CONSTITUTIONAL & ADMINISTRATIVE LAW

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CONSTITUTIONAL LAW

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Welcome/Introduction/Overview

This book provides you with basic information as a basis for you to form your own critical opinions on this area of law. Once you have mastered the basics, you will be inspired to question Constitutional framework principles in your essays and apply them in mock client advisory scenarios. Again, for your convenience, we have published a book that specifically provides you with examples of how to answer such questions and how to apply your knowledge as effectively as possible to help you get the best possible marks.

This aid is a fully-fledged source of basic information, which tries to give the student comprehensive understanding for this module. However, it is recommended that you compliment it with the further reading suggestions provided at the end of each topic, as well as read the cases themselves for more in-depth information. This book provides an analysis of the basic principles of modern Constitutional law. The following is a summary of the Book content:

- An introduction to the Law of the Con & Add;
- The legal relationships between the organs of state;
- What are the sources of the Constitutional framework of the UK;
- Law making;

The aim of this Book is to:

- Provide an introduction to anyone studying or interested in studying Law to the key principles and concepts that exist in the UK Con & Add.
- To provide a framework to consider the UK Constitutional and its law within the context of examinations.
- Provide a detailed learning resource in order for legal written examination skills to be developed.
- Facilitate the development of written and critical thinking skills.
- Promote the practice of problem solving skills.

- To establish a platform for students to gain a solid understanding of the basic principles and concepts of Constitutional Law, this can then be expanded upon through confident independent learning.

Through this Book, students will be able to demonstrate the ability to:

- Demonstrate an awareness of the core principles of Con & Add.
- Critically assess challenging mock factual scenarios and be able to pick out legal issues in the various areas of Con & Add.
- Apply their knowledge when writing a formal assessment.
- Present a reasoned argument and make a judgment on competing viewpoints.
- Make use of technical legalistic vocabulary in the appropriate manner.
- Be responsible for their learning process and work in an adaptable and flexible way.

Studying Constitutional & Administrative law

Constitutional Law is one of the seven core subjects that the Law Society and the Bar Council deem essential in a qualifying law degree. Therefore, it is vital that a student successfully pass this subject to become a lawyer. Additionally, a knowledge and understanding of Constitutional Law is needed in order to study other law subjects such as Politics, Administrative law, Immigration Law and international Law. The primary method by which your understanding of the law of Constitutional Law will develop is by understanding how to solve problem questions. You will also be given essay questions in your examinations. The methods by which these types of question should be approached are somewhat different.

Tackling Problems and Essay Questions

There are various ways of approaching problem and essay questions. We have provided students with an in-depth analysis with suggested questions and answers at the end of each chapter.

Chapter 1 - Introduction to Constitutional Law

Introduction

Law is generally divided into two different segments: public law and private law. While public law regulates relationships between the state and private individuals, private law generally regulates legal relationships between private persons. Public law is comprised of constitutional law which regulates the functioning of the state and administrative law which governs the relationships between the state and private individuals.

The distinction between private and public law

As stated above, private law is *in fine* a branch of the law that is concerned with the relationship that individuals have with one another. It should be noted that the notion of private persons encompasses both individuals and legal persons that are private entities (companies, associations etc.).

Private law will apply, for example, when an individual agrees to purchase a car and forms a legally binding contract with another person. Private law also regulates defamatory cases where for example, an individual sues a neighbour for making slanderous accusations about his past.

It is also worth noting that private persons can have legal relations of private law transactions with public persons (in this context and for the present purposes, the term public persons refers to the state in general including the government, local authorities etc.). For example; a private legal person, such as a company, can have private legal transactions with local authorities for the purposes of providing public services. Similarly, an individual may sue a public person in the law of negligence for having acted carelessly and caused harm.

However, these legal relationships, given that they involve the state, will generally imply a public law dimension. Accordingly, special rules will be applied to the state in order to not treat as an ordinary private individual defendant. In this connection, it is important to note that the line between public and private law may sometime be difficult to draw given that there is no absolute distinction. In this regard, Lord Wilberforce in **Davy v Spelthorne Borough Council** (1984) 1ac 262, commented: "the expressions "private law" and "public law" are convenient expressions for descriptive purposes. In this country they must be used with caution."

Public law subsumes constitutional and administrative law. It is the branch of law that focuses on the power of the state as well as its structure and organization. It deals with the location of state powers, how they are exercised and controlled and how it could impact on individuals. One of the questions raised by public law is to determine how the institutions relate between them and in relation to individuals.

At this stage, it is important to note that criminal law, although it has a public law dimension, has historically been taught separately. Indeed, the public law dimension comes from the fact that the society as a whole also suffers from an offense. Hence, public authorities are entitled to punish authors of criminal acts. Therefore, it is not wrong to say that the broad term of public law embraces criminal law, although it is usually taught in a different module.

The distinction between constitutional and administrative law

Although constitutional and administrative law form part of the generic term of public law, a distinction between them should be drawn. Constitutional law relates to the rules enshrined by a constitution. A precise definition of the term constitution will be given in the following chapters. However, for the present purposes, a constitution is a set of fundamental rules regulating the powers of the state and determining the relations between its institutions and

individuals.

Constitutional law concerns various aspects of the structure and organization of the state such as the recognition of the principal institutions of the state (parliament, government and the courts) but it also confers there to these institutions specific roles and functions, determines their nature and the extent of their powers.
In addition to this, constitutional law sets procedures and mechanisms to oversee, regulate and check the powers conferred to the different institutions. This is usually done by the way the constitution organizes the way of how the main institutions relate to one another.

The constitution generally enshrines the fundamental rights of the individual of the state and how these rights can be judicially protected from infringements of the state.

In contrast with constitutional law, administrative law is generally concerned with the law relating to the administration/government. The government and its administration are invested with extensive prerogatives to provide services such as education and to adopt regulations to implement its political program. Administrative law therefore ensures that the administration is strictly acting within the limits of its mandate.

This branch of the law deals with different control mechanisms that can be judicial (for example the judicial review) or political (for example parliamentary control with ombudsman). Although a clear-cut distinction between administrative and constitutional law is impossible to draw, it should be noted that where constitutional law concerns the main structure and organisation of the state, administrative law relates rather to the concrete exercise of the governmental powers. For the purposes of clarity of the analysis, constitutional law and administrative law will be studied separately in the next chapters.

Recent developments in constitutional and administrative law

The general election victory by the conservative party, led by Margaret Thatcher in 1979 was a contextual starting point for many of the recent developments of the UK constitutional and administrative law. Margaret thatcher used the methodology of 'new public management' (NPM), an approach which rejected traditional bureaucratic methods and structures in favour of market-based and business-like regimes of public service.

Since then, the different administrations have been driven by the perceived need for greater efficiency and accountability of public action. For years the division between the public and private sectors in the UK had been clear-cut. Traditionally, the national provision of communications, power and utilities, the health service, and public transport were provided by public bodies, namely local authorities steered by government departments. However, the quest for greater efficiency brought dramatic changes in the nature and the structure of the state. This phenomenon, called privatisation of the public sphere, took two forms.

The first evolution de-nationalised many of the above-mentioned public prerogatives and encourage the state to buy a stake in the new competing private enterprises by buying shares. As a consequence, a great number of companies started competing for the consumer's business in the provision of energy, telecommunications, and transport. But what were the constitutional implications? Loveland puts it: "*in privatising former public services, the government effectively abolishes ministerial responsibility for matters which may have a significant impact on citizens' lives and welfare. If we regard the constitution as being concerned essentially with structuring both the substance and the processes of the relationship between a country's government and its citizens, it seems that a major part of the*

constitution has undergone substantial reform..."[1].

The second form of privatisation was through contracting-out to private providers specific services which were traditionally provided by public entities. For instance, the provision by private companies of 'outsourced' services from office-management to staff recruitment; waste-collection to social care; catering, cleaning and laundry provision for schools, hospitals and prisons. Through contractual arrangements to private companies the responsibility logically shifted although a number of problems relating to ultimate responsibility for the discharge of those functions and commensurate dimensions of accountability remained.

In 1988, the cabinet office efficiency unit published a report entitled "improving management in government: the next steps". The fundamental idea behind the program presented in this report was to improve the accountability of the government and clearly define responsibility of public bodies.

Historically, the constitutional convention of ministerial responsibility meant that government ministers were, in principle and in most cases in reality, accountable for everything done in the name of their department. In serious cases where something had gone badly wrong, this notion of ministerial responsibility could result in ministerial resignations or removal from that particular office.

The 2005 Act also brought about a major change to the UK's court structure. Historically, the House of Lords had both a legislative and a judicial capacity. To accentuate the separation between legislature and judiciary, however, the constitutional reform act

[1] Ian Loveland, Constitutional Law, Administrative Law and Human Rights, (4th edn, Oxford University Press, 2006) pp. 24-5

provided for the House of Lords in its judicial capacity to become the new Supreme Court of the United Kingdom, and this change came into effect in October 2009.

