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Judicial Review of Commercial Regulation

1. Judicial Review and the Administrative State in Context

The basic idea that courts must police the boundaries of administrative power is firmly based on the constitutional principle of the rule of law. The function thus ascribed to the judiciary *vis-à-vis* the limitation of executive actions is crucial to promote the virtues of legality, fairness, and reasonableness which this principle has traditionally embodied.[1]

British courts have long been required to vindicate these norms on review in order that citizens are protected from unlawful decision-making in the public sphere. Of course, this endeavour is not devoid of theoretical and practical issues, as it presents the court with countervailing forces which it must seek to balance. Indeed the legal positions of Parliament, the government, the courts, and private parties in judicial review cases each contribute to the intricate combination of arguments which form the background against which the judge applies the law.

More specifically, it can be argued that differences in the judicial emphasis on these positions have explicitly furnished an intelligible justification for the solution concerning most of the controversial issues in the field, such as those relating to the foundations of judicial review, standing to apply, scope of supervision, effectuation of legislative intention, non-statutory intervention, grounds of review, and intensity.

In considering the relevance and content of these criteria, the courts have also struggled to deal with the manner in which administrative law evolves over time. This development relates, for instance, to the dynamic influence exerted by European law, the heightened status of human rights, more complex statutory regulation, and fluid changes in the structures of government.

[1] This proposition is uncontroversial and it has been recognized by many distinguished authors. See, for example, Dicey, Albert V., *An Introduction to the Study of the Law of the Constitution*, (London: Macmillan, 1885) especially chapters I, IV, XII and XIII; Raz, Joseph, *The Authority of Law*, (Oxford: Oxford University Press, 1979) 210–221; Jowell, J., 'The Rule of Law Today', in *The Changing Constitution*, J. Jowell and D. Oliver (eds.), (Oxford: Oxford University Press, 1994) 17–23; Craig, Paul, 'Formal and substantive conceptions of the Rule of Law: An analytical framework' [1997] *Public Law*, 467–487; Allan, Trevor, 'The Rule of Law as the Foundation of Judicial Review', in *Judicial Review and the Constitution*, Christopher Forsyth (ed.), (Oxford: Hart Publishing, 2000) 419; Woolf, Lord H. 'The Rule of Law and a Change in the Constitution' [2004] 63(2) *Cambridge Law Journal*, 317–329; and Bingham, Sir T. 'The Rule of Law' [2007] 66(1) *Cambridge Law Journal*, 67–85.

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In light of this sophisticated array of arguments, there is little doubt that, while institutional and legal principles can guide the court's exercise of supervisory supervision, they are not sufficiently exact to allow it to determine the precise approach which should be adopted in every context. The theoretical framework which permits that approach to be justified also requires the judge to evaluate the characteristics of the particular legal environment in which the decision-making process has been conducted. Consequently, it has become a settled principle of British and European law that the application of different standards of judicial scrutiny in a public law case depends upon the subject matter at hand.[2] As Lord Steyn said in *Daly*: 'in law, context is everything'.[3]

Context-sensitive analysis therefore can and should be harnessed to serve a better understanding of the development of any model of supervision. If judicial control is not to be likened to insensitive and inaccurate proceedings in which legal nuances are regrettably overlooked, then it must be rationalized in terms of subject-matter. Although this is still a very general consideration, it is one which crystallizes in the purpose of this book. In particular, by acknowledging the need to give contextual validation to the manner in which oversight powers are exercised, the above-mentioned principle may enhance thematic research and scholarship in the area of judicial review. The present work, therefore, attempts to undertake such an analysis within the specific context of commercial regulation, to which we now turn.

2. Judicial Review in the Commercial Context

There are infinite ways in which economic activities of the individual may be affected by bodies performing public functions. Although a significant number of these decisions are capable of coming before the courts in judicial review proceedings, not all of these challenges can be included within the narrower phenomenon of judicial review in the commercial context. What really makes this subject distinguishable from other aspects of judicial review is that it is essentially and directly concerned with the development and protection of economic activities,[4] that is to say, it deals with applications against public decisions which have a significant impact on the operation of markets through command and control.[5] Thus, it can

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[2] See generally Laws, Sir John, 'Wednesbury', in *The Golden Metwand and the Crooked Cord*, C.F. Forsyth and I. Hare (eds.), (Oxford: Oxford University Press, 1998) 313; De Búrca, Gráinne, 'The Principle of Proportionality and its Application in EC Law' [1993] 13 *Yearbook of European Law*, 105; Elliott, Mark, 'The Human Rights Act 1998 and the Standard of Substantive Review' [2001] 60(2) *Cambridge Law Journal*, 312–315; and Clayton, Richard, 'Principles for Judicial Deference' [2006] 11(2) *Judicial Review*, 129–130.

