often through frivolous applications, that needs better focus and care in its procedures and tests'.[13]

The concerns Cox highlights stem in part from the Supreme Court cases of *Miller (No.1)* and especially *Miller (No. 2)*.[14] They projected judicial review further into public consciousness and drew notorious media coverage; both have been read, particularly by right-wing commentators as judicial efforts to interfere with 'Brexit',[15] although it was made clear in *Miller (No. 1)*, that the 'wisdom' of the decision to withdraw from the EU was of no concern

[9] 'Blair's Asylum Stance 'Chilling', *BBC News*, 30th September 2003, available online at: <http://news.bbc.co.uk/1/hi/uk_politics/3152982.stm> accessed 26th August 2020.
[10] Prime Minister's Speech to the CBI, 19th November 2012, available online at: <https://www.gov.uk/government/speeches/prime-ministers-speech-to-cbi> accessed 17th August 2020.
[11] Chris Grayling, 'The Judicial Review System is not a Promotional Tool for Countless Left-wing Campaigners', *The Daily Mail*, 6th September 2013, available online at: <https://www.dailymail.co.uk/news/article-2413135/CHRIS-GRAYLING-Judicial-review-promotional-tool-Left-wing-campaigners.html> accessed 22nd August 2020.
[12] Dominic Cummings, 'On the Referendum #1: Gove and the Human Rights Act', *Dominic Cummings's Blog*, May 11th 2015: <https://dominiccummings.com/tag/echr/> accessed 26th July 2020.
[13] HC Hansard, 16th January 2020, Vol 669, available online at: <https://hansard.parliament.uk/Commons/2020-01-16/debates/54496335-2C79-4CDC-8AC3-7A5F3FE5AF54/LeavingTheEUHumanRights?highlight=account%20their%20administrative%20decisions#contribution-085A71A9-CDDF-4FD7-9292-405887507909> accessed 21st July 2020.
[14] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 and *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41.
[15] See James Black, 'Enemies of the People: Fury Over 'Out of Touch' Judges Who Have 'Declared War on Democracy' by Defying 17.4m Brexit Voters and who Could Trigger Constitutional Crisis', *The Daily Mail*, 3rd November 2016, available online at: <https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> accessed 16th August 2020. See Charles Moore, 'The Rule of Law Has Become the Rule of Lawyers', *The Spectator*, 28th September 2019, available online at: <https://www.spectator.co.uk/article/the-rule-of-law-has-become-the-rule-of-lawyers> accessed 20th July 2020.

to the court.[16] Critics have suggested that *Miller (No.2)*, in particular, provided particular impetus for the Government's present focus on judicial review.[17]

Judicial review has been further scrutinised since Johnson's comments. So-called 'activist lawyers' were singled out for criticism in an official Home Office video on 'Twitter' and then criticised by the Home Secretary, Priti Patel, for their role in using the courts to slow the deportation of failed asylum claimants.[18]

These critiques reveal tension between acknowledging the importance of judicial review and increasingly focused efforts to characterise the process as an excess serving partisan socio-political agendas. Notable in these critiques is the use emotive terms like 'farcical', 'completely pointless' and 'frivolous', all attempting to frame judicial review as conflicting with 'common sense' notions of society and governance. The Prime Minister's present evaluation of judicial review is no different and it is to his language that I will now turn.

The Prime Minister's language

Johnson's comments offer neither substantive legal analysis, nor do they develop existing academic critiques of judicial review, which are worthy of evaluation and study in their own right.[19] Given the lack of legal engagement, his language warrants attention. Repetitions of 'indeed' and use of 'perhaps' alongside the glib suggestion that there may be '*some* ways' in which judicial review goes 'too far' seem intended to soften what is in fact an important intervention by the Prime Minister. These imply the Government will approach reform to judicial review with neutrality. However, given that his motivation to do so focusses on investigating its 'perverse' consequences or whether it goes 'too far', it seems logical to