One of the other main debates concerns the fundamental constitutional doctrine – that of parliamentary sovereignty, which is the core characteristic of UK's constitutional identity. The question of the UK parliamentary sovereignty raises another issue of devolution of executive and legislative powers to different parts of the United Kingdom. This question is particularly pertinent with regard to Scotland, following the referendum on Scottish independence in 2014 and the debates following the Brexit; but it also affects wales and Northern Ireland.

The mandate and missions of the administration of the state requires the government, local authorities or courts to use special public prerogatives which enables local authorities', for example to purchase property compulsorily or courts to impose imprisonment. These powers are, of course, granted to public authorities almost exclusively by means of statutes which – at least in theory – delineate the extent and scope of those powers.

Judicial review is often seen as the major way in which the legality of administrative action is controlled. This is an approach which stresses the part played by the law in the control of administrative activities, and is underpinned by the doctrine of *ultra vires* which imposes on public bodies the obligation to lawfully act within the limits of the powers given to it.

Historically, the massive expansion of the administrative state over the last hundred years, with the state taking on responsibility for education, health provision, energy, social services and housing; logically imposed on public bodies to operate within the bounds of legality. Consequently, administrative law is defined as the legal framework through which public bodies may deliver better, in

other words more transparent and fair, public services.

Those in favour of these ideas are followers of the green-light theory. Taggart explained it: “green light theorists looked to the truly representative legislature to advance the causes of workers, women, minorities and the disadvantaged. For them, the role of law was to facilitate the provision of programmes of public services. Parliament was trusted to deliver socially desirable results”. In this respect, the functions of administrative law are to facilitate and to regulate of public bodies.

In the 1990s has emerged a new function to administrative law which we may term a ‘rights-based’ approach. The achievement of this phenomenon has resulted on the incorporation of the European convention on human rights into English law through the human rights act 1998. This approach stresses the need not for a reactive verdict on the legality or otherwise of administrative action, but rather on the proactive development of standards of legality designed to protect human rights and prevent abuse of power. Like red-light theory, this view sees a central role for the judiciary in analysing the impact of governmental actions on rights.

Summary

- Law is generally divided into two different segments: public law and private law.

- While public law regulates relationships between the State and private individuals, private Law generally regulates legal relationships between private persons.

- Although constitutional and administrative law form part of the generic term of public law, a distinction between them should be drawn.

- Constitutional law concerns various aspects of the structure and organization of the state such as the recognition of the principal institutions of the state (Parliament, Government and the courts) but it also confers their to these institutions specific roles and functions, determines their nature and the extent of their powers.

- Although a clear-cut distinction between administrative and constitutional law is impossible to draw, it should be noted that where constitutional law concerns the main structure and organisation of the state, administrative law relates rather to the concrete exercise of the governmental powers.

- In 1979, the use of the methodology of 'new public management' (NPM) by Margaret Thatcher consequently led to a privatisation of the public sphere which changed the structure and organization of the administration.

- In 1988, the Cabinet Office Efficiency Unit published a report entitled "Improving Management in Government: the Next Steps" in order to improve the accountability of the government and clearly define responsibility of public bodies.

- In the same view, judicial review was introduced and the House of Lords became the Supreme Court of the UK.

- In the late 1990's, administrative law took a new turn with an "right-based" approach underlining the proactive development of standards of legality designed to protect human rights and prevent abuse of power.

Chapter 2 – The characteristics of a constitution

The idea of a constitution

All organisations – whether a sports club or a state – have a set of rules which serve as a constitution. Every society requires fundamental rules in order to function and to ensure order. However, before considering the importance for a state to have a constitution, it is crucial to define what a state is. Even though defining the notion of statehood, in its modern sense, is one of the most controversial issues of international relations, there is a definition, almost universally shared by the international community, coming from international law.

The Montevideo Convention on Rights and Duties of States 1933, art 1 defines a state as follows:

"The State as a person of international law should possess the following qualifications:
(a) a permanent population;
(b) a defined territory;
(c) government; and
(d) capacity to enter into relations with other states".

In international law, the concept of state recognition has been presented for a long as being a precondition of statehood. However, this issue seems to have been recently solved by modern international law which excludes this factor from the constitutive elements of statehood, as stated in the Montevideo convention. The idea of constitution comes from the historical evolution from the modern State and the Rule of Law: even the government is subjected to certain rules determining what he can or cannot do. These rules are meant to ensure the continuity of the state and its order.

In an attempt to define a constitution, Bradley and Ewing have noted that in a narrow sense, a constitution can be described as: *"(...) a document having a special legal status which sets out the framework and principal functions of the organs of government within the state and declares the principles or rules by which those organs must operate".*

But there are other perspectives on what a constitution is about. A social scientific perspective would tend to view the state as those elements in society which, taken together, represent the central source of political, military and economic power; and the constitution of a state is the formal expression at any given time of the allocation of this power as between individuals and groups.

As a conclusion and for the purposes of this chapter, we may conclude that a constitution is a set of supreme rules and principles regulating the organisation and structure of a state, which the governing institution should adhere to. Generally, these rules will be gathered in a written document entitled "Constitution" as being more or less supreme for each state. However, for some states, for instance the United Kingdom, these rules are located other than in a specific constitutional document.

The contents of a constitution

The exact contents of constitutions will vary from state to state. However, there are always common features present in almost every constitution. For example, as an introduction, a preamble will be found in many states constitutions. These preambles are usually symbolic and set the main values ideology of the rest of the text. For instance, the preamble to the United Nations Charter, which serves as a constitution for the organisation although it is not a constitution in the nationalist sense, is illustrative of the ideology and the spirit of the text: "We, the peoples of the united nations". In this respect, preambles of constitutions tend to be declaratory in nature but they generally identify the people as the constituent or the sovereign power from which the moral authority of the constitution derives.

A constitution will primarily establish the different institutions of the state and set out their different roles, powers and functions. Traditionally, the constitution will establish the legislative, the executive and the judiciary that are the three main powers of the state, divided by function. The law-making institution passes legislation. From state to state, the legislative will be called Parliament, Congress or Assembly. The government is the main institution responsible for complying with the obligations of the state towards its population and making policy decisions. The

executive power is generally headed by the Prime Minister but it can also be headed by the President or a cabinet of ministers.
The judicial institution dictates and interprets the law. The courts are usually part of a judicial system which is hierarchal and headed by the Supreme Court or a Constitutional Court. In some judicial systems, such as France, civil and administrative courts are separated and placed under a different hierarchy according to their functions.

The constitution may also confer specific powers to certain institutions. For example, the constitution may provide, by a specific provision of its text, that the President has the power to sign Treaties on the behalf of the state. A constitution will also determine the constitutional relationship between the different institutions that it establishes. For instance, the constitution will generally set out that the Parliament approves by a consulting vote the budget of the executive. This principle, which is inherent to any democracy, refers to the check and balances as it is generally called under US constitutional law. For example in the UK, the constitution establishes the relationship between the Queen and the Parliament in the context of the passage of legislation. Even though the Parliament adopts legislation the Queen is still required to grant Royal Assent to legislation.

Accordingly, a major theme of constitutional law and the study of the level of democracy in a state is how the state institutions work together, and most importantly, how these institutions check and balance one another. As stated above, a constitution will also deal with how the individual relates to the state. Democratic constitutions will do so by conferring fundamental rights to the individual. The enshrinement of these rights in the constitution will impose obligations on the state such as the protection of the life of an individual from murder for example. In this respect, the constitution will accord a special protection for individual's rights from infringement by the state. However, this list of rights will also contain the justifications to restrictions on individuals' rights.

Therefore a constitution will also set what powers the state can exert over the individual by regulating for instance in what circumstances an individual can be arrested or detained. To some extent, this can be seen as being a condition part of the social

contract signed between the individual and its state. In a democracy, having such a bill of rights in the constitution will legitimate the public powers of the state institutions. One of the most famous declarations of fundamental rights is the French Declaration of Human and Citizens' Rights (1789), which has been interpreted by the French Constitutional Court as being part of the constitutional bloc.

Finally the constitution will generally contain the methods and procedures to be amended. Given that law is an evolutionary science, constitution have to be capable of being adapted and improved especially when they have been in force for decades or centuries. For example, amendments to the constitution of the United States can be made provided that two-thirds of both the Congress and three-quarters of the state legislatures approve such changes. The French fifth constitution (1958), in its article 89 adds a supplementary condition of popular consultation. This is because the people are considered as being the constituent, having the power to adopt and reform the constitution. As opposed to the theory of national sovereignty, this approach is generally referred to as popular sovereignty.