[3] *R v. Secretary of State for the Home Department, ex p Daly* [2001] U.K.H.L. 26, [2001] 2 A.C. 532 at [32]. See also the dictum of Sir Thomas Bingham in *R v. Ministry of Defence, ex p Smith* [1996] Q.B. 517, at 554; the dictum of Lord Hope of Craighead in *R v. Secretary of State for the Home Department, ex p Launder* [1997] 3 All E.R. 992; the dictum of Laws LJ in *R v. Secretary of State for the Home Department, ex p Amjad Mahmood* [2001] H.R.L.R. 14; and in *International Transport Roth GmbH v. Secretary of State for the Home Department* [2002] E.W.C.A. Civ 158, paragraph 76.

[4] Engelman, Philip, *Commercial Judicial Review*, (London: Sweet & Maxwell, 2001), 3.

[5] This is Prosser's core conception of market regulation, which is also close to the definitions used by many economists, industries, and in popular debate. Prosser, Tony, *Law and Regulators*, (Oxford: Clarendon Press, 1997) 4.

be differentiated from other areas of judicial review such as immigration, health, education, housing, planning, and prisoner rights which, although they may have a considerable effect on economic activities, are not principally concerned with commercial decisions.

Nevertheless, it has to be emphasized that there is an inevitable overlap in certain cases arising in both commercial and other contexts. For example, there have been instances of decision-making involving both economic interests and international sanctions,[6] safety of life at sea,[7] and the protection of health.[8] For this reason, it seems complex to attempt a definition of the subject which would provide a pristine demarcation between commercial cases and the rest. However, despite this difficulty in accurately identifying the boundaries of judicial review in the market context, secondary sources provide us with a relatively workable criterion based on the authority's function. In this sense, commercial judicial review is concerned with the supervision of those bodies responsible for the regulation of economic activities.[9]

There are, in fact, a remarkable number of governmental departments and independent agencies empowered to oversee the efficient working of different markets such as TV and radio broadcasting,[10] financial services,[11] public utilities,[12]

[6] See *R v. The Treasury and The Bank of England, ex p Centro-Com (SRL)* [1994] The Times, 27 May, concerning the implementation of the United Nations Security Council Resolution 757 which prohibits any person from supplying or delivering any goods to a person connected with Serbia or Montenegro, in response to the tragic events which had been taking place in Yugoslavia.

[7] See *R v. Department of Transport, ex p Presvac Engineering Ltd*, [1991] The Times, 10 July. In that case Presvac Engineering, a company which specializes in the manufacture of valves for ship, cargo and bunker tanks, sought to challenge a certificate issued by the Secretary of State for Transport which certified that Martin valves (Presvac's competitor) comply with regulations laid pursuant to the International Convention for the Safety of Life at Sea, 1974. See also *R v. Secretary of State for Social Services, ex p Wellcome Foundation* [1988] 2 All E.R. 684. In 1998, this Department underwent a de-merger, creating freestanding departments for Health and Social Security. The latter merged into the Department for Work and Pensions in 2001.

[8] See *R v. Secretary of State for Health, ex p United States Tobacco International Inc.* [1991] 3 W.L.R. 529. In this case the applicants sought judicial review of the validity of the Oral Snuff (Safety) Regulations 1989, which prohibited persons from supplying 'oral snuff', a substance manufactured from tobacco plants, on the ground of its possible carcinogenic effects.

[9] Gordon, Richard, *Judicial Review: Law and Procedure*, 2nd edn., (London: Sweet & Maxwell, 1996), 246. See also Black, J., Muchlinski, T. and Walker, P. (eds.), *Commercial Regulation and Judicial Review*, (Oxford: Hart Publishing, 1998) 1–17; Engelman, (as above n. 4), 3–46; Lidbetter, Andrew, 'Judicial Review in the Company and Commercial Context' [1995] 10 *Butterworths Journal of International Banking and Financial Law*, 63–70.

[10] The Office of Communications (OFCOM), established by the Office of Communications Act 2002 and empowered under the Communications Act 2003.

[11] a) The Financial Services Authority. This body was created in October 1997 as successor to the Securities and Investments Board, and now exercises statutory powers given to it by the Financial Services and Markets Act 2000; b) the Takeover Panel. This independent body was established in 1968 in order to supervise and regulate takeovers and other matters in accordance with the rules set out in the City Code on Takeovers and Mergers. Its statutory functions are set out in and under Chapter 1 of Part 28 of the Companies Act 2006. It has also been designated as the supervisory authority to carry out certain regulatory functions in relation to takeovers pursuant to the Directive on Takeover Bids (2004/25/EC); c) and the Financial Ombudsman Service. This body was established by the Financial Services and Markets Act 2000 as an independent public body which resolves individual disputes between consumers and financial services firms.

