Mechanisms of Constitutional Review in Recent Cases

Bilateral Exchange with the Italian Constitutional Court

10 July 2026

Lord Stephens[1]

1. The UK has an unwritten constitution which protects individual rights and balances the powers of the legislature, the executive and the judiciary. The UK Parliament is supreme. It has the right to make or unmake any law whatsoever. The courts cannot strike down legislation as being unconstitutional. However, the Human Rights Act 1998 enables the courts to declare that laws passed by the UK Parliament are incompatible with the European Convention on Human Rights ("**ECHR**").

2. In exercise of the UK Parliament's right to make laws it has passed legislation devolving powers to assemblies and executives in respectfully Scotland, Wales and Northern Ireland. The statutes enacted by the UK Parliament devolving these powers are in effect written constitutions for the devolved assemblies and executives. The limits on the powers of each of the devolved assemblies and executives are to be found in the legislation enacted by the UK Parliament.

3. In addition, as the Judicial Committee of the Privy Council ("**JCPC**") we hear appeals challenging legislation and policies in several countries under the written constitutions in those jurisdictions.

4. The cases which follow illustrate the constitutional issues which arise in relation to: (a) the Constitution of the UK; (b) the constitutions of the devolved assemblies and executives; and (c) the constitutions of countries with a right of appeal to the JCPC.

Case 1: R (on the application of Miller and another) v Secretary of State for Existing the European Union[2]

5. Some of the most important issues of law which judges must decide concern questions relating to the constitutional arrangements of the United Kingdom.[3] No discussion of constitutional review is complete without *Miller 1,* brought after the 2016 referendum on the UK's membership of the European Union. The principal question was not whether (which had been decided following a referendum), but how, the United Kingdom may lawfully set about leaving the EU.[4]

6. The Treaty on European Union[5] provides in article 50 that, if a Member State decides to withdraw from the EU "*in accordance with its own constitutional requirements*", it should serve a notice of that intention before the EU treaties can cease to apply.[6] *Miller 1* was a dispute about what the constitutional

[1] Justice of the Supreme Court of the United Kingdom. I am grateful to my judicial assistant, Sarah Quinn, for her assistance in the preparation of this lecture.

[2] *R (on the application of Miller and another) v Secretary of State for Existing the European Union; Reference by the Attorney General for Northern Ireland – In the matter of an application by Agnew and others for Judicial Review; Reference by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review* [2017] UKSC 5 *("**Miller 1**").*

[3] *Miller 1* [4] (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge) ("majority" hereafter).

[4] *Miller 1* [276] (Lord Hughes).

[5] Article 50 appears in the Treaty on European Union (TEU), having been first introduced by the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community signed at Lisbon on 13 December 2007 (also known as the "Lisbon Treaty"), and was addressed in domestic law in the European Union Amendment Act 2008, s2. A Member State must notify the European Council of its intention to leave. The withdrawal agreement must then be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union (TFEU).

[6] Treaty on European Union 1992 (Consolidated version 2016), art. 50(1). Art. 50(3) provides that the treaties which govern the EU "shall cease to apply" to that member state within two years after notification referred to in Art. 50(2).

requirements of the UK were.[7] The Government had proposed to use its prerogative powers[8] to withdraw from the EU by serving a notice withdrawing the UK. Two individuals, Gina Miller and Dier Dos Santos, challenged the Secretary of State for Exiting the European Union. The Supreme Court had to decide whether, under the UK's constitutional arrangements, such a notice to unmake a treaty can lawfully be given by ministers under the prerogative power without prior authorisation by an Act of Parliament.[9] The prerogative power in ministers to unmake treaties cannot be exercised if it results in a change in UK domestic law.[10] Only Parliament can alter domestic law.[11] By a majority the Supreme Court held that the minister could not give notice of withdrawal without Parliament's authority as withdrawal altered domestic law. Parliament is supreme, so that the Government requires authority as conferred by legislation in order to change domestic law.[12]