The purposes of a constitution

The *rationale* of having a constitution can be explained by several reasons. First of all, as any other organisation, a society needs rules to ensure stability. History, and particularly the middle age, has shown that the lack of regulations resulted on the instability of permanent military conflicts. In this regard, constitutionalism has been a factor of progress for modern societies.

In this respect, a constitution ensures that the state achieves its primary purpose and objectives. For instance, the third and fourth French constitutions have resulted on institutional blockages that prevented the executive from governing the country and the legislative power from adopting laws. This lack of stability inspired the fifth constitution (1958) that reaffirmed the legitimacy and stability of state institutions and particularly the executive.

A constitution also legitimates the state in its actions to maintain public order. The constitution will contain provisions about which

institution is able to declare war in case of external attack but also which measures the state can take to efficiently tackle a civil war. Another function of a constitution will also be to ensure that institutions have certain legitimacy and act with consent of the people. Thomas Paine famously stated: *"A constitution is not the act of a government, but of a people constituting a government, and a government without a constitution is a power without right"*.

In our modern democracies the legitimacy of a constitution will be enacted through popular consultation. As noted above, according to the popular sovereignty theory, the sovereign is the people. For example, Article 6 section 1 of the Irish constitution specifically underlines this idea: *"All powers of government, legislative, executive, and judicial, derive, under God, from the people, whose right is to designate the rulers of the state"*. Therefore, once the sovereign, the people, has been granting official assent, the state institutions enjoy the public prerogatives required to govern the people. A safeguard to engage the responsibility of the state when exercising such powerful prerogatives is to enshrine, in the constitution, a bill of rights preventing the exercise of such powers to interfere with individuals' rights.

A constitution may also serve draw a clear line under an authoritarian past enshrining the values and principles of a new democracy. Needless to quote the numerous historical examples, a constitution may often be adopted after a revolution a drastic change of regime. The role a constitution is not only to distribute public powers amongst the state institutions but also to draw the limits of these powers and the mechanisms to check that they are not misused or abused at the expenses of the individuals.

Finally, a constitution is also a text that gathers the core values of a society and binds its individuals between them. These values keep the individuals of a society united and enable them to progress together towards common objectives. They will vary from state to state and can be for example the public good, the welfare of the population, the promotion of democratic values or the protection of human rights. For instance, the Brazilian constitution, under its Article 3, provides that one of the objective of the state is to eradicate poverty.

Religious states usually confer a special attachment to a religion. Generally, where a specific religion is predominant, this predominance will be enshrined in the constitution. For example, this is the case of the catholic states conferring a particular role to the Church. However, a constitution can also be used to unify different groups or religions or to recognize the rights of certain minorities. For example, the Moroccan Constitution (2011) in its preamble recognizes the Muslim and Jewish cultural identity of its citizens.

The classification of constitutions

Written and unwritten constitutions

A written constitution is traditionally seen as one formulated of one or several written documents. The USA provides a classic example of such a purely formal constitution. Similarly, the Indian constitution is made of one written document that contains 400 articles.

However, other constitutions, such as the French constitution, are comprised of multiple written documents (Déclaration of the Rights of Man and of the Citizen of 1789, Preamble of the 1946 constitution, the 1958 constitution, etc.). For some commentators, such as FF Ridley: *"There is no British Constitution"*. In this view, a single entrenched written document is the defining characteristic of constitutional states. The UK, in contrast, does not have a "traditional" written constitution. Its constitution has evolved over many centuries, and as a result cannot be found in any single, or even a small group of documents. For traditional constitutionalists, such as de Tocqueville, writing in the first half of the 19th century, the UK's lack of a written constitution left him to remark that in England: "there is no constitution". However, in line with definitions cited earlier, the UK can certainly be seen as a constitutional state. In addition to this, most of the constitutionalists agree to admit today that the UK has a constitution, although it is not a traditional written constitution. The UK constitution has a body of rules, both written and unwritten, which allocate the functions of the state. This is one of the primary functions of a constitution. Sir Ivor Jennings put it: *"If a constitution means a written document, then obviously Great*

Britain has no constitution ... But the document itself merely sets out the rules determining the creation and operation of governmental institutions, and obviously Great Britain has such institutions and such rules. The phrase 'British constitution' is used to describe those rules." Therefore, it can be said that the UK has a *de facto* constitution.

Theorists use the distinction between those constitutions that are codified in one or several documents (as in the USA), and those that are uncodified and found from a number of legal sources (as in the UK).Nevertheless, the distinction between written and unwritten is not absolute since it has recently been admitted that other unwritten sources feed a constitution, even in states that have a written constitution. For example, jurisprudence of the national supreme courts interprets the constitution and sets principles that are constitutional. Moreover, written provisions are necessarily supplemented by political practices and conventions that have been developed throughout the state's constitutional history.

Rigid and flexible constitutions

Historically, a distinction has also arisen based on the process of amending constitutions. Accordingly, a rigid constitution is one where constitutional law can only be amended through a special constitutional procedure. These constitutions require several constitutional obstacles to be overcome as safeguards of the continuity of the state. This is because according to the traditional hierarchy of norms, constitutional law has a higher status than all other forms of national law.

Generally, rigid constitutions are contained in one written document. However, there are exceptions to this trend and the constitution of Singapore provides an example: it is written but flexible. The US Constitution is a very good example of a rigid constitution. In order to make a constitutional amendment; a proposal firstly has to be adopted by both houses in Congress (the legislature) with a two-thirds majority. The proposal then has to be ratified by three-quarters of the states.

On the other hand, a "flexible" constitution is one where constitutional laws can be amended by regular legislative laws. For

instance, in the UK, Parliament is the supreme law-making body and it can pass, amend, or repeal any law with a simple majority. The Human Rights Act 1998, which is recognized as having constitutional value, for example, could be amended or even repealed entirely in exactly the same way as any other Act of Parliament. Accordingly, no special mechanisms are necessary to change important constitutional laws in the UK. The traditional legislative law-making process in the UK implies the consent of both the House of Commons and the House of Lords together with the Royal Assent. This can be explained by the central place of parliamentary supremacy (or sovereignty) in the UK. However, having a flexible constitution does not mean that Parliament, or other bodies entitled to do so, can amend the constitution without any limits. Because of the major importance of the constitution in every state, there are some legal and political constraints on what Parliament can and cannot do.

Unitary and federal constitutions

These classifications have to do with the structure of the state and the devolution of powers or sovereignty from the central to the local level. A unitary constitution has the majority of its legal and executive power vested in the central organs of the state. In the UK, most power is centrally controlled in Westminster and Whitehall. However, some power is devolved to regional bodies, for example local authorities ("councils"), to the London Assembly and most notably (since 1998) through the devolved Parliament in Scotland and the Assemblies in Northern Ireland and Wales.

The devolved nations of the UK have significant but limited jurisdiction in certain areas: their power is given by an Act of the Westminster Parliament (for example, the Scotland Act 1998 and the Government of Wales Act 1998), and the power to repeal those Acts remains with the Westminster Parliament. Therefore, these institutions remain subordinate, in the legal sense, to the supremacy of Westminster Parliament. This phenomenon is referred to by specialists as the decentralization of the power in unitary states and is also illustrated for example, in Spanish or French constitutional history.

In short, even if a unitary constitution recognizes and delegate power to decentralized institutions, they do not have express constitutional protection and do not formally exist as separate entities from the central state, unlike the state/provincial/ legislatures in a federal constitution.

Conversely, in a federal constitution, power is divided between federal government and states or regional authorities. This model is generally established in a constitutional document, for example the German and US Constitutions. These constitutions establish the legal recognition of local states as separated entities, remaining inter-connected by the federation.

Some powers, like state security and foreign policy, are likely to be reserved to central government, but the regional authorities (such as the states in the USA or the German "*Bundesländer"*) have considerable powers to legislate on and administer their own affairs. For this reason, where the competence to legislate in a specific area belongs to regional states, you will find, within the same federation, different legislations from one state to another. For instance, in the US, since the power to adopt legislation on death penalty remains a state prerogative, some of them have prohibited death penalty and others are still practicing it.

Separated and fused powers

According to the theory of the separation of powers, one of the principles of constitutionalism is that power should be divided and dispersed in order to prevent abuse of power by those in control. This approach fosters checks and balances between the different bodies of the state.

The US Constitution is a clear example of a separated constitution; power is clearly dispersed between Congress, the Judiciary (Supreme Court), and the President. Each body has its own functions though it exercises some control or check over the other two. At the other end of the extreme would be an autocratic or totalitarian regime where power is vested in one body or one individual: this type of constitution is said to be fused. Thus, a separated constitution is an indicator of the democratic nature of a state.

Monarchical and Republican constitutions

A monarchical constitution provides that the head of state is a monarch. Most of the modern states in this category have adopted "constitutional monarchies'' in which the monarch plays a largely symbolic role with only very limited powers, for example the UK, Spain, the Netherlands and Sweden.