[12] a) The Water Services Regulation Authority (OFWAT), which regulates the privatized water and sewerage industry in England and Wales pursuant to the Water Act 2003; b) The Office of Gas

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banking,[13] trade and industry,[14] agriculture,[15] and the gaming industry.[16] These bodies make decisions on a regular basis which may have far reaching consequences on the respective markets. In particular, it must be emphasized that, given the increasing importance of law in commercial regulation and the ever-lengthening agenda of complex regulatory issues, executive decisions adopted by these authorities may not only alter the operation of private business; they may also substantially affect the position of numerous individuals who have become entitled to test their rights and obligations against the legal frameworks of each economic sector.[17]

This factor, in turn, has significantly enhanced the role of the courts as the guardians of law and protectors of individual rights, so that there is no difficulty over the principle that regulatory decisions are subject to judicial review.[18] Rather, applications for judicial review can be brought against the regulator itself if it is considered that it has exceeded its powers. In fact, the increasing number of applications for judicial review brought against these authorities shows clearly that they have no immunity from the rule of law. Specifically, applications for judicial review have been brought against many of their activities including, *inter alia*, licensing, rule-making, interpreting rules, determining prices and conditions of service, deciding disputes, monitoring, and penalizing. It is submitted that these

and Electricity Markets (OFGEM). This body was formed in 1999 by the merger of the Office of Electricity Regulation (OFFER) and Office of Gas Supply (OFGAS). Its main powers derive from the Gas Act 1986, the Electricity Act 1989, the Competition Act 1998, the Utilities Act 2000, the Enterprise Act 2002 and the Energy Act 2004; c) PhonepayPlus (previously known as ICSTIS) is the regulatory body for premium rates services in the UK on Ofcom's behalf; d) The Office of Rail Regulation. This body was established on 5 July 2004 under the Railways and Transport Safety Act 2003; e) OFCOM.

[13] The Bank of England. This body was founded in 1694. Its current goal is to maintain a stable and efficient monetary and financial framework as its contribution to a healthy economy.

[14] a) Department for Business, Innovation and Skills (BIS), which was created on 5 June 2009 by the merger of the Department for Innovation, Universities and Skills (DIUS) and the Department for Business, Enterprise and Regulatory Reform (BERR); b) The Office of Fair Trading. This is a statutory body established by the Fair Trading Act 1973, and then modified by the Enterprise Act 2002, whose main function is to protect consumer interests, while ensuring that businesses are fair and competitive; c) The Competition Commission. This is a non-departmental public body created by the Competition Act of 1998 as successor to the Monopolies and Mergers Commission. Its powers are mainly governed by the Enterprise Act 2002; d) Companies House, an executive agency of the Department of Business, Innovation and Skills which examines and stores company information delivered under the Companies Act 2006 and related legislation; e) The Intellectual Property Office. This is the operating name of 'The Patent Office', a regulatory body which was set up by the Patents Law Amendment Act 1852 as the United Kingdom's office for the granting of patents, and the registration of industrial designs and Trade marks. It is currently an executive agency of the Department for Business, Innovation and Skills.

[15] The Department of Environment, Food and Rural Affairs; The Food Standards Agency. This is an independent government department created by the Food Standards Act 1999 to protect consumer interests in relation to food safety and standards.

[16] The Gambling Commission, created under the Gambling Act 2005 as successor to the Gaming Board for Great Britain.

[17] Scott, Colin, 'The Juridification of Relations in the UK Utilities Sector', in *Commercial Regulation and Judicial Review*, (as above n. 9), 20.

[18] Wade, W. and Forsyth, C.F., *Administrative Law*, 10th edn., (Oxford: Oxford University Press, 2009) 133; Baldwin, R. and Cave, M., *Understanding Regulation*, (Oxford: Oxford University Press, 1999) 299.

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are precisely the challenges which fall under the category of commercial judicial review.

Furthermore, this situation of judicial supervision is likely to increase in the near future. Three reasons, in particular, stand out. First, the Legislative and Regulatory Reform Act 2006 imposes several statutory obligations on all regulators which provide further and more specific grounds on which to challenge regulatory action before the courts.[19] Secondly, the recent extension of the powers of regulators to impose sanctions, provided by the Regulatory Enforcement and Sanctions Act 2008 is, at least, a reflection of the increasing tendency of the legislator to deepen and enhance administrative influence over markets, thereby increasing the likelihood of litigation in this field. Thirdly, the recent sub-prime financial crisis originating in the United States is expected to have a major impact on how the issue of market regulation is approached around the world. In particular, it has been argued that legislation has been inadequate to deal with the subsequent credit crunch in the UK and that, therefore, both public oversight of capital and the authorities' responsiveness to risk should be strengthened.[20] This view is most clearly reflected in the Banking Act 2009—which provides regulators with new powers to deal with banks that get into financial problems—and the recently announced Basel III bank rules on capital requirements.[21] This critical scenario, in general, might prompt greater attention to commercial rights and to their vindication against regulators by different means.