7. Unlike England and Wales, Scotland and Northern Ireland had voted to remain in the EU. All three devolved administrations made submissions – by a reference from Northern Ireland, and in interventions by the Lord Advocate for the Scottish Government and the Counsel General for Wales for the Welsh Government.[13] The Northern Ireland Act 1998 which devolved powers to the Northern Ireland assembly imposed a constraint on its legislative competence. It must not act in breach of EU law.[14] If it did so, then the legislation passed by the assembly could be challenged in the courts.[15] So, it was argued that the right to challenge devolved legislation could not be removed by the exercise of the prerogative power to unmake a treaty.[16] Rather, Westminster legislation was required to remove that right. As the majority had held that an Act of Parliament was required to authorise ministers to give notice of the decision of the UK to withdraw. It was not necessary for the Court to decide whether the Northern Ireland Act imposed its own requirement for such legislation.[17]

8. The statute devolving powers to Scotland preserved the right of the Westminster Parliament to legislate on matters within the competence of the devolved legislature.[18] The Sewel Convention was adopted as a means of establish cooperative relations between the UK Parliament and devolved legislatures on matters which are within the competence of the devolved legislature.[19] Scotland and Wales relied on the Sewel Convention that the UK Parliament would not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.[20] The Court held that the Sewel Convention is just that: a political convention. It operates as a *political* constraint on Parliament's activity, but the policing of its scope and operation is outside the constitutional remit of the courts. The Sewel Convention did not give rise to a legally enforceable obligation.[21]

[7] *Miller 1* [276] (Lord Hughes).
[8] For a definition of prerogative, see *Re De Keyser's Royal Hotel Ltd*. [1920] AC 508, 526 (Lord Dunedin): "The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown".
[9] *Miller 1* [2] (majority).
[10] *Id.* [56] (majority).
[11] *Id.* [43] (majority).
[12] *Id.* [152], see also e.g. [46] (majority).
[13] The Counsel General also relied on the Sewel Convention, and supported the argument that a statute is required before ministers can give notice of withdrawal: [10], [137]-[139] (majority); [155], [175] (Lord Reed).
[14] *Id.* [128], citing Northern Ireland Act 1998 s6(2)(d) and s24(1).
[15] *Id.* [131].
[16] *Id.* [6].
[17] *Id.* [132].
[18] Scotland Act 1998 s28(7).
[19] *Miller 1* [136].
[20] *Id.* [10].
[21] *Id.* respectively at: [136]-[151] per the majority (holding that the Sewel Convention is a political convention, which facilitates relationships between the UK Parliament and devolved legislatures, but does not lie within the constitutional remit of the judiciary), with which Lord Carnwarth [243] and Lord Hughes [282] agreed; [175]-[178], [242] per Lord Reed (holding that the argument on the Sewel Convention does not arise as it applies to Parliamentary legislation, not the exercise of prerogative powers).

Case 2: R (on the application of Miller) v The Prime Minister[22]

9. The second major constitutional challenge to Brexit, *Miller 2,* involved the exercise of the Royal prerogative on the advice of the Prime Minister to prorogue Parliament. The appeal to the Supreme Court involved linked appeals from England and Wales and from Scotland. There were four issues: whether the advice given by the Prime Minister to Her Majesty the Queen on 27 or 28 August 2019 was justiciable; if so, the standard of lawfulness; whether the advice met that standard; and the remedy if it did not.[23]

10. The advice was that Parliament should be "prorogued" from a date between 9 and 12 September until 14 October 2019. Prorogation entails that neither House of Parliament can meet, debate and pass legislation, or debate Government policy. The Government remains in office and can exercise its powers to make delegated legislation and bring it into force, and can exercise all other powers the law permits.[24]

11. Whether the matter was justiciable (the first issue) had troubled the lower courts. In Scotland, Lord Doherty had refused to hear the Scottish appeal on the ground that the issue was not justiciable.[25] This was overturned on appeal.[26] In England and Wales, the Divisional Court too felt that the challenges did not raise any legal question on which the courts can adjudicate: the decision to prorogue and advice to the Monarch as to prorogation were inherently political, and there were no legal standards against which to judge their legitimacy.[27]

12. As the Supreme Court explained, if an issue before the court is justiciable, deciding it will not offend the separation of powers. Rather, *"the court will be performing its proper function under our constitution"*.[28] That was the case here. Per the common law, it is well established that the courts can rule on the extent of prerogative powers.[29] The Court did so, applying the legal standard which outlined the limits of the power.