In the UK, Queen Elizabeth II is still nowadays the head of state and all government acts are passed in the name of the Crown. She has a large amount of theoretical legal power but little practical power given that constitutional practices have led to political limits of her powers. Indeed, the Executive, on the Crown's behalf, exercises a large amount of the legal "prerogative" power of the Crown.

On the other hand, a republican constitution is one in which the head of state is usually democratically elected, and is most often known as a President. The degree of power that such leaders have depends on the constitution itself.

In some countries, the President will have very significant political power, as for instance in France and the USA. In other states, though, the President's role will be largely symbolic and ceremonial, such as in Germany or in the Republic of Ireland. In those countries, the Prime Minister or the Chancellor will be, *de facto*, the head of the executive.

The basic principles of constitutionalism

The main objective of constitutionalism is to ensure that governments act constitutionally. In other words, each institution of the state has to act in accordance with the rules and principles enshrined in the constitution. This is related to the Rule of Law which is of a crucial importance in the modern state where governance is bound by a legal system allocating and limiting powers.

As stated above, the function of a constitution is not only to describe the powers of governing institutions but also to set out control mechanisms and checks in the constitution. The rationale

behind constitutionalism is linked to the separation of powers; the objective is to prevent abuse of power by state institution. To some extent, constitutionalism is a safeguard against the excesses of totalitarianism and authoritarianism. For instance, the executive cannot decide to monopolise legislative and judiciary functions by force just because it finds it necessary.

According to the modern notion of constitutionalism, acting constitutionally also entails to respect for the basic human rights of individuals. In this sense, the fact that the executive of the state is bound by the obligation to act constitutionally, prevents him, at least legally, to commit violations of individuals' rights. For instance, in the UK constitution, constitutionalism implies that the use of public power is controlled in accordance with the following principles:

- Basic rights of the individual are enshrined and safeguarded
- Public power is separated amongst the different state institutions
- When exercising public power, state institutions should act strictly within their legal prerogatives and limits
- An independent and impartial court system should review the constitutional use of public power
- The Kingdom should adhere to the basic principles and values of democracy

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Chapter 10 – The European Convention on Human Rights

Human Rights and the adoption of the European Convention

The concept of human rights relies on the postulate that individuals have rights simply because they are human beings. One of the fundamental principles of human rights is equality; human rights are vested in all individuals regardless of their race, ethnicity, religion, gender, sexual orientation or nor matter whether they are disabled or abled.

Human rights have developed through history along the principles of natural law, which comes from the period of Enlightenment. Authors like John Locke, Thomas Paine, Jean-Jacques Rousseau argued at the time that a body of superior principles and values should be complied with by any other laws. The American Constitution and its Bill of rights (1787) and the French Declaration of the Rights of Man and the Citizen (1789) had major influences in the legal codification of human rights theories.

Later on, in 1945, the United Nations were created by the international community in order to ensure peaceful settlement of conflicts. In 1948, the Universal Declaration of Human Rights was adopted by the UN General Assembly. Although originally considered in international law as a soft law, it is nowadays undisputed that it has the effect of customary international law.

At the European level, the Council of Europe was created in 1949 with three main objectives: the protection of Human Rights, Democracy and the Rule of Law. The Council of Europe has to be distinguished from the European Union. It is an inter-governmental organization composed of 47 Member States, often referred to as the "broad Europe". For instance, Turkey and Russia are also members of the Council of Europe.

In 1950, the Member States of the Council of Europe adopted, according to the Council of Europe's mandate given that one of its main objective is the protection of human rights, the Convention for the Protection of Human Rights and Fundamental Freedoms

(hereinafter "the Convention"). The Convention is an international treaty which protects, *inter alia*, the right to life (Article 2), the prohibition of torture (Article 3), the prohibition of slavery (article 4), liberty and security of the person (Article 5), the right to a fair trial (Article 6), the right to private life (Article 8), freedom of thought, conscience and religion (Article 9) and freedom of expression (Article 10).

As of today, the Convention has 16 protocols. The latest entered into force in August 2018. In this regards, Protocol No. 16 to the Convention allows the highest courts and tribunals of a State Party to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

The status of the European Convention and its legal force

The Convention, for the purposes of public international law, is a bilateral Treaty. Article 46 of the Convention and subsequent practice: all final judgments (Chamber and Grand Chamber) are binding on the respondent States. After a judgement is issued, the concerned contracting State has to comply with it by paying any just satisfaction ordered by the Court or/and by taking the necessary steps to amend the impugned domestic law which is not compatible with the Convention. For instance, following the European Court's judgement in the case **Malone v. UK, no 8691/79, 02/08/1984**, ECHR which found a violation of Article 8 (right to private life) concerning telephone tapping, the British Parliament adopted the Interception of Communication Acts 1985, in order to comply with the Court's judgement.

The Committee of Ministers supervises the enforcement of judgments. It not only ensures that damages awarded by the Court are paid, but it also assists the State in question in trying to find suitable measures in order to comply with all other demands made by the Court. Should a Member State refuse to implement a judgment, the Committee of Ministers can apply multilateral peer-pressure or bilateral pressure from neighbouring States. It can also threaten the Member State in question with the publication of a list, containing all its pending cases before the Court, or – as a last resort – with the exclusion from the Council of Europe.

Derogations, reservations and denunciations

According to Article 15 of the Convention, temporary derogations are allowed in times of public emergency, under the following conditions: *"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law".*

However, the second paragraph of Article 15 prohibits derogations to rights as protected by Article 2 (except regarding deaths resulting from lawful acts of war), 3, 4(1) and 7. These rights are often referred to as "absolute rights" as opposed to "conditional rights" that can be derogated from. This concept of absolute rights is also applicable to the rights that do not allow for interferences. Conversely, conditional rights, such as Article 8,9,10 and 11 allow interferences if they can be justified (prescribed by law, protecting a legitimate aim and necessary in a democratic society).

General principle: The natural and customary meaning of "public emergency threatening the life of the nation" is clear and refers to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.

Lawless v. Ireland (No. 3), no 332/57, 01/07/1961, ECHR
Facts: In this case, the applicant, a member of the organization IRA, had been detained for a period of five months without trial under the Offences against the State (Amendment) Act 1940. He claimed that his detention constituted a violation of Article 5. Ireland however previously informed the Council of Europe, under Article 15 of the Convention, that it might take measures interfering with some of the rights protected by the Convention.
Ratio: The Court acknowledged the difficulties faced by States in protecting their populations from terrorist violence, which constitutes, in itself, a grave threat to human rights. Accordingly, it concluded that the measures taken in derogation from obligations under the Convention were

"strictly required by the exigencies of the situation".
Application: The Court interpreted the notion of public emergency quite flexibly in order to enable State to protect citizens from terrorism.

In addition to this, under Article 15 § 3, any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed. The primary purpose of informing the Secretary General is that the derogation becomes public and the measures taken by the State are covered by public scrutiny. Reservations to the Convention are also possible under Article 57. In other words, any State, when signing or ratifying the Convention can subject its accession to a condition or limit the scope of one of the provisions of the Convention. However, Article 57 prohibits general reservations which would defeat the object and purpose of the Convention (**Loizidou v Turkey, no 15318/89, 23/03/1995**, ECHR).

As regards withdrawal, according to Article 58(1) of the Convention: *"A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties".* In other words, the Court has still jurisdiction to review pending cases against a State that denounces the Convention but also on cases lodged up to 6 months after the denunciation. In practice, only Greece denounced the Convention in 1970 after a military coup but ratified the Convention once again in 1974. In a Brexit context, the same question was debated for the UK. However, although withdrawing from the European Convention is legally possible for the UK, and even easier in practice than exiting the EU, it seems that it is not yet on the political agenda.

Proceedings before the European Court of Human Rights

The European Court of Human Rights (hereinafter "the Court") is located in Strasbourg, France. It is composed of 47 judges, each one of them representing one of the Member States. The Judges are appointed by the Parliamentary Assembly of the Council of Europe (PACE), which selects one judge out of a list of three proposed by the concerned Member State. If the PACE does not find any suitable candidate in the list, it can refuse the list and ask the Member State to present a new one. The Court is composed of a Chamber who takes judgements that can be referred to the Grand Chamber by a panel of judges upon the request of one of the parties. This is a sort of appeal given that the Grand Chamber's judgement prevails over the Chamber's judgement. Since the entry into force of Protocol 14 in 2010, the Court can issue single-judge decisions to declare applications inadmissible. The Court initiated new working methods to tackle the massive backlog of clearly inadmissible cases. In 2011 over 100,000 of such applications were pending. As of today, the total of pending applications is approximately 60 000.

Jurisdiction

Under Article 1 of the Convention: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". Here the term "everyone" should be emphasised. It means that there is no requirement regarding citizenship to claim that applicants have been victims of human rights violations by the any responding State. In addition to this, the contracting parties' obligation to secure the Convention's rights applies to every human being, regardless their residence status in the concerned Member States. Therefore, a State cannot pretend that the Court does not have jurisdiction over alleged violations of the rights of undocumented migrants, for example.