Taken together, these considerations also combine to justify the need to address this matter. Once it is accepted that the standards of judicial review depend on the context, and that commercial judicial review is a context which raises particularly sensitive issues concerning governmental intervention with people's activities or liberties, it becomes apparent that embarking upon the study of this subject is a useful and interesting endeavour.

3. The Book: Challenging Judicial Deference

At first glance, questions related to judicial review seem equally pertinent in the commercial context as they are in other areas of governmental activity. As Julia Black and Peter Muchlinski observe, there is nothing special about this specific area of law,

> the questions posed by commercial judicial review are posed in the context of judicial review more generally, and there is no aspect of the commercial context which suggests that they should be answered in a particular way.[22]

[19] See Black, Julia, 'Tensions in the regulatory state', *Public Law*, 2007, 72–73.

[20] Gieve, John (Deputy Governor, Bank of England), 'The Financial Cycle and the UK Economy', speech given at the London Stock Exchange, 18 July 2008, available at <http://www.bankofengland.co.uk> accessed 26 September 2010, 5. In the area of finance, see Turner, Lord Adair, *The Turner Review: A Regulatory Response to the Global Banking Crisis*, March 2009, 88–91, available at <http://www.fsa.gov.uk/pubs/other/turner_review.pdf> accessed 26 September 2010.

[21] These rules were announced by the Basel Committee on Banking Supervision of the Bank for International Settlements on 12 September 2010.

[22] Black and Muchlinski, (as above n. 9), 15.

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A similar point is expressed by Philip Engelman. He observes that 'the trends developing in commercial Judicial Review are simply illustrative of the developing jurisprudence in Judicial Review generally'.[23]

Nevertheless, these authors agree that a 'number of factors which combine in the area of commercial regulation to ensure that it provides a particularly challenging context for judicial review'.[24] In particular, it is observed that,

> ...although many of the principles which are applied in commercial judicial review cases are common to those to be found in judicial review cases generally, there are a number of themes which appear to be developing which require more specialist consideration.[25]

One of these issues concerns the cautious approach that the courts adopt in exercising their supervisory powers over regulatory decisions. Indeed, although English courts have traditionally held a policy of judicial deference towards administrative action,[26] expressed in cases like *GCHQ*,[27] this approach has been particularly light in the field of market regulation. As Colin Scott points out, 'there is a view that the courts take a more restrictive attitude to judicial review in cases involving commercial regulation'.[28] In fact, there have been numerous cases in which the courts state that the issue is judicially cognizable but there are good reasons for taking a non-interventionist approach to the substantive activities of the public body. Prominent among these considerations are the need to pay deference to the regulator's expertise and institutional autonomy, and the demands of administrative efficiency, which prevent the courts from interfering with the development of regulatory policies. Thus, it appears that, in this specific context, the attitude of the judiciary relies heavily on the qualities and interests of the decision-maker rather than on the position of the private litigant, who normally seeks effective review of the contended decision.

However, it is worth noting that this policy of judicial deference seems to be inconsistent with relevant values of English public law which protect individuals from capricious and arbitrary executive action. Specifically, it may be argued that such restraint may adversely affect the right of the applicant to obtain an independent assessment of the validity of the impugned order. Indeed, by relying upon the decision-maker's criteria to provide a definitive answer to the legal issues presented, the courts have implicitly declined to act impartially, independently forming its own opinion on the legal merits of the case. In practice, this situation gives executive measures a prodigious binding effect, since affected private parties have almost no realistic chance of persuading the court that their complaints are well founded.

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[23] Engelman, (as above n. 4), 5.

[24] Black, Muchlinski and Walker, (as above n. 9), 15.

[25] Engelman, (as above n. 4), 4.

[26] Elliott, Mark, 'The Human Rights Act 1998 and the Standard of Substantive Review', (as above, n. 2), 301–308.

[27] *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374 at 410. Lord Diplock said that a decision may be irrational and so liable to be quashed only if it 'is so outrageous in its defiance of logic or of accepted moral standard that no sensible person who had applied his mind to the question could have arrived at it'.