[16] *Miller (No. 1)*, at 3.
[17] Mark Elliott, 'The Judicial Review Review III: Limiting Judicial Review by 'Clarifying' Non-justiciability – or Putting Lipstick on the Proverbial Pig', *Public Law for Everyone*, August 2020, available online at: <https://publiclawforeveryone.com/2020/08/20/the-judicial-review-review-iii-limiting-judicial-review-by-clarifying-non-justiciability-or-putting-lipstick-on-the-proverbial-pig/> accessed 20th August 2020.
[18] Richard Ford, Jonathan Ames and Steven Swinford, 'Lawyers Scupper Priti Patel's Bid to Send Channel Migrants to Spain', *The Times*, 28th August, 2020, available online at: <https://www.thetimes.co.uk/edition/news/lawyers-scupper-priti-patels-bid-to-send-channel-migrants-to-spain-hqv5qjhng> accessed 3rd September 2020.
[19] See Jeremy Waldron 'The Core of the Case Against Judicial Review', *Yale Law Journal*, May 2006, Vol. 121, No. 7 (May, 2006) and Annabelle Lever 'Democracy and Judicial Review: Are they Really Incompatible?', *Perspectives on Politics*, Dec., 2009, Vol. 7, No. 4 (Dec., 2009). For a response to Waldron, see Dimitrios Kyritsis, 'Representation and Waldron's Objection to Judicial Review', *Oxford Journal of Legal Studies*, Vol. 26, No. 4 (2006) pp. 733 – 751.

conclude that Johnson has a distinct vision for reform to this area. Calling judicial review a 'tradition' implies a sense of gravity but risks colouring it as an anachronism. [20] This tendentially undermines its place in the democratic order, doing a disservice to the debates which have developed around judicial review's basis and purpose that have helped reveal its standing within our constitutional framework.[21] 'Perverse', meaning against what is 'reasonable, logical, expected, or required' is similarly loaded.[22] 'Perverse consequences' suggests the existence of a commonly understood ethical standard against which all judicial reviews could be assessed.

A consequentialist approach to judicial review?

Johnson's approach speaks the language of Utilitarianism in assuming the capacity to assess things in terms of their *consequences* rather than for their inherent merit. Hence 'perverse' carries the majoritarian implication that displeasing or unforeseen consequences should be rejected in the name of 'common sense' policy making which may prove popular but lacks both detail and substantive legal engagement.

This view is unworkable within the UK's socio-political frameworks. Jury trials, for example, uphold the reality that contentious results may occur but are a price worth paying to ensure that the innocent are not convicted of crimes they did not commit. This is not to allow the guilty to walk free but is in service of the maxim 'better that ten guilty should escape than one innocent person suffer'. Samuel Johnson explained the point in the following terms; 'unless civil institutions ensure protection of the innocent, all confidence that mankind should have in them, would be lost'.[23] Justice is not consequentialist, it should facilitate the uncovering of truth and this search cannot be undertaken seriously when one knows what one wants to discover before proceedings have begun. It is therefore nonsensical to seek to

[20] *Oxford English Dictionary*, 'Tradition', *n*., 1a, 'A belief, statement, custom, etc., handed down by non-written means (esp. word of mouth, or practice) from generation to generation; such beliefs, etc., considered collectively.'

[21] See Paul Craig, 'Ultra Vires and the Foundation of Judicial Review', *The Cambridge Law Journal*, March 1998, Vol. 57, No. 1 pp. 63 – 90.

[22] *Oxford English Dictionary*, 'Perverse', *adj*., 1a, 'Of a person, action, etc.: going or disposed to go against what is reasonable, logical, expected, or required; contrary, fickle, irrational. Perverse also has a legal meaning: 'Perverse', *adj*., 4. *Law*., 'Against the weight of evidence or the direction of the judge on a point of law'. Given Johnson's use of the word both in the context of *Begum* and in relation to judicial review, I suggest that he is evoking the meaning given above.

[23] James Boswell, *Life of Johnson* [1791], (Oxford, 2008) p. 1258-1259.

eliminate 'perverse consequences' of judicial review, given, first, the subjective nature of 'perversity' and second, the fact that a ruling or judicial decision can displease many but remain correct. This is the flaw in Jeremy Bentham's consequentialism which views 'the greatest happiness of the greatest number […] [as] the measure of right and wrong'.[24] Such an approach misses the central functions of judicial review within our democracy and under the rule of law. [25] I will turn to these functions after an examination of judicial review itself.

Judicial review and the rule of law

The purpose of judicial review is for the 'courts [to] enforce compliance by public authorities with the law'.[26] It 'ensure[s] administrative [agencies do] not exceed the authority delegated to [them] by Parliament'.[27] Beyond questions of lawfulness, the codification of the European Convention on Human Rights into UK law with the Human Rights Act 1998 (HRA 1998) has focused questions around individuals' *rights*,[28] being both praised and criticised for facilitating greater judicial intervention in relation to the administration of government.[29]

Judicial review is a central component of traditional standardisations of the rule of law within the British constitutional context.[30] Theories of the rule of law have attracted rigorous academic treatment in both legal and philosophical settings since the term was coined by nineteenth century jurist A V Dicey.[31] Given the discourses that have developed around the subject, the rule of law's elusiveness as a legal and philosophical concept is self-evident.[32] Lord Bingham though provided the following basis for considering the subject:

[24] John Stuart Mill, *Mill on Bentham and Coleridge* (Chatto & Windus, 1967) p. 92.
[25] *Oxford English Dictionary*, 'Consequentialism', *n*., 'An ethical doctrine which holds that the morality of an action is to be judged solely by its consequences'.
[26] Tom Bingham, *The Rule of Law* (Penguin, 2011) p. 60.
[27] Douglas E Edlin, 'From Ambiguity to Legality: The Future of English Judicial Review', *The American Journal of Comparative Law*, Spring 2004, Vol. 52, No. 2 (Spring, 2004) p. 383.
[28] Thomas Poole, 'Legitimacy, Rights and Judicial Review', *Oxford Journal of Legal Studies*, Winter 2005, Vol. 25, No. 4 (Winter, 2005) pp. 697 – 725.
[29] Robert Leach, Bill Coxall and Lynton Robins, *British Politics* (Palgrave, 2006,) p. 257.
[30] Mark Elliott, *The Constitutional Foundations of Judicial Review*, ed. Tom Hadden (Bloomsbury, 2001) p 100.
[31] See A V Dicey, *Introduction to the Law of the Constitution* (1885) (MacMillan, 1897)
[32] See Roberto Mangabeira Unger, *Law in Modern Society* (Simon & Schuster, 1977), Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1983), T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003).

> all persons and authorities within the state, whether public of private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.[33]

Judicial review is a conduit allowing parties the mechanism to ensure adherence to this principle by the state and state agencies. Allen marked the rule of law as the foundation of judicial review: 'as a constitutional principle', he argues, 'it operates to direct the reasoning and functions of the courts as much as the doctrine of parliamentary sovereignty'.[34]

Judicial review is the domain of public law and exploring it is helped by assessing public law's role, distinguished by Harlow and Rawlings into two theories: 'red light' and 'green light'; the 'amber' light theory, a later addition, has gained prominence since the introduction of the HRA 1998.[35] The 'red' and 'green light' standardisations are helpfully broken down by Adam Tomkins into differing perspectives on the law, the state, notions of control and personal liberty. In 'red light' theory, public law is autonomous and superior to politics; it keeps the state in check through adjudication in the courts which advances individual liberty. 'Green light' theory views the law as a discourse of the political; public law is to encourage good administrative practices to advance individual liberty. 'Amber light' theory views public law as limiting the actions of state agencies when they contravene fundamental principles of legality.[36]

The 'red' and 'amber light' distinctions expose division in critical assessments of judicial review which are distinguishable according to the orthodox *ultra vires* and common law models of judicial review.[37] The *ultra vires* approach justifies judicial review as a basis to enforce the intentions of Parliament, under the conventional Diceyan view of Parliamentary sovereignty.[38] It has legitimacy insofar as it provides the avenue through which the courts can

[33] Bingham, p. 8.
[34] T R S Allan, 'Legislative Supremacy and The Rule of Law: Democracy and Constitutionalism', *Cambridge Law Journal*, 44(1), March 1985, pp. 111 – 144, p. 114.
[35] C Harlow and R Rawlings, *Law and Administration* (Weidenfeld & Nicholson, 1984).
[36] This is Adam Tomkins's analysis from his review of Martin Loughlin's *Sword and Scales: An Examination of the Relationship between Law and Politics*. See Adam Tomkins, 'Review: In Defence of the Political Constitution', Reviewed Work: *Sword and Scales: An Examination of the Relationship between Law and Politics* by Martin Loughlin, *Oxford Journal of Legal Studies*, Spring 2002, Vol. 22, No. 1 (Spring 2002) pp. 157 – 175.
[37] Edlin, p. 384.
[38] See A V Dicey, *The Law of the Constitution*, ed. J W F Alison (Oxford, 2013).

apply the intentions of parliament.[39] The common law model, on the other hand, views judicial review as separate from 'legislative intention or authorisation', marked by a more reserved stance towards absolute Parliamentary sovereignty, favouring a model focused on legality and adherence to rule of law.[40] Under this model, the courts will seek to give effect to the 'body of norms which lie at the core of British legal culture'.[41]

The *ultra vires* model fits readily within orthodox standardisations of the British constitutional settlement. Forsyth, supporting it, argues that notwithstanding a fundamental reassessment of the constitutional order, the courts' role should remain that of 'guardians' rather than 'subverters' of Parliamentary sovereignty; their scope ought not extend beyond enforcing Parliament's intentions.[42] The common law model is more elusive since its justification cannot be found in as prominent a British constitutional pillar as Parliamentary sovereignty. It is clear, though, that judicial review, historically, has its origins in the common law, as evidenced in the earliest authorities on the subject.[43] Wade explained how seventeenth century jurists such as Coke 'base[d] judicial review on the capacity of the common law to control public power' because public and private law were not separate at the time.[44] Beyond these historical origins, judicial review has developed substantively through the common law.[45]