The term "jurisdiction" in Article 1 of the Convention refers to the traditional concept of territorial jurisdiction, which encompasses the combination of the European territories of the contracting parties but also the overseas' territories. For instance, the Court has jurisdiction for alleged violations committed in Martinique (French overseas region). In addition to the traditional concept of territorial jurisdiction, the Court, in specific circumstances, also has extra-

territorial jurisdiction. In those cases, the Member States will be held responsible for acts that have occurred outside the geographical jurisdiction of a contracting State. These could include matters arising from the activities of State agents abroad, for instance, or when a Member State has effective control of the relevant territory abroad as a consequence of military occupation, or because the government of that territory had consented or acquiesced to the exercise of its powers. The Convention allows individual complaints (under Article 34 of the Convention) but also inter-States complaints (Article 33 of the Convention) to be lodged to the European Court of Human Rights for a review of potential violation of human rights as provided for by the Convention.

General principle: The European Court of Human Rights can review both individual and inter-States complaints.

Ireland v. The United Kingdom, no 5310/71, 18/01/1978, ECHR
Facts: The Irish government brought an inter-State complaint against the United Kingdom for alleged violations of Article 3 of the Convention (prohibition of torture, inhuman and degrading treatment) of the rights of suspected terrorists by British soldiers in Northern Ireland.
Ratio: The Court held that the authorities' use of the five techniques of interrogation in 1971 constituted a practice of inhuman and degrading treatment, in breach of Article 3, and that the said use of the five techniques did not constitute a practice of torture within the meaning of this Article.
Application: Although a vast majority of the applications to the Court are lodged by individuals, inter-States complaints can also be reviewed by the Strasbourg Court under Article 33 of the Convention. It should be noted that the Court recently received a request for revision of this judgement for new facts, which was dismissed on 20/03/2018.

Admissibility

The Court, before examining the merits of a case, will first look at its admissibility. Admissibility criteria are listed in Article 34 and 35 of the Convention. These rules are aimed at filtering out helpless claims or claims presented in bad faith and helps reducing

the backlog of applications by processing cases more rapidly. Most of the criteria are formal or procedural. Accordingly, we will only discuss those of greater significance.

First of all, the Court will only review applications lodged by applicants who claim to be "victims" of a breach of the Convention. According to Article 34 of the Convention, individual applications can be lodged by "any person, non-governmental organisation or group of individuals claiming to be a victim of a violation" of their rights by one or several Member States. The term "person", in line with its traditional legal signification, covers both individuals and legal persons such as companies, trade unions or political parties.

Applicants must demonstrate that they have been directly affected by State action or inaction in order to be a "victim" for the purposes of admissibility of their applications. However, the Court may accept indirect victims such as relatives of a deceased person with claims related to Article 2, for example.

General principle: In very exceptional circumstances, a non-governmental organisation that was in contact with the direct victim might have standing to lodge an application on behalf of a deceased mental patient without relatives.
Centre for Legal Resources on behalf of Valentin Campeanu v. Romania [GC], no 47848/08, 17/07/2014, ECHR
Facts: The application was lodged by a non-governmental organisation, the Centre for Legal Resources (CLR), on behalf of a young Roma man, Mr Câmpeanu, who died in 2004 at the age of 18 because of the alleged medical negligence of a hospital.
Ratio: The Court dismissed the Government's preliminary objection that the CLR had no standing to lodge the application. It accepted that the CLR could not be regarded as a victim of the alleged Convention violations as Mr Câmpeanu was indisputably the direct victim while the CLR had not demonstrated a sufficiently "close link" with him or established a "personal interest" in pursuing the complaints before the Court to be considered an indirect victim. However, in the exceptional circumstances of the case and bearing in mind the serious nature of the allegations, it had to have been open to the CLR to act as Mr Câmpeanu's representative.

Application: In this case the Court conceded that in exceptional circumstances resulting on the death of a direct victim of a breach of the Convention, persons related to the deceased could have standing to lodge an application on his/her behalf where declaring such application inadmissible would result on a flagrant injustice.

Another admissibility criterion is that applications have to be lodged within six months after the final domestic decision. The 6-month-rule is closely related to the main admissibility criterion that requires applicants to exhaust all domestic remedies before lodging an application to the Court. One of the main exceptions to this rule requires the applicant to demonstrate that the said remedy was not effective in the sense that it did not present reasonable prospects of success in order to redress the breach of the Convention.

In addition to this, since 2010 and the entry into force of Protocol 14, the Court can declare applications inadmissible if the applicant has not demonstrated that he or she suffered a significant disadvantage. This rule will be applied, for example, if the financial loss suffered by the applicant is modest.

It should be noted that the Court increasingly made use of the manifestly ill-founded ground to reject cases that did not disclose *prima facie* violations. Mainly invoked in single-judge decisions, this ground of inadmissibility is located between admissibility and the review of the merits of a case. The doctrine qualifies this use as abusive and dangerous for the administration of justice. In this regard, it should be noted that more than 90% of the applications are declared inadmissible by the Court.

Key jurisprudential principles developed by the European Court to examine the merits of applications

The notion of positive obligations

The idea of traditional negative obligations under the Convention is that a State should refrain from actively interfering with an individual's rights. In a concrete example, the negative obligations of contracting States under Article 3 means that they should refrain from torturing or subjecting individuals to ill treatments.

It should be noted that the defendant, before the Strasbourg Court will always be a Member State. However, the State can still be condemned by the Court for failure to act, for example, in a case implying infringements of individual's rights by private actors. This is the theory of positive obligations: Member States are held responsible for their inactivity in protecting from or investigating into human rights violations committed by private actors. In Article 3 example, a Member State would be in breach of its positive obligations if it is demonstrated that it failed to protect the individual's right to not be subjected to torture or ill-treatments.

Historically, positive obligations have been developed by the Strasbourg Court as regards the violations often referred to as the "most serious", namely violations of rights under Articles 2 and 3. On the one hand, "positive obligations to protect" require Member State to protect individuals from interferences with their rights under Article 2 and 3. This include that Member States are required to enact laws in their domestic legal systems that prohibit, deter, and punish individuals who commit such violations.

General principle: Positive obligations regarding Article 2 may require Member States to take preventative measures to protect an individual whose life is at risk from the criminal acts of another private individual.

Osman v United Kingdom, no 23452/94, 28/10/1998, ECHR
Facts: This case concerned the obsession of a teacher for one of his students. After having moved to another school, the family of the kid reported vandalism at their home and declared having seen the teacher walking around the house. Several signs of possible implication of the teacher in such acts were communicated to the police. The kid was later killed by the teacher. The family of the kid argued that the UK failed to take preventative measures to protect the kid and therefore breached its obligation under Article 2 of the Convention.
Ratio: The Court Stated that a contracting State is under positive obligation to take preventative measures to protect life if it is: "established (…) that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that

they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk". However, the Court clearly restricted this obligation to what could reasonably be expected from Member States: "For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising".
Application: The positive obligation to take preventative measures to protect life is part of the substantial obligations of States to protect the lives of individuals.

On the other hand, positive obligations of a procedural nature include, *inter alia*, the duty for States to investigate deaths that may have occurred in breach of the Convention (**Mccann and Others v. The United Kingdom, no 18984/91, 27/09/1995**, ECHR).

Prescribed by law

The Strasbourg Court appreciates the justification of interference to a conditional right using its traditional test (prescribed by law, pursuing a legitimate aim and necessary in a democratic society). In accordance with key principles of the Rule of law, the prescription by law should present a minimum standard of certainty and clarity. The clarity of laws guarantees that individuals are able to regulate their conduct in accordance with the law. In the context of the European Convention for Human Rights, this notion is referred to as "prescribed by law" which is a requirement for the justification of interferences in individuals' rights.

General principle: The expression "prescribed by law", covering both statutes and unwritten provisions, ensures that a legal provision allowing for an interference on individuals' rights must be adequately accessible to citizens and formulated

with sufficient precision to enable the citizen to regulate his conduct.

The Sunday Times v. The United Kingdom n°6538/74, 26/04/1979, ECHR

Facts: The applicant, a British newspaper, published an article on titled the Thalidomide, a drug taken by pregnant women allegedly causing birth defects to new-borns, and criticizing English law for failing to tackle this issue. In this article, a footnote announced another article to be published later on the same topic. In November 17, 1972, the Divisional Court of the Queen's Bench granted an injunction in order to restrain the publication of the future article stating that its publication would constitute contempt of court. The applicant argued that the law of contempt of court was so vague and uncertain that the restrain imposed on their freedom of expression (Article 10 of the Convention), could not be regarded as "prescribed by law".