[28] Scott, (as above n. 17), 24. See also Prosser, Tony, 'The Powers and Accountability of Agencies and Regulators', in *English Public Law*, David Feldman (eds.), (Oxford: Oxford University Press, 2004) 296.

Thus, it may create a dangerous opportunity for economic authorities to impose decisions upon citizens without meaningful judicial control. In this sense, the current approach to commercial regulation appears to entail a serious abdication of the court's role as ultimate arbiters of law. This abdication, which has received relatively little attention, ought to worry those who are concerned with securing individual justice in the field.

It is the purpose of this book to contribute to the debate on this issue by advocating a more intensive form of judicial review. It will be argued that only by adopting a close supervision over decisions which alter or determine the operation of markets is it possible to reach a level of judicial control that is consistent with the requirements of fairness and reasonableness in this area and with proper respect for the rights of the parties involved. This approach is particularly founded on the idea that a good system of public regulation over private business necessarily requires the court to play a more interventionist role which ensures impartial protection of market players. In this sense, it expresses a particular mode of relation between judges and decision-makers which leaves little room for executive immunity.

In light of this, it becomes clear that the present work challenges the much more deferential attitude which has traditionally been exhibited by the domestic courts *vis-à-vis* decisions of economic authorities. Indeed, by suggesting that a relatively intrusive form of review should be adopted, this view provides an approach which is in sharp contrast with the current jurisprudence on the matter. In this way, it also represents an invitation to the judges to move beyond their actual perception of their limited role within the regulatory framework and recognize the need to engage in a stricter model of substantive review which reflects the importance of securing effective judicial protection of private interests.

In developing this alternative doctrine, it is worth emphasizing that the framework within which it should apply is a complex construct made up of many factors and reasons. They all combine to constitute the basis upon which the more rigorous approach is founded: they supply the mechanism through which judicial review can be applied to executive decisions which impact upon private business in a manner which is consistent with the concrete protection of individual rights. These important ideas are explored in detail in different parts of the book. However, it is important, at the outset, to be clear about the basic content of the principal arguments in favour of intensive review which the book develops. Four, in particular, should be mentioned.

First, it will be argued that the necessity of adopting such an approach derives, in part, from the argument of lack of ministerial accountability, which indicates that diminution in the power and effectiveness of political control over independent regulators necessarily requires the courts to strengthen oversight of their decisions in order to maintain the constitutional balance of power. Secondly, it will be noted that the current context of open and competitive markets clearly purports to advocate a less deferential judicial attitude which ensures that decision-makers do not hamper liberal economic policies. The third idea relates to the fundamental right to a fair hearing which, in accordance with the jurisprudence of the European Court of Human Rights (ECtHR), entitles individuals to access to a court of 'full

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jurisdiction' in regard to regulatory decisions made in the absence of procedural safeguards which are 'decisive' of private rights and obligations. The fourth argument concerns the principle of legal certainty. As seen below, this doctrine presupposes a level of judicial intervention which goes beyond the orthodox approach in that it further constrains the discretionary freedom of the decision-maker to make frequent changes of law or policy which may undermine the rights of those induced to rely upon them.

Nevertheless, once these factors are appreciated, it becomes necessary to address a more specific point. The development of a more intensive form of review raises important issues regarding the constitutional relationship between the judiciary and the executive. Independently of the substantive merits of such a shift in the commercial context, it is relatively clear that it entails a reduction in agency autonomy which appears to be inconsistent with precisely the courts' perception of their position within the fundamental order. In particular, the judges have recognized that it is inappropriate for them acting on their own motion to try to change the constitutional distribution of judicial and administrative functions.[29] In light of this, it is possible to argue that a fully satisfactory justification for the proposed view must necessarily be based on legal principles which accord a lower margin of freedom to the decision-maker, thereby permitting greater judicial intervention. In other words, it is necessary to draw upon a doctrine which expresses a rather different conception of the separation of powers in the sense that it leaves it to the court, rather than to the executive, to determine how the balance between rights and competing regulatory claims ought to be struck. It will be argued below that such doctrine is forthcoming once the principle of proportionality to which public authorities and judges are progressively being subjected is taken into account within the particular field.

As Mark Elliott correctly explains, the doctrine of proportionality entails a greater judicial attenuation of administrative autonomy than does the traditional approach to substantive review.[30] In particular, it holds that the mere existence of public policy considerations is not sufficient in itself to establish the reasonableness and legality of the decision. In order to determine whether the challenged decision is justified in law, the court must also be satisfied that the qualification placed on the applicant's rights is proportionate to the competing policy aim being pursued. On this view, therefore, the balance between individual rights and public interest is primarily for the courts; they become entitled to set aside most of the executive actions which go beyond what they consider is strictly necessary to achieve the desired outcome. In this manner, the proportionality-based approach clearly narrows the range of options which are available to the decision-maker at the substantive level.