13. The limit was that a decision to prorogue Parliament (or to advise the monarch to do so) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.[30] In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.[31]

14. The House of Commons had already demonstrated that it did not support the Prime Minister on the critical issue for his Government and that it was especially important that he be ready to face the House of Commons.[32] The Commons had explicitly passed motions against leaving the EU without an agreement and had passed the European Union (Withdrawal) (No 2) Act 2019 to the same effect.[33]

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[22] *R (on the application of Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland* [2019] UKSC 41 *("**Miller 2**").*
[23] *Id.* [27]: (1) Is the question of whether the Prime Minister's advice to the Queen was lawful justiciable in a court of law? (2) If it is, by what standard is lawfulness to be judged? (3) By that standard, was it lawful? (4) If it was not, what remedy should the court grant?
[24] *Id.* [2]. MPs also cannot ask written or oral questions of Ministers, or meet and take evidence in committees. In general, Bills which have not yet completed all stages are lost and will have to start from scratch in the next session of Parliament.
[25] *Id.* [24] (citing *Cherry v Advocate General for Scotland* [2019] CSOH 70).
[26] *Id.* (citing *Cherry v Advocate General for Scotland* [2019] CSIH 49).
[27] *Id.* [28]-[29].
[28] *Id.* [34].
[29] *Id.* [52].
[30] *Id.* [38]-[51]. This was the outcome of the Court's review of common law authorities on constitutional principles.
[31] *Id.* [50].
[32] *Id.* [57].
[33] The European Union (Withdrawal) (No 2) Act 2019 (now repealed) provided, amongst other things, that if the European Council decided to agree an extension to 11.00pm on 21 January 2020, the Prime Minister had to notify the President of the European Council, immediately after the decision was made, that the UK agreed to the proposed extension (s3).

15. The Supreme Court held Parliament was not prorogued.[34]

Case 3: Reference by the Lord Advocate of Devolution Issues under paragraph 34 of Schedule 6 to the Scotland Act 1998[35]

16. Looking north of Westminster to Edinburgh, in 2022 the Scottish Government drafted a Scottish Independence Referendum Bill which made provision for a referendum on the question "Should Scotland be an independent country?" The UK government refused to authorise the referendum. A question arose as to whether the Bill was within the legislative competence of the devolved assembly.[36] The Lord Advocate[37] made a reference under the Scotland Act 1998 Schedule 6 paragraph 34,[38] asking the Supreme Court whether the provision of the proposed Bill would be outside of the legislative competence of the Scottish Parliament under the Scotland Act 1998 because it relates to either or both of the reserved matters of the Union or the UK Parliament.[39] A reference is not an appeal from decisions of the Scottish courts. Rather, it is a procedure under which the Supreme Court determines the limit on the constitutional competence of the devolved legislature.

17. In a unanimous judgment, the Court decided, first, that the question referred was a devolution issue, so the Court had jurisdiction to decide it.[40] Second, the Court should accept the reference.[41] Third, the pertinent provision of the proposed Bill did relate to matters which have been reserved to the Parliament of the UK under the Scotland Act, namely matters of the Union and of the UK Parliament.[42] Accordingly, in the absence of any modification of the definition of reserved matters,[43] the Scottish Parliament did not have the power to legislate for this referendum.