Ratio: The Court developed its jurisprudence on the notion of prescribed by law, stating that: "In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail" (§49). Applying this test to the present case, it found that the applicants "were able to foresee, to a degree that was reasonable in the circumstances, the consequences of publication of the draft article". Accordingly, the interference on the applicant's freedom of expression was prescribed by law as for the purposes of paragraph 2 of Article 10 of the Convention.

Application: Interestingly, in this case, the Court made it clear that the term "law" referred to both written and unwritten legal provisions: "The Court observes that the word "law" in the expression "prescribed by law" covers not only statute but also unwritten law. Accordingly, the Court does not attach importance here to the fact that contempt of court is a creature of the common

law and not of legislation. It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is Party to the Convention of the protection of Article 10 (2) (art. 10-2) and strike at the very roots of that State's legal system" (§47).
However, this does not mean that a legal basis has to be absolutely clear. However, what matters is the possibility for an individual to foresee the legal consequences of an act which is regulated by law (see **Hashman and Harrup v. UK, no 25594/94, 25/11/1999,** ECHR).

General principle: When discretion is conferred on public authorities regarding interferences of Convention rights, the law should indicate with reasonable clarity the scope and manner of exercise of the relevant discretion.

Malone v. United Kingdom, no 8691/79, 02/08/1984, ECHR
Facts: The plaintiff claimed that intercepting his telephone conversations, on authority of a warrant by the Secretary of State for Home Affairs, was unlawful, and asked for an injunction against the Metropolitan Police Commissioner for monitoring his telephone. He argued that he had a right of privacy.
Ratio: The court found a violation of Article 8 of the Convention because the interference was not prescribed by law. It considered that: "In the opinion of the Court, the law of England and Wales does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. To that extent, the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking".
Application: The *rationale* behind this rule of necessary limitations to discretionary powers of the executive regarding interferences with convention rights is to protect the key principles of the Rule of law.

General principle: The European Court will be reluctant to declare an interference prescribed by law where the legal

provision contains vague terms enabling for clear risks of arbitrariness in the grant of broad discretionary powers.

Gillan and Quinton v. UK, no 4158/05, 12/01/2010, ECHR
Facts: This case concerned Section 44 of the Terrorism Act 2000, which allowed a senior police officer to grant a stop and search authorisation for a designated area where he considered it "expedient" to do so for the prevention of acts of terrorism. One safeguard provided that this grant had to be authorized by the Secretary of State.
Ratio: The Court held that the interference was not prescribed by law and found a violation of Article 8 of the Convention (respect for private life). "The Court notes at the outset that the senior police officer referred to in section 44(4) of the Act is empowered to authorise any constable in uniform to stop and search a pedestrian in any area specified by him within his jurisdiction if he "considers it expedient for the prevention of acts of terrorism". However, "expedient" means no more than "advantageous" or "helpful". There is no requirement at the authorisation stage that the stop and search power be considered "necessary" and therefore no requirement of any assessment of the proportionality of the measure. (…) In the Court's view, there is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer".
Application: Once again, in this case, the reasoning of the Court is relying on the fundamental protection of the rule of law. As the Court stated, in its judgement: "In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise".

General principle: The Strasbourg Court applies flexibility to certain types of laws that, by their very definition, do not lend themselves to precise legal definitions.

Wingrove v. United Kingdom, no 17419/90, 25/11/1996, ECHR
Facts: In this case, the British Board of Film Classification refused to grant distribution certificate for the applicant's video in order to

be published. The latter claimed that the criminal offence of blasphemy, in UK law, was so vague, that it was inordinately difficult to foresee whether a particular publication would constitute an offence.
Ratio: The Court was satisfied that applicant with legal advice could reasonably foresee that scenes in film could fall within the scope of blasphemy, it could not be said that blasphemy law did not afford adequate protection against arbitrary interference. Therefore, the Court held that the impugned restriction was prescribed by law. Interestingly, the Court noted that blasphemy, by very nature, has no precise legal definition - national authorities must be afforded degree of flexibility in assessing whether particular facts fall within definition.
Application: It should be noted that the same solution was adopted by the Court, few years earlier, in the context of obscenity laws (see **Müller v. Switzerland, no 10737/84, 24/05/1988**, ECHR).

Subsidiarity

The principle of subsidiarity in the Convention system means that human rights violations should be reviewed by judges at the most immediate (or local) level that is consistent with their resolution. As Stated by the Court in **Cocchiarella v. Italy, no 64886/01, 29/03/2006**, ECHR : "The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention".

Accordingly, the Strasbourg Court will refrain from imposing its view if, during national proceedings, domestic judges have fairly reviewed the applicant's case in accordance with the main safeguards enshrined by the European court's case law. One of the main illustrations of this principle which underlines the entire Convention is the admissibility criterion that requires applicants to have exhausted domestic remedies.

The principle of subsidiarity has been recently reinforced by the Member States during the Brighton conference which resulted in the entry into force of Protocol no. 15. Protocol no. 15 amended

the preamble of the Convention by adding the following sentence: *"Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".*

Margin of appreciation

The margin of appreciation is a jurisprudential concept developed by the Strasbourg Court to improve the flexibility of its review over domestic proceedings. It provides contracting States with a kind of discretion when balancing multiple interests in a specific case. The traditional argument in favour of the recognition of a national margin of appreciation is that local authorities are better placed to assess and balance the interests at stake. Therefore, on this aspect, the margin of appreciation is based on the principle of subsidiarity which requires decisions to be taken at the most immediate level.

General principle: When restricting individuals' rights in order to protect public morals, the Convention leaves to the Contracting States a wide margin of appreciation.

Handyside v. UK, no 5493/72, 07/12/1976, ECHR
Facts: The Little Red Schoolbook is a book for children which had been published in several European and non-European countries. The book urged young people at whom it was directed to take a liberal attitude in sexual matters. Prosecutions were brought against the applicant for possessing obscene publications, under Obscene Publications Act 1959, as amended by the Obscene Publications Act 1964. He claimed that his prosecution breached his freedom of expression under Article 10 pf the Convention.
Ratio: The Court found that there has been no violation of Article 10 of the Convention. It noted that "it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of

opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them". On the specific question of obscenity laws, it stated that: "The Contracting States have each fashioned their approach in the light of the situation obtaining in their respective territories; they have had regard, inter alia, to the different views prevailing there about the demands of the protection of morals in a democratic society".
Application: In this case, the Strasbourg Court that local authorities are better placed to define public morals, a concept that is country-specific depending on the traditions and culture of each contracting state.

General principle: Not only the nature of the legitimate aim invoked to justify the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. When a restriction impinges on the enjoyment of the individual's right to private life, the margin of appreciation afforded to the Contracting States is generally narrow.

Dudgeon v. The United Kingdom, no 7525/76, 22/10/1981, ECHR
Facts: This case concerned the criminalisation of homosexual activity. The applicant was a gay activist in Northern Ireland. He was subsequently arrested an interrogated. He claimed that his right to private life under Article 8 of the Convention has been violated.
Ratio: The Court held that the applicant suffered an unjustified interference with his right to private life. Accordingly, it found that there has been a violation of Article 8 of the Convention. The Strasbourg Court considered that "not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of

paragraph 2 of Article 8 (art. 8-2)".
Application: It should be noted that the notion of margin of appreciation is flexible, and the Court will broaden its scope depending on the circumstances of each case.To some extent, the breadth of the margin of appreciation is assessed by the Court, on case by case basis, taking into account the context, the national specificities (such as, for example, the political structure of a contracting State, see **Demuth v. Switzerland, no 38743/97, 2002,** ECHR) and the interests at stake. The Court considered that different historical development of countries and their cultural diversities can explain that domestic authorities should apply the Convention with a certain margin of appreciation. This case by case assessment has been heavily criticized by academics who pointed out a tool used by the Court to discretionarily justify or reject its intervention in State affairs.

However, the Court has developed some jurisprudential criteria to determine the breadth of the margin of appreciation in specific areas, such as freedom of expression, where it had constantly reiterated that margin of appreciation should be particularly narrow when the applicant intended to debate a question of general interest (**Morice v. France [GC], n 29369/10, 23 /04/2015**, ECHR).

General principle: The absence of European consensus speaks in favour of allowing a wider margin of appreciation.

Animal Defenders International v. The United Kingdom, no 48876/08, 22/04/2013, ECHR
Facts: In this case, it should be noted that the Communications Act 2003 prohibited political advertising in television or radio services. The applicant, a non-governmental organisation, was campaigning against the use of animals in commerce, science and leisure and sought to achieve changes in the law. In 2005 it sought to screen a television advertisement as part of a campaign concerning the treatment of primates. However, the Broadcast Advertising Clearance Centre ("the BACC") refused to clear the advert. The applicant claimed that this had violated its rights under Article 10 of the Convention.
Ratio: The Court held that there has been no violation of Article 10 given that domestic authorities enjoyed a wide margin of appreciation in balancing the interest at stake. It

stated that: "The Court would underline that there is no European consensus between Contracting States on how to regulate paid political advertising in broadcasting. It is recalled that a lack of a relevant consensus amongst Contracting States could speak in favour of allowing a somewhat wider margin of appreciation than that normally afforded to restrictions on expression on matters of public interest".
Application: The Court, when examining the existence of European consensus, looks at state practice on a given topic by engaging in comparative law analyses.