Questions therefore arise concerning precisely whether this intensive mode of judicial review should apply in the context of commercial regulation. The following sections demonstrate that the answer to this question is firmly in the positive. This

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[29] See Elliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' (as above n. 2), 310–311.

[30] Ibid., 302–315.

follows mainly from the requirement, in section 2 of the Human Rights Act 1998 (HRA), that domestic courts should take into account the jurisprudence of the European Court of Human Rights in Strasbourg (ECtHR) which indicates that the principle of proportionality occupies a pivotal role in assessing executive action which impacts upon private business. In addition, proportionality is a general principle of EC law and therefore national courts are obliged to apply it in economic regulation cases which have a Community law element. Thus, it becomes clear that there are at least two significant types of case in which judicial supervision based on the proportionality standard constitutes an adequate remedy for the purpose of protecting private interests against the abuse of regulatory power.

This conclusion has important consequences for judicial review in the commercial context. In approaching the control exercised over market authorities under the principle of proportionality, it is crucial to understand that the court becomes the primary judge of where the balance lies between the interests of the community and the interests of the litigants. More specifically, the judges must be alert to the importance of ensuring that interference by the decision-maker with the rights of market players is justified in that it cannot go beyond what is strictly necessary to secure the regulatory objective. Once this is recognized, it becomes apparent that English courts, in relation to decisions which determine the operation of private business, should refuse to adopt the cautious approach which is predominant in the present case law. Rather, they should go on to ask whether the magnitude of the qualification placed on the private interest was proportionate to the regulatory aim sought to be achieved.

This question thus lies at the core of the effort to provide an approach to regulatory decisions which is both satisfactory, in the sense that it conforms to the relevant requirements of individual justice, and constitutionally valid, in that it entails a shift in the balance between the judicial and executive branches of government which has been authorized by parliament, rather than by judges, through human rights and EU legislation. In particular, by acknowledging that the proportionality test underlies the courts' supervisory endeavour, significant shortcomings of the traditional deferential approach can be avoided: as it involves a fair balance between individual rights and competing public policy considerations, the alternative approach facilitates a more independent and impartial assessment of the merits of the case; moreover, since this mode of analysis requires a compelling justification for qualifying individual rights, it reduces the risk of the decision-maker imposing arbitrary decisions upon citizens without effective supervision. These ideas are explained in more detail below, when considering the benefits of the proportionality test for the applicant's position in regard to the different aspects of the impugned decision. However, it is helpful to set them out briefly at the outset. Six points, in particular, fall to be considered.

The first one relates to the application of Article 6 of the European Convention on Human Rights and Fundamental Freedoms ('the European Convention'). It will be argued that only by adopting a proportionality-based reasoning the English courts will be able to ensure that their jurisdiction is sufficiently full in order to 'cure' the lack of impartiality and independence of economic authorities which determine

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civil rights and obligations. Secondly, it will be noted that, by requiring the courts to apply a criterion of substantive review which is narrower than the traditional test, the principle of proportionality has the advantage of reducing the zone of immunity within which regulatory decision-making is free from judicial scrutiny, thereby securing a higher level of protection against the abuse of executive power. Thirdly, it will be argued that this reasoning is central to the interpretation of vague terms, because it requires the courts to determine whether the meaning chosen by the decision-maker is proportionate to the competing policy and aim being pursued. The fourth context concerns factual review. As seen below, it appears that the question posed by the proportionality test increases pressure for a wider jurisdiction over facts, since it strongly relies on the detailed factual context in which the decision is adopted. The fifth point which will be made relates to the protection of legitimate expectations. It is submitted that this more rigorous approach to regulatory decisions, which the proportionality doctrine institutionalizes, also reduces the freedom of the executive to depart from its prior interpretations and policies, so that it may be reconciled with the need to protect the interests of those parties who reasonably relied on their application.

Finally, the adoption of the doctrine of proportionality will be considered in relation to the exercise of the court's remedial discretion. In this context, its importance is two-fold. On the one hand, it might require the payment of compensation to the innocent parties against whom the remedy is either refused or granted in order to ensure that interference with their rights is proportionate to the aim sought to be realized, namely, the protection of the competing private and public interests. On the other hand, it suggests that, in such circumstances, the court should exercise its discretion against the party who would be subsequently entitled to the lowest amount of damages from the public authority. In this manner, a reasonable relationship of proportionality can be established between the need to protect the individual's rights and the demands of the general interest of the community in protecting societal resources.