18. The Court articulated the scope of the reference mechanism, explaining that *only* a "*devolution issue*" can be referred to the Court under paragraph 34 of Schedule 6. The definition in the Scotland Act includes "*any other question arising by virtue of this Act about reserved matters"*.[44] The question referred fell within this description.[45] In finding it had jurisdiction, the Court held that the existence of the separate scheme for the scrutiny of Bills for legislative competence by the Court (section 33 of the Scotland Act) did not prevent a reference from being made under paragraph 34 of Schedule 6 in relation to a proposed Bill, before it is introduced.[46] Further, it was consistent with the rule of law and with the intention of the Scotland Act that the Lord Advocate should be able to obtain an authoritative judicial decision on the

On 19 October 2019, the House of Commons debated and voted on a government motion to approval a new deal (the revised withdrawal agreement, revised political declaration, and unilateral declaration on consent). The House of Commons amended the motion and resolved to withhold approval of the new deal unless and until implementing legislation was passed. This amendment aimed to block a loophole in the 2019 Act that could have led to a no-deal exit on 31 October 2019.

[34] *Id.* [70].

[35] *Reference by the Lord Advocate of Devolution Issues under paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31 *("**Scottish Independence Case**").*

[36] *Scottish Independence Case* [56] ("whether legislation providing for a referendum on Scottish independence would relate to a reserved matter" in the terms of the Scotland Act 1998).

[37] The senior law officer of the Scottish Government.

[38] Scotland Act schedule 6 para 34 provides *"The Lord Advocate, the Attorney General, the Advocate General or the Advocate General for Northern Ireland may refer to the Supreme Court any devolution issue which is not the subject of proceedings."*

[39] *Scottish Independence Case* [12].

[40] *Id.* [47], [92].

[41] *Id.* [53]-[54].

[42] *Id.* [70]-[83], [92].

[43] By an Order in Council or otherwise.

[44] *Scottish Independence Case* [13]-[14]; Scotland Act 1998 Schedule 6, s1(f).

[45] *Scottish Independence Case* [47].

[46] *Id.* [21]-[27].

legislative competence of the Scottish Parliament in advance of the introduction of a Bill.[47]

<u>Case 4: Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill</u>[48]

19. To see the use of the reference mechanism in a different context, one need look no further than the very next case decided by the Supreme Court. On 24 March 2022, the Northern Ireland Assembly passed the Abortion Services (Safe Access Zones) (Northern Ireland) Bill. The Bill was primarily designed to protect the right of women to access abortions and related sexual and reproductive health services. The new Bill prohibited anti-abortion protests and other specified behaviour within "*safe access zones*" around abortion clinics and related premises. Clause 5(2)(a) made it a criminal offence "*to do an act in a safe access zone with the intent of, or reckless as to whether it has the effect of… influencing a protected person, whether directly or indirectly".* Protected persons included patients, persons accompanying them, and staff at the premises. Anti-abortion protestors convicted of this new crime would be unable to rely on a defence of having a reasonable excuse.

20. Comparable to the situation in Scotland, under the Northern Ireland Act 1998 the power of the Assembly to make legislation is limited. The relevant limit here was that a provision of a Bill is outside the Assembly's legislative competence and therefore not law if it is incompatible with any of the rights protected by the ECHR.[49]

21. The Attorney General for Northern Ireland[50] was concerned that, because clause 5(2)(a) did not provide any defence of reasonable excuse, it disproportionately interfered with anti-abortion protestors' rights to freedom of thought, conscience and religion, freedom of expression, and freedom of assembly under ECHR articles 9, 10, and 11. The Attorney General therefore asked the Supreme Court to decide whether the penal sanction with no provision for reasonable excuse was outside the legislative competence of the Assembly because it involved disproportionate interference with those rights of those who seek to express opposition to the provision of abortion treatment services.

22. The Supreme Court unanimously held that clause 5(2)(a) is compatible with the ECHR rights of those who seek to express their opposition. Accordingly, clause 5(2)(a) is within the legislative competence of the Northern Irish Assembly. In so finding, the Supreme Court clarified a boundary of constitutional review as a preliminary matter. The Court confirmed that a provision of devolved legislation such as clause 5(2)(a) will only be outside legislative competence because it is incompatible with ECHR rights if it would give rise to an unjustified interference with those rights in all or almost all cases.[51]

23. Turning to the referred question, the Court held that clause 5(2)(a) is compatible with the ECHR rights of anti-abortion protestors and is therefore within the legislative competence of the Assembly. The Court recognised that, although not all anti-abortion protest activities are protected by the ECHR, clause 5(2)(a) does restrict the exercise of protestors' ECHR rights. However, this restriction could be justified.[52]

24. The Court was satisfied that the restrictions imposed by clause 5(2)(a) of the Bill were justifiable because they were required to protect the rights of women seeking treatment or advice. They were also in the interests of the wider community, including other patients and staff of clinics and hospitals. A conviction

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[47] *Id.* [44]-[46].