The gap between the *ultra vires* and common law models of judicial review reveals itself in relation to 'ouster clauses'. These are a tool used in an act of Parliament to prevent a public body from being scrutinised by the courts.[46] Here, the courts have appeared willing to set the scope of their own competence in relation to this principle. In *Gilmore*, for example, Denning LJ asserted that Parliament could not protect a body from judicial review except by the 'most

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[39] Paul Craig, p. 64.
[40] Edlin, p. 387.
[41] Mark Elliott pp. 104 – 5.
[42] Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review', *The Cambridge Law Journal*, Vol. 55, No. 1, March 1996, pp. 122 – 140, p 137.
[43] *Bagg's Case* [1615] 11 CO. Rep. 93b.
[44] Paul Craig, p. 87.
[45] Consider for example the scope of judicial review with regards to the *content* of decisions that emerged in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 with the principle of '*Wednesbury* unreasonableness'. The three heads of judicial review, i.e. illegality, irrationality and procedural impropriety, are not set out in statute but were, rather, by Lord Diplock definitively in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. The scope of judicial review in relation to non-statutory bodies can be seen in *R v Panel on Take-overs and Mergers, ex p Datafin* [1987] QB 815 and also *R v Advertising Standards Authority Ltd, ex p Insurance Services plc* [1990] 2 Admin LR 77.
[46] See Robert Craig, 'Ouster Clauses, Separation of Powers and the Intention of Parliament: from *Anisminic* to *Privacy International*', *Public Law*, October 2018, 570 – 584.

clear and explicit words'.[47] In the key authority on the subject, *Anisminic*, Lord Reid distinguished between 'determinations' and 'purported determinations'. The latter would remain justiciable despite an explicit statutory clause providing that 'determinations […] not be called into question in any court of law'.[48] Given the clarity of the language used in the statute, this is a stark intervention.[49] The decision in *Anisminic* and indeed in judicial treatment of ouster clauses more generally suggest the evocation of fundamental rule of law principles. It suggests, as Wade has argued, that certain legal principles, including judicial review may be impossible for a sovereign Parliament to abolish.[50] This is reflected in case law, for example in Lord Hoffmann's dicta from *Simms* that:

> in the absence of express language or necessary implication to the contrary, the courts presume that even the most general words were intended to be subject to the basic rights of the individual.[51]

Lord Hope's dicta from *Jackson*, although merely persuasive and not binding, provides further instruction. Hope argued, 'gradually […] the English principle of absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified'. He went on: 'the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based'.[52] Lord Steyn, also in *Jackson*, suggested, given the development of Parliamentary sovereignty through the common law, that the courts might have competence to stop Parliament, if it were to seek to abolish certain 'constitutional fundamentals', including perhaps judicial review or the ordinary role of the courts.[53]

Treatment of 'ouster clauses' and the courts' approach to these more fundamental questions show tension at the heart of the constitutional discourse. The *ultra vires* model of judicial review lends itself easily to an analysis favouring the centrality of Parliamentary sovereignty within the constitutional order. This is the model of judicial review with which Boris Johnson would presumably be most at ease. It is though, inefficient, failing to recognise the degree to

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[47] *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 Q.B 574, at 583.
[48] Edlin, p. 391. See also Foreign Compensation Act 1950.
[49] Foreign Compensation Act 1950.
[50] H W R Wade and C F Forsyth, *Administrative Law* (Oxford, 2000) p. 708.
[51] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, at 131.
[52] *R (Jackson) v Attorney General* [2006] 1 AC 262, at 303 and 304.
[53] Ibid. at 302.

which the rule of law also forms part of the UK's constitution. Allan helpfully sums this up as follows:

> the rule of law, as a juristic principle, […] embodies the liberal and individualistic bias of the common law in favour of the citizen. It transcends the principle of legality by authorising, and demanding, an attitude of independence and scepticism on the part of the judges in the face of claims of governmental power.[54]

Johnson's analysis either misses or ignores this principle, favouring a more far-reaching approach to constitutional reform, which evidences an ominous disregard for the rule of law. Given the commitments of the Conservative Party Manifesto, and Johnson's insistence in his *Sunday Telegraph* interview that 'this is a Government that absolutely will not be diverted, will not be blocked off course', the latter seems more likely. [55]

Conclusion

The absolute absence of burden causes man to be lighter than air.[56]