Thus the principle of proportionality operates, in the present context, to ensure that, so far as possible, the courts' supervisory jurisdiction is exercised in a manner which is consistent with both the requirements of public policy and the rights of the applicant in relation to administrative justice. Specifically, this mode of analysis directs attention towards the reasoning process adopted by the decision-maker, rather than towards its qualities, and it can therefore be usefully applied to facilitate a more effective and impartial review of the contended decision. Moreover, by requiring a balance to be struck between the different interests at stake, it has the advantage of allowing the courts to provide an equitable solution to the problem of competing, but equally legitimate, claims at a remedial level. Hence the need for the proportionality standard as the mechanism by which intensive judicial control is exercised in the commercial context.

At this point, however, it might be noted that the influence of this form of review is relatively limited because it does not extend to cases which fall outside the scope of the HRA or EU law. It is not, therefore, inconceivable that the court may adhere to a less rigorous approach in relation to regulatory decisions which involve elements of

general administrative law only. However, as seen below, it is this book's contention that such conclusion would be inconsistent with a series of normative and pragmatic reasons which indicate that the proportionality test will have a broader influence on English law, thereby requiring the courts to adopt a more intensive standard of review even in areas where it is not currently used. In other words, it seems likely that this principle of review will be recognized as an independent ground of review that can be applied to any type of executive intervention on the rights and interests of market players.

4. The Structure of the Book

The foregoing analysis indicates that the focus of this book is on what the appropriate intensity of judicial review should be in the commercial context. As seen above, the answer to this question is revealed upon consideration of several factors related to the balance of power in the public sphere. However, given that these conditions might entail the application of polar-opposite approaches to the contested order, it appears that the mere preference for a particular set of arguments does not suffice to justify the judgement of the court because it would fail to furnish a complete account of the views at stake. Evaluative analysis of the legitimacy of the competing arguments is therefore necessitated in order to provide a more complete framework within which the courts may determine the intensity of their supervision. In particular, it is necessary, in articulating a more intrusive form of review, to first provide an explanation of the content and implications of the factors which induce the courts to adopt the deferential approach. By doing so, it will be possible to understand better the need to change the *status quo* and inspire judges to get familiar with interventions that aim at increasing the protection of market players.

In light of this, the reading of the present book is loosely arranged in accordance with the structure of a legal disputation. This means that presentation of arguments will be structured according to the headings that mark the arguments for and against the orthodox approach, which are followed by the reasons for preferring a stricter scrutiny which attempts to avoid the shortcomings of the doctrine identified in the previous chapters.

Thus the analysis begins, in the following chapter, by examining that approach which may be regarded as orthodoxy. Specifically, this part is divided into two sections. The first one explains the main arguments upon which the cautious approach is founded. In particular, they point towards two important features of modern administration such as expertise and institutional autonomy which indicate that regulators are far better equipped than the courts to deal fairly and impartially with technical issues arising from the relevant context. Moreover, it is argued that a less strict standard of review would be consistent with the notion of regulatory effectiveness, which demands decisiveness and certainty on the part of executive bodies. The second section of this chapter provides an account of the cases in which the courts have traditionally shown reluctance to review regulatory decisions in the commercial context. It is worth noting that this view is not confined to a particular stage of

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the judicial review process but it has been expressed in relation to different aspects of the contended order which may require the supervision of the courts. Thus the authorities indicate that deference should be accorded to the decision-maker's criteria in regard to factual findings, substantive choices, and interpretation of vague or self-regulatory rules. It will be observed that, in most of the cases, the justification given by the courts for showing deference to the decision-maker is rooted in the *Wednesbury* principle, which allows the courts to strike down administrative decisions only in rather extreme circumstances. An interesting form of judicial restraint can also be found in the field of remedies, where the courts have sometimes refused to grant relief to the successful applicant in order to protect the interest of the administration and the position of third parties who may have reasonably relied on the validity of the impugned decision.

The book then moves on to consider, in the next chapter, the arguments against the orthodox approach. It will be noted that this doctrine has kept the focus away from the position of the applicant—who is seeking effective review of the administrative order—and has, instead, prompted greater concentration on the criteria and interests of the decision-maker, thereby severely undermining judicial protection of individual rights against the abuse of executive power. This situation entails an inevitable clash with relevant principles of English public law which advocate a more equitable analysis of the claims of the competing parties. Two principal matters require consideration. First, it will be argued in section 2 that the present doctrine—which justifies judicial caution on the basis of the regulator's special qualities and the need for administrative efficiency and certainty—is inconsistent with the position which postulates the courts' role as ultimate and impartial guardians of law. Indeed, by deferring to the regulator's own criteria for applying the law to particular factual situations the courts are implicitly declining to make an independent assessment of the merits of the case. On this view, therefore, it is the administrative authority, rather than the judge, which ultimately provides the reasons upon which the case is decided. It is argued below that this outcome must be rejected as both unsatisfactory, in the sense that it eschews the rights-based conception of public law adjudication which inheres in the context of liberalized markets, and unconvincing, in that it relies on an erroneous account of parliament's intention.