[48] *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32 *("**Safe Access Zones**").*

[49] Northern Ireland Act 1998, ss6(1), 6(2)(c).

[50] The chief legal adviser to the Northern Ireland executive.

[51] *Safe Access Zones* [12]-[19].

[52] *Id.* [111]-[112].

under clause 5(2)(a) would not therefore interfere disproportionately with a protestor's rights under Articles 9, 10 and 11 ECHR.[53] So, clause 5(2)(a) was within the Assembly's competence.[54]

Case 5: Maharaj v The Cabinet of the Republic of Trinidad and Tobago and another[55]

25. The constitutional question that arose in *Maharaj* was whether legislation which extended the period in office of elected local government representatives applied to those presently in office. A 2022 Act amended the terms of office from three years to four years.[56] The amendments were brought into force one month before the terms of incumbent local representatives came to an end. A government minister stated that the new four year terms would apply to incumbent representatives so that local government elections were to be postponed for one year.[57] The issue was whether the amendment to the periods of office applied to local representatives who were in office when the provisions were brought into force, as well as to those elected in the future. This was challenged by the appellant, who alleged a breach of constitutional rights. He contended that, if the relevant changes applied to incumbents, the amendments contravened entrenched rights to vote under the Constitution, derived from the right to join political parties and to express political views (article 4(e)).

26. The Privy Council majority held that the amendment did not apply to incumbent local representatives.[58] The election of representatives for a fixed or maximum period was the foundation on which a democratic society was built and it would be inimical to a representative democracy if those representatives were to be chosen by anyone other than the electorate.[59] For that reason, the majority further held that when construing legislation that was said to have an effect which diminished the rights of the electorate or interfered with the democratic process the courts should approach issues of construction in a way which was different from the construction of what might be called "ordinary" legislation. In view of the fundamental importance of such matters to the workings of a democratic system of government at a local as well as national level, the courts were bound to scrutinise such legislation to discern whether it did indeed have that effect and could not suppose that Parliament had intended to compromise the electorate's right to choose their representatives without that being clearly the intention of Parliament. Thus, the central importance of the statutory regime for democratic government required clear words[60] in order for legislation to interfere with the basis on which incumbent representatives were elected.

27. Further, it was central to a consideration of the intended application of the amendments that, if construed to apply to incumbent local government representatives, those amendments would change the basis on which such local government representatives had been elected because the effect would be that they had been chosen to serve as representatives for an additional year, not by the electorate but by the Government which had brought the amendments into force while those local government representatives were still in office.[61] Therefore in the present case the need for clarity arose on that basis, but also on the basis of the retrospective effect of the amendments if interpreted as applying to incumbent local government representatives, since they would directly interfere with and undermine the electorate's decision to elect incumbent local government representatives for a term of three years and would impose on incumbents an

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[53] *Id.* [154].
[54] *Id.* [157].
[55] *Ravi Balgobin Maharaj v The Cabinet of the Republic of Trinidad and Tobago and another* [2023] UKPC 17 *("**Maharaj**").*
[56] Miscellaneous Provisions (Local Government Reform) Act 2022.
[57] *Maharaj* [4].
[58] *Id.* [51] (Lord Richards, with whom Lord Reed and Lord Hodge agreed) ("**majority**").
[59] *Id.* [33]-[34] (majority).
[60] *Id.* [41]-[43] (majority).
[61] *Id.* [34] (majority).

obligation to serve a further period of one year.[62]

28. Finally, it was held that, applying this approach, the amendments contained in the 2022 Act, properly construed, were not intended to apply to incumbent local government representatives, in respect of whom the 2022 Act had made no express provision.[63]