Proportionality

As for the criterion of prescription by law, the notion of proportionality only applies to conditional rights, in other words, Articles 8 to 11: the right to respect for private and family life, Freedom of thought, conscience and religion, Freedom of expression, Freedom of assembly and association. The Court's assessment of proportionality intervenes at the end of the review of the justification of interference to conditional rights, when the Court determines whether the interference was necessary in a democratic society. The doctrine of proportionality ensures that domestic courts have conducted a fair balance between pursuing a legitimate aim and protecting Convention rights.

General principle: The principle of proportionality imposes on contracting States, when pursuing a legitimate aim, to consider using the less restrictive measures in order to justify interferences to a conditional right.

Goodwin v. The United Kingdom, no 17488/90, 27/03/1996, ECHR
Facts: This case concerned a disclosure order granted to private company requiring a journalist to disclose the identity of his source. A fine was subsequently imposed on the journalist for having refused to disclose the identity of his source.
Ratio: The Court concluded that there was not, in sum, a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim. The restriction which the

disclosure order entailed on the applicant journalist's exercise of his freedom of expression cannot therefore be regarded as having been necessary in a democratic society, within the meaning of paragraph 2 of Article 10 (art. 10-2), for the protection of Tetra's rights under English law, notwithstanding the margin of appreciation available to the national authorities.

Application: In this case, the Court developed the idea of proportionality as a concept imposing on contracting States to refrain from taking measure that are not strictly necessary to achieve the legitimate aim invoked. If there was a suitable alternative less restrictive to the applicant's rights and the responding State did not make a reasonable use of it, the Court will certainly declare the interference disproportionate.

In addition to this, the Court observes that the nature and severity of the penalty imposed are also factors to be taken into account when assessing the proportionality of the interference (**Sürek V. Turkey (No. 1), no 26682/95, 08/07/1999,** ECHR). Accordingly, a fine of a significant amount of money or a very restrictive measure in terms of its impact on the applicant's rights, will generally speak in favour of the disproportionate nature of the interference to the legitimate aim.

Summary

- The concept of human rights relies on the postulate that individuals have rights simply because they are human beings.

- Human rights have developed through history along the principles of natural law, which comes from the period of Enlightenment.

- The Council of Europe was created in 1949 with three main objectives: the protection of Human Rights, Democracy and the Rule of Law. It is an inter-governmental organization composed of 47 Member States.

- In 1950, the Member States of the Council of Europe adopted the Convention for the Protection of Human Rights and Fundamental Freedoms. As of today, the Convention has 16 protocols. The latest entered into force in August 2018.

- According to Article 46 of the Convention and subsequent practice: all final judgments (Chamber and Grand Chamber) are binding on the respondent states. The Committee of Ministers supervises the enforcement of judgments.

- According to Article 15 of the Convention, temporary derogations are allowed in times of public emergency. However, the second paragraph of Article 15 prohibits derogations to rights as protected by Article 2 (except regarding deaths resulting from lawful acts of war), 3, 4(1) and 7.

- The European Court of Human Rights (hereinafter "the Court") is located in Strasbourg, France. It is composed of 47 judges, each one of them representing one of the Member States.

- The term "jurisdiction" in Article 1 of the Convention refers to the traditional concept of territorial jurisdiction. However, in specific circumstances, the Court also has extra-territorial jurisdiction.

- The Convention allows individual complaints (under Article 34 of the Convention) but also inter-States complaints (Article 33 of the Convention) to be lodged to the European Court of Human Rights for a review of potential violation of human rights as provided for by the Convention.

- The Court, before examining the merits of a case, will first look at its admissibility. Admissibility criteria are listed in Article 34 and 35 of the Convention. The term “person”, in line with its traditional legal signification, covers both individuals and legal persons such as companies, trade unions or political parties.

- The idea of traditional negative obligations under the Convention is that a State should refrain from actively interfering with an individual’s rights. However according to the theory of positive obligations: Member States are held responsible for their inactivity in protecting from or investigating into human rights violations committed by private actors.

- The Strasbourg Court appreciates the justification of an interference to a conditional right using its traditional test (prescribed by law, pursuing a legitimate aim and necessary in a democratic society).

- The principle of subsidiarity in the Convention system means that human rights violations should be reviewed by judges at the most immediate (or local) level

- The doctrine of proportionality ensures that domestic courts have conducted a fair balance between pursuing a legitimate aim and protecting Convention rights.

Chapter 15 – Judicial review: Preliminaries and procedure

Introduction to Administrative Law and Judicial Review

The mandate and missions of the State administration requires that government, local authorities or courts are able to use special public prerogatives for example to purchase property compulsorily or to impose imprisonment. These powers are, of course, granted to public authorities almost exclusively by means of statutes which – at least in theory – delineate the extent and scope of those powers.

Judicial review is often seen as the major way in which the legality of administrative action is controlled. It is the cornerstone of administrative law. This is the mechanism by which the courts are able to scrutinise the decision-making processes and the legality of actions or decisions taken by public authorities and officials. Under judicial review proceedings, judges are thus capable of examining the legality of public decisions.

Similar procedures exist in a large number of other European states. This is an approach which stresses the role played by the law in the control of administrative activities, and is underpinned by the doctrine of *ultra vires* which imposes on public bodies the obligation to lawfully act within the limits of the powers given to it.

Historically, the massive expansion of the administrative state over the last hundred years, with the state taking on responsibility for education, health provision, energy, social services and housing; logically imposed on public bodies to operate within the bounds of legality. Consequently, administrative law is defined as the legal framework through which public bodies may deliver better, in other words more transparent and fair, public services.

Judicial review has evolved along with important jurisprudential developments in the 1960's. Initially restricted to certain domains, it now touches almost every aspect of public decision-making such as, for example: planning, financial services, immigration and

asylum, public transport, social security, university discipline, controls on broadcasting, and environmental regulation.

The definition and objectives of Judicial Review

In the words of H. Barnett: "Judicial review represents the means by which the courts control the exercise of governmental power. Government departments, local authorities, tribunals, state agencies and agencies exercising which are governmental in nature must exercise their powers in a lawful manner". Accordingly, as stated earlier, the rationale behind judicial review stems from the core principles of the Rule of law.

The Rule of law imposes on rulers to respect and act in compliance with law. As a result, for example, those exercising power can only act on the basis of a legal provision, subjected to the will and limited to the terms provided for by Parliament, as a justification of their action. Judicial review ensures that this principle is respected. Lord Phillips famously stated: *"The common law power of the judges to review the legality of administrative action is a cornerstone of the rule of law in this country and one that the judges guard jealously"*.

Throughout the development of case law on judicial review, key elements of this procedure have arisen. Firstly, judicial review can be brought against one or several bodies, regardless of their rank in the hierarchy of the administration (from a Secretary of State to a Parole Board). We will see below that judicial review proceedings may also be introduced against bodies that are not, in a strict sense, public authorities.

Judicial review is not confined to "executive actions" of governmental bodies; it can also include reviewing the decision-making process of judicial bodies of inferior courts. It should be noted that judicial review, technically speaking, is brought in the name of the Crown.

General principle: The objective of judicial review is not to appellate a public law decision on the merits but rather to examine the legality of the decision-making process.

Chief Constable of the North Wales Police v Evans [1982], 1 WLR 1155

Facts: The claimant argued that he was unjustly dismissed as a probationary constable. The Chief Constable interviewed him and asked him to resign rather than formally firing him on the grounds that Evans married a woman much older than himself, that he was keeping four dogs in a police council house, which had a one dog limit, and that he and his wife lived a "hippy" lifestyle. He tried to challenge the legality of the decision under judicial review.

Ratio: The Court found the probationer police constable to have been unlawfully induced the claimant to resign, but the court could not order his reinstatement. The House granted instead a declaration: "affirming that, by reason of his unlawfully induced resignation, he had thereby become entitled to the same rights and remedies, not including reinstatement, as he would have had if the chief constable had not unlawfully dispensed with his services under regulation 16(1)". Lord Brightman concluded: *"Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power be itself guilty of usurping power".*

Application: In this case, the Court made it clear that the purpose of judicial review was not to question a decision itself. Courts should not serve as appellate jurisdictions but rather as operators of a review of the legality of decision-making processes. As Lord Green MR stated in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948]** 1 KB 223: *"it is not an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local have contravened the law by acting in excess of the powers which Parliament has confided in them".*

Modern debates over Judicial Review

Historically, the British constitutional system has been compared by Dicey to the French constitutional system which distinguishes administrative and civil jurisdictions. In the UK, it was decided that state officials were held to account before ordinary courts, without such separation.