Secondly, it will be shown, in section 3, that there exist specific sets of reasons which militate against the application of the orthodox doctrine in the fields of factual findings and remedial discretion. As regard the latter, it is suggested that leaving *ultra vires* decisions unaffected in order to protect decisiveness and certainty in volatile markets is seriously flawed because it fails to provide an adequate protection of the rights of the successful applicant. In particular, it is argued that this view is inconsistent with the principles of legality and fair competition in the market economy, which provide inspiration for the exercise of the court's remedial discretion in favour of those directly affected by the unlawful order. In addition, it will be demonstrated that it is not at all clear that this approach is correct, as a matter of justice, to assert that the applicant's interests should be trumped or outweighed by reference to the protection of administrative convenience and third-party rights.

In light of the significant shortcomings of the traditional doctrine, Chapter 3 then goes on to suggest the adoption of a more satisfactory and convincing approach to regulatory measures which may render judicial oversight workable in terms of individual justice. The better view, it is argued, is that a stricter form of scrutiny should be adopted which allows the courts to conduct a careful and independent inquiry into the challenged order, so that citizens may be effectively protected from capricious and arbitrary governmental action. The difficulty, however, is that such a doctrine reveals a related shift in constitutional and institutional competence from the regulator to the judge which cannot be achieved without legislative warrant. Thus, some explanation is still required of the normative considerations which may motivate the courts in engaging in high-intensity substantive rights adjudication.

This task is undertaken in Chapter 4, where it will be argued that there appears to be a natural relationship between, on the one hand, the adoption of a more rigorous judicial attitude towards market regulation and, on the other hand, the ethos of European law. It is contended below that effect must be given to the legislation and decisions of European courts which, by virtue of the Acts of Parliament, have become part of the English legal order with the direct and indirect effect of rendering the domestic court's supervision ever more intrusive. In this sense, the European content of regulatory law acts as a legal warrant that furnishes an adequate explanation for the change of approach in commercial judicial review. This idea will be developed in three principal stages. First, in section 2, it is explained that these norms rest on the foundational values of liberal-market democracies which clearly demand that judges should act in a strict and neutral way in order to avoid undue interference with economic rights and freedoms. Secondly, section 3 shows that one relevant legal expression of this doctrine is the right to a court of 'full jurisdiction', which reasserts meaningful judicial oversight of regulators in accordance with Article 6(1) of the European Convention. Thirdly, in section 4, the principle of proportionality is presented as an attempt to articulate a more structured form of inquiry which postulates a balanced approach to market regulation under the explicit influence of European law, and which therefore satisfies the dual imperatives of impartiality and constitutional legitimacy.

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Thus, Chapter 5 goes on to consider the implications and advantages of proportionality in relation to the different aspects of the challenged decision which may require the supervision of the courts. Specifically, it is argued in sections 1 to 3 that, by adhering to a robust judicial attitude based on this doctrine, it is possible to begin to deal with the difficulties which prevent the orthodox approach from providing an adequate control of the decision-maker's criteria on the reasonableness of the decision, interpretation of rules, and factual considerations. In addition, section 4 seeks to articulate a 'proportional' approach to the problem of remedial discretion which accurately captures the idea that the court's primary role is to protect citizens against executive abuse, as it takes into account the interests of third parties and public administration without going so far as to deny effective relief to the applicant.

Finally, Chapter 6 supplies a particular explanation concerning the scope of the principle of proportionality. It observes that there are justified reasons to think that this doctrine will be recognized as an independent ground of review within

domestic law. As seen below, this has important implications for the intensity of judicial review in the relevant context: in particular, the courts are entitled to adopt a more rigorous test to deal with claims arising not only under the Human Rights Act or EC law, but also under other areas of national law that have direct impact upon the operation of private businesses.

In Chapter 7, in addition to the specific conclusions reached in each chapter, three broader and integrated themes are analysed which further illuminate the response to the question of the intensity of judicial review in the commercial context which the present book seeks to supply. The first thematic point which emerges relates to the existence of contextual factors which specifically support the adoption of a more intensive form of review in the field. Secondly, it will be argued that it is necessary to appreciate that the proposed approach supplies alternative means to deal with the problem of judicial intervention without seriously affecting the applicant's interest in seeking review and protection. The final point which emerges concerns the need to bear in mind that market regulation through technical rules is a relatively new phenomenon in the United Kingdom, and therefore, susceptible of being grasped gradually, but surely, by the judges.

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