<u>Case 6: R (on the application of Elan-Cane) v Secretary of State for the Home Department</u>[64]

29. This case concerned the compatibility of a government policy with article 8 ECHR. The appellant identified as gender neutral with the name Christie Elan-Cane. The appellant was born female but felt revulsion at having a female body. The appellant underwent a bilateral mastectomy and a hysterectomy to alleviate those feelings. [65] All UK passports must record the passport holder's gender as either male (M) or female (F). This was a policy adopted by the Passport Office which considered that an "X" marking would place it out of step with the rest of government and society which didn't recognise a third gender. In any event, few individuals had asked for such a marking, and it would cost £2 million to roll out.[66]

30. The appellant brought proceedings under section 6 of the Human Rights Act 1998 and article 8 ECHR challenging that policy of male or female passport gender identification seeking to establish that there was a positive obligation on the state to ensure that the appellant's non gendered identification was respected so that the appellant's non-gender could be recorded on a passport by the letter "X".[67] The appellant had lost in the High Court and in the Court of Appeal. On appeal to the Supreme Court, it was no longer in dispute between the parties that the appellant's identification as non-gendered is an aspect of private life within the meaning of article 8.[68]

31. The appeal to the Supreme Court was dismissed.[69] The judgment analysed the Strasbourg Court's concept of the margin of appreciation which is of particular significance in relation to positive obligations because the imposition of positive obligations requires contracting states to modify their laws and practices, and possibly to incur public expenditure, in order to advance social policies which they may not wholly support, or which they may not regard as priorities, without the imposition of the obligation being supported by any democratic mandate or accountability. While not a conclusive objection, those characteristics of positive obligations indicate the importance of exercising caution before they are imposed. An important conceptual mechanism by which the Strasbourg Court exercises such caution is by interpreting and applying the Convention in a way which allows contracting states a margin of appreciation.[70]

32. The judgment reinforces that the width of the margin of appreciation varies according to the circumstances. In this case the degree of prejudice to the appellant was that attributable to the unavailability of an "X" passport which was not a particularly important facet of the appellant's identity.[71] Rather the lack of a consensus within the member states of the Council of Europe either as to the relative importance of the interest at stake or as to the best means of protecting it is a factor to be taken into account in establishing

[62] *Id.* [47] (majority).
[63] *Id.* [51] (majority).
[64] *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56 *("**Elan-Cane**").*
[65] *Elan-Cane* [3].
[66] *Id.* [12]-[13].
[67] *Id.* [31].
[68] *Id.* [30].
[69] *Id.* [111].
[70] *Id.* [55].
[71] *Id.* [56].

a wide margin of appreciation.[72] The Supreme Court ruled that the appellant's interest in being issued with an "X" passport was outweighed by considerations relating to the public interest put forward by the Secretary of State, including the importance of maintaining a coherent approach across government to the question of whether, and if so in what circumstances, any gender categories beyond male and female should be recognised. It was clearly a matter in which states would be afforded a wide margin of appreciation by the Strasbourg Court, in the absence of consensus.[73]

Case 7: *In the matter of an application by JR87 and another for Judicial Review*[74]

33. This case concerned the compatibility of the core syllabus for religious education in schools in Northern Ireland with religious freedom protections guaranteed by article 2 of protocol 1 ("A2P1") to the ECHR read with article 9 ECHR as scheduled to the Human Rights Act 1998. Whilst the core syllabus was specified by the Department of Education it had been prepared by the four main Christian churches in Northern Ireland.[75]

34. The appellants were an eleven-year-old girl "JR87" and her father "G". Between the ages of four and seven, JR87 attended a controlled grant-aided primary school in Northern Ireland.[76] Whilst at school, JR87 was taught religious education and attended collective worship. JR87's school stated that the religious education and collective worship at the school met the requirements of the core syllabus.[77] JR87's parents have a "humanist" outlook and do not wish for her to be raised as a Christian. They object to JR87 being taught at school to assume that Christianity is an absolute truth.[78] They considered that the education JR87 received was not objective, critical, or pluralistic but instead amounted to indoctrination.[79] For instance, between the ages of four and eleven the core syllabus was to be exclusively based on promoting faith in Christianity without any education about any other world religion. Furthermore, at the age of eleven pupils were to study only two World Faiths in addition to Christianity, but it was "intended that study of the World Faiths will require only a modest amount of teaching time in each year of key stage 3."[80]