The development of judicial review under the common law shows a growing emphasis on the courts' role in protecting fundamental rights, [57] especially, for example in relation to ouster clauses, in the face of attempts to exclude judicial scrutiny. Although with the potential to problematise the Diceyan view of Parliamentary sovereignty, this model should claim democratic legitimacy. It creates a second 'veto point' in the legislative order of any governmental act which might compromise core principles under the rule of law.[58]

It is vital therefore to separate substantive critiques of judicial review from those, like the Prime Minister's, which appear politically self-serving. There are questions to be considered around streamlining judicial review, for example, further codifying some of the procedures

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[54] Allan, p. 119.
[55] Edward Malnick, 'Boris Johnson Exclusive Interview: We Will Not Need Another National Lockdown', *The Sunday Telegraph*, July 19th 2020, available online at: <https://www.telegraph.co.uk/politics/2020/07/18/boris-johnson-exclusive-interview-will-not-need-another-national/> accessed 21st July 2020.
[56] Milan Kundera, *The Unbearable Lightness of Being*, trans. Michael Henry Heim (Faber & Faber, 1995) p. 5
[57] *R (Jackson) v Attorney General* [2006] 1 AC 262, at 302.
[58] See Richard H Fallon Jr, 'The Core of an Uneasy Case for Judicial Review', *Harvard Law Review*, Vol. 121, No. 7, (May 2008), pp. 1693 – 1736.

beyond those of 1977 – 81.[59] These merit objective, rounded study. Johnson's critique though seems disingenuous and suggests the attitude of one unburdened by his immense responsibilities. His prevarications around the possibility that judicial review may '*perhaps*' go too far, and the illusion of a 'common sense' approach his language is designed to conjure, reveals Johnson's tendency to treat serious matters with lightness and triviality.[60] Such an attitude conflicts with the thoughtful approach one might expect a Prime Minister to adopt when considering the role of as fundamental a tenet as judicial review. Indeed, the questions that have emerged around the objectivity of the panel appointed by the Government to consider judicial review, will provoke further unease about how substantive reform to this area of the law will be handled. [61]

The place and role of judicial review has been diminished because of what Allan highlighted as a 'failure to recognise the importance and scope of the rule of law as a juristic principle', leading to 'fears of a constitutional imbalance' with Parliamentary sovereignty.[62] This failure has helped create the impression, particularly in the minds of lay commentators, that courts, judges and now 'activist lawyers', regularly exceed their competence, creating a power and constitutional discrepancy that is in need of redress. This failure has enabled a populist discourse to develop around the legal profession, the implications of which may bring worse perversities than Johnson's statement envisaged. In light of troubling developments around the Government's commitment to its international treaty obligations,[63] Boris Johnson should remember the words of one notable former Conservative minister: the degree to which

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[59] Senior Courts Act 1981.

[60] Jon Sharman and Benjamin Kentish, 'Boris Johnson: 15 of the Conservative Leader's Most Calamitous Mistakes and Gaffes', *The Independent*, 23rd July 2019, available online at: <https://www.independent.co.uk/news/uk/politics/boris-johnson-prime-minister-leader-mistakes-gaffes-iran-libya-muslims-europe-sacked-a9016666.html> accessed 22nd September 2020.

[61] Jonathan Ames and Oliver Wright, 'Former Minister to Lead Enquiry into Judges' Power', *The Times*, 3rd August 2020, available online at: <https://www.thetimes.co.uk/article/questions-over-former-minister-investigating-judicial-review-lpbzfhqmz> accessed 4th September 2020. See also Edward Faulks, 'The Supreme Courts Prorogation Judgment Unbalanced our Constitution. MPs Should Make a Correction', *Conservative Home*, 7th February 2020, available online at: <https://www.conservativehome.com/thinktankcentral/2020/02/edward-faulks-the-supreme-courts-prorogation-judgement-unbalanced-our-constitution-the-commons-needs-to-make-a-correction.html> accessed 10th September 2020.

[62] Allan, p. 114.

[63] Nicola Slawson, 'Brexit: Gove Claims Internal Market Bill Protects UK Integrity from EU 'Threat'', *The Guardian*, available online at: <https://www.theguardian.com/politics/2020/sep/12/brexit-gove-claims-internal-market-bill-protects-uk-integrity-from-eu-threat> accessed 12th September 2020.

judicial review tests political agendas and the administration of government, should be 'a judgment of its correctness'.[64]

[64] HC Hansard, 27h October 2014, Vol 756, available online at: <https://hansard.parliament.uk/Lords/2014-10-27/debates/14102714000824/CriminalJusticeAndCourtsBill> accessed 26th July 2020.

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