35. Whilst JR87's parents had a statutory right to withdraw her from religious education or collective worship, they did not exercise that right because, in their view, to do so would give rise to a risk that JR87 would be stigmatised. They also believed that JR87 should not have to be excluded from any aspect of her education because the core syllabus provided for religious education which was unlawful. They wanted JR87 to receive lawful religious education, namely education which was objective, critical and pluralistic. They also believed that exercising their right to withdraw JR87 from religious education and collective worship would place an undue burden on them and this itself had a deterrent effect.[81]

36. The High Court (Colton J) held that as both religious education and collective worship in the school followed the core syllabus specified by the Department of Education for Northern Ireland, they were not conveyed in an objective, critical, and pluralistic manner. The judge concluded that the parental statutory right to withdraw JR87 from religious education and collective worship was insufficient to prevent a breach of A2P1 read with article 9 ECHR.[82]

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[72] *Id.* [59]-[60].
[73] *Id.* [62].
[74] *In the matter of an application by JR87 and another for Judicial Review* [2025] UKSC 40 *("**JR87**").*
[75] *JR87* [74].
[76] *Id.* [18].
[77] *Id.* [25].
[78] *Id.* [20]-[21].
[79] *Id.* [12]; see also [10].
[80] *Id.* [79].
[81] *Id.* [40]-[45].
[82] *Id.* [3].

37. The Court of Appeal upheld the High Court's finding that religious education and collective worship in the school were not conveyed in an objective, critical, and pluralistic manner, but concluded that the unqualified statutory right of the parents to withdraw JR87 was sufficient to prevent a breach of A2P1 read with art.9 ECHR and meant that the State was not pursuing the prohibited aim of indoctrination. The Court of Appeal also found that the fears of stigmatisation or of being under an undue burden would not have been realised in practice. The judicial review was thereby dismissed.[83]

38. The Supreme Court unanimously allowed the appellant's appeal:

(1) The High Court made a factual finding that the concerns raised by JR87's parents in relation to withdrawing JR87 from religious education and collective worship were valid. There was ample evidence to support such a finding. The factual finding that there was a risk of stigmatisation to JR87 was not only amply supported but was the only available finding open to the judge on the evidence.[84]

(2) The Court of Appeal erred in seeking to draw a distinction between conveying knowledge in a manner which was not objective, critical or pluralistic, on the one hand, and indoctrination on the other. The Strasbourg authorities show that these are two sides of the same coin. [85] Moreover, the Court of Appeal erred in making a breach of A2P1 dependent on a finding that the Department had pursued the aim of indoctrination. In circumstances where indoctrination has occurred, making a breach of A2P1 dependent on a finding that the State has pursued the aim of indoctrination would make the rights of parents and pupils theoretical and illusory, by depriving them of a remedy where they had suffered a wrong.[86]

(3) In relation to the exemption which permitted JR87's parents to withdraw her from the religious education and worship, the Court of Appeal incorrectly imposed a higher and different standard than provided for in the Strasbourg jurisprudence, requiring the parents' apprehensions to be objectively justified so that they would have been realised in practice. Instead, the Court of Appeal was required to consider whether there was "capacity" for an undue burden and, that being the standard, "reasonable apprehensions" on the part of parents suffice.[87]

(4) When the Court of Appeal rejected the parents' fears of stigmatisation, it erred in departing from the factual finding made by the High Court, which was that the concerns raised by the parents in relation to exclusion are valid. It is only in exceptional circumstances that an appellate court should reverse a finding of a trial judge on a question of fact.[88]

(5) Exercising the right to withdraw JR87 was capable of placing an undue burden on the parents so that there was a breach of A2P1 read with article 9 ECHR.[89]

Case 8: In the matter of an application by Allister and others for Judicial Review[90]

39. The final case exhibiting mechanisms of constitutional review circles back to the constitutional aftermath of Brexit and ties in with the UK's dualist constitutional approach to international treaties: international treaties are binding only as a matter of international law and do not have an effect in domestic law. [91]

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[83] *Id.* [6].
[84] *Id.* [118].
[85] *Id.* [122].
[86] *Id.* [107], [123].
[87] *Id.* [127].
[88] *Id.* [128].
[89] *Id.* [129].
[90] *In the matter of an application by Allister and others for Judicial Review (Northern Ireland); In the matter of an application by Clifford Peeples for Judicial Review* [2023] UKSC 5 *("**Allister**").*
[91] *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 500 (Lord Oliver). See also *Miller 1* [56], [167] and [244].

40. The proceedings in *Allister* challenged the lawfulness of the Northern Ireland Protocol which formed part of the agreement between the UK and the EU regarding the UK's exit from the EU. The Protocol was given legal effect by the European (Withdrawal) Act 2018 s7A, which stipulates that all enactments are to have effect subject to s7A.[92]

41. The appellants challenged the Protocol, arguing that it was incompatible with Article VI of the Acts of Union 1800, which Acts provided for the Union of Great Britain and Ireland. Article VI states in its trade limb "[His] Majesty's subjects of Great Britain and *Ireland* shall … be on the same footing … in respect of trade". The appellants argued the Protocol means the people of Ireland are not 'on the same footing' because, for example, the Protocol requires paying a charge on goods which may be moved into the EU.

42. The Supreme Court dismissed the appeal.[93] Article VI is subject to the Protocol such that any parts which conflict with the Protocol are suspended. The Protocol is incorporated into UK law.[94] The consequence of all enactments having effect subject to s7A is that Article VI is modified to the extent it conflicts with the Protocol.[95] The suspension, subjugation, or modification of rights contained in an earlier statute may be effected by express words in a later statute. A clear answer has been provided by Parliament in relation to any conflict between the Protocol and any other enactment. The Acts of Union and Article VI remain in place but are modified to the extent and for the period during which the Protocol applies.[96]

43. This response by the Supreme Court emphasised Parliamentary sovereignty. As the Court held, "the most fundamental rule of UK constitutional law is that Parliament, or more precisely the Crown in Parliament, is sovereign and that legislation enacted by Parliament is supreme." A clear answer had been expressly provided by Parliament in relation to any conflict between the Protocol and the rights in the trade limb of article VI. The answer to any conflict between the Protocol and any other enactment whenever passed or made is that those other enactments are to be read and have effect subject to the rights and obligations which are to be recognised and available in domestic law by virtue of section 7A(2).[97]

44. Reflecting the sovereignty of Parliament, the Northern Ireland Protocol was lawful. Brexit or no Brexit, fundamental principles of constitutional review proved to be resilient and live another day.

Conclusion

45. My hope is that this whistle-stop tour of recent cases of constitutional significance will provide apt illustration of how litigants can and have approached constitutional challenges of some of the biggest and most controversial topics of the day. Although neither are dedicated constitutional courts, the UK Supreme Court and Judicial Committee of the Privy Council consider mechanisms of constitutional review in all sorts of ways in all sorts of contexts. The questions we consider span the globally significant referenda on the UK's membership of the EU and Scottish independence, to localised protected zones outside abortion clinics in Northern Ireland, to matters touching on one's private life such as the symbol of one's gender in a passport. The mechanisms of constitutional review remain flexible and responsive to what history throws their way.

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[92] *Allister* [65].

[93] Ground 2 related to s1(1) of the Northern Ireland Act 1998, providing that Northern Ireland remains part of the UK unless the majority of the people of Northern Ireland consent via a poll. Ground 3 challenged the lawfulness of the Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020, which permitted the Assembly to vote on the continued application of articles 5 to 10 of the Protocol without the need for cross-community support as required by s42 of the Northern Ireland Act 1998.

[94] European (Withdrawal) Act 2018, s7A.

[95] *Allister* [65].

[96] *Id.* [66].

[97] *Id.* [67].