However, this view has been reversed later on along with the modern development and nature of judicial review. The High Court historically has exercised the power of judicially controlling the actions of public authorities. In 2000, the Crown Office List, a branch of the High Court in charge of the processing of judicial review applications, was renamed the "Administrative Court". In addition to this, section 22 of the Crime and Courts Act 2013 allows immigration, asylum and application for nationality to be transferred from the Administrative Court to the Upper Tribunal. Therefore, though changes have been made to confer to specialist judges the examination of judicial review cases, there is still no clear-cut separation between two different orders of jurisdictions as it is the case in France.

Judicial review is subject to many criticisms as it has been devised by the judges, for the judges and against the executive. Indeed, judicial review is a product of common law. It is the courts themselves, and not Parliament, who created, defined and significantly expanded judicial review. Judges are not elected and because of social inequalities, not representative of the society. Accordingly, judges do not enjoy the same legitimacy than MPs or elected members of the executive.

To some extent, striking down decisions of the administration can be seen as a form of judicial activism, especially regarding the recent developments that extended the powers of judges under judicial review. However, it should be remembered that the executive is neither elected *per se*, and the powers of judges to review the legality of its action is strictly limited, as it will be developed below.

Amenability of a Decision to Judicial Review

As a general rule, only public law decisions are amenable to judicial review. The typical situation in which judicial review is the appropriate legal course of action is when a government body is carrying out a public function. However, both non-governmental bodies and inferior courts are also subject to judicial review.
It is generally accepted that public law decisions of government ministers and departments are subject to judicial review.

Bodies subject to judicial review

General principle: The Home Secretary's actions, as actions of any other government minister, are subject to challenges in judicial review.

R (Venables and Thompson) v Home Secretary [1997] UKHL 25
Facts: The claimants argued that the Home Secretary had unlawfully decided not to release them from prison, after they were convicted of murder as children. The Home Secretary took into account public petitions demanding the murderers to be imprisoned for life. They sought to challenge this decision under judicial review.
Ratio: The House of Lords held by 3 votes to 2, that the Home Secretary acted unlawfully by taking into account irrelevant considerations (a public petition) and failing to take into account relevant considerations (progress in detention). Lord Steyn considered the following: "The Home Secretary misunderstood his duty. This misdirection by itself renders his decision unlawful".
Application: Governmental bodies are traditionally subject to judicial review. In this case, the House of Lords made it clear that judicial review can be brought against any public body, regardless of their rank in the hierarchy of the administration.

In addition to public bodies of central government, decisions of local authorities and devolved institutions are also subject to judicial review. The scope of judicial review encompasses inferior courts' decisions including The Crown Court, The Magistrates' Court, The Coroners' Court, the Election Courts and Tribunals.

Judicial review also represents a possible course of legal action against decisions of non-governmental bodies exercising public law powers. Historically, the courts looked at the source of a body's power when deciding whether it would be subject to judicial review. If the body was created by or exercised power pursuant to statute, its decisions would normally be considered amenable to judicial review. However, in addition to the source of powers, courts nowadays look at the nature of such powers, determining whether or not they are *de facto* governmental in

nature.

General principle: If a private body is exercising a public law function, or if the exercise of its functions has public law consequences, these elements may be sufficient to bring the body within the reach of judicial review.

R v Panel of Take-overs and Mergers, ex parte Datafin [1987] QB 815
Facts: The claimant sought judicial review of a Panel which was a non-governmental body and had not been established by an Act of Parliament or under royal prerogative. It was a body established to regulate the City Code in London.
Ratio: The Court of Appeal underlined that judicial review was an adaptable procedure and could be extended to a body which performed public law duties. The Panel was a powerful body taking important decisions on the regulation of the financial activity of the City of London. Accordingly it was a *de facto* public body that was subject to judicial review. Lloyd LJ stated: "If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review (...) if the body is exercising a public law function, or if the exercise of its functions have public law consequences, then that may be sufficient to bring the body within the reach of judicial review."
Application: For the first time, judicial review was accepted to challenge actions of a body that was not, *per se*, part of public administration. This extensive approach has been reinforced by the Civil Procedure Rules Part 54.1(2)(a)(ii) which defines judicial review in terms of a claim to review the lawfulness of a decision or action "in relation to the exercise of a public function".

Application of the Datafin principle

General principle: Not all non-governmental regulatory authorities exercise public functions. Only those exercising governmental functions.

R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan, [1993] 2 All ER 853
Facts: In this case, the decision of the Jockey Club was being

challenged under judicial review. This private body regulated horse racing in Britain (licences and authorisations were provided for race meetings).
Ratio: The Court of Appeal held that, although the decision of the Jockey Club affected the public, it was not a public body (in terms of history, constitution and membership) and did not exercise governmental functions. It noted that the powers of the Jockey Club to regulate horse racing were derived from an agreement between private parties.
Application: It should be noted that not all regulatory authorities exercise public functions. This case should be contrasted with **R v Panel of Take-overs and Mergers, ex parte Datafin [1987]** QB 815 where the defendant was a powerful body regulating financial activity, which was considered by the Court of Appeal to be a public law duty.

General principle: Powers which are sufficiently public in nature are powers that the administration of the State would have to exercise in the absence of performance by a private body.

R v Chief Rabbi of the United Hebrew Congregation of GB and Commonwealth, ex parte Wachmann, [1993] 2 All ER 249
Facts: On the ground of suspected adultery, the Chief Rabbi of the Jewish religion exiled the claimant from the religion. The latter sought to challenge this decision under judicial review.
Ratio: The High Court refused to subject the functions of the Chief Rabbi to jurisdiction of judicial review. It noted that for a body to be amendable to judicial review, it must have some connection to government. The functions of the Chief Rabbi were in essence religious and spiritual and were such that the government would not seek to discharge them in his absence.
Application: One has to look at the traditional conception of public law duties when appreciating the public nature of powers exercised by non-governmental bodies. The body will not be subject to judicial review if the function performed is not likely to be otherwise performed by the State. However, it should be noted that even if private regulatory authorities are not subject to judicial review, courts, in the course of private law proceedings, may also apply certain administrative principles (for instance the duty to act fairly, see **Nagle v Feilden [1966],** 2 QB 633).

Procedural exclusivity

The O'Reilly principle

The exclusivity principle provides that public law rights should be enforced through judicial review (Pt. 54 of the Civil Procedure Rules). The aim of this principle is to protect the administration from unrestricted potential challenge of its action. It also prevents "busybodies" to introduce abusive legal actions.

General principle: Where a claimant argues that a public law issue is at stake, he must use the special judicial review procedure to enforce this public law right. Bringing a public law issue by any other ordinary action would amount to an abuse of process of the court.

O'Reilly v Mackman [1983] 2 AC 237
Facts: Four prisoners were convicted to disciplinary penalties by the Visitors Board. In order to challenge this decision for alleged bias, they decided to use private law proceedings.
Ratio: The Court held that the prisoners had used the wrong procedure. It noted that judicial review was the exclusive procedure for challenging public law decisions and that private law matters were to be dealt with by ordinary action. Accordingly, it would be contrary to public policy to evade the procedural protection afforded to public bodies under judicial review. Lord Diplock however conceded that: "I have described this as a general rule (…) there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim from infringement of a right of the claimant arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons".
Application: In this case, the Court laid down a general principle which was intended to be restricted with legitimate exceptions, as Lord Diplock announced it. The court determined that judicial review was the exclusive procedure for challenging public law decisions and that private law matters were to be dealt with by ordinary action. To bring a public law challenge any other way would amount to an abuse of process of the court.

General principle: Where private rights depended upon prior public law decisions, the judicial review process should ordinarily be used.

Cocks v Thanet District Council [1981] UKHL 10
Facts: The claimant, a homeless person, argued that he had a right to be provided with accommodation under the Housing (Homeless Persons) Act 1977. He sought to enforce the obligation on the respondent to house him permanently by an action in the county court. The defendant claimed that this was an abuse of process as he should have used judicial review.
Ratio: The House of Lords held that it would be an abuse of court process to allow the claimant to seek relief in respect of his claim otherwise than by an application for judicial review. Where the action impugned the authority's performance of its statutory duties as a pre-condition to enforcing private law rights, the correct way was to do so within judicial review proceedings. The authority's decision could not be challenged by an ordinary action.
Application: In this case, the House of Lords applied the principle laid down in **O'Reilly v Mackman [1983]** 2 AC 237, making it clear that in cases involving private and public rights, where private rights depended upon prior public law decisions, the exclusivity principle should be applied.

Exceptions to the O'Reilly rule: Mixed Public/Private Law

The principle of procedural exception is subject to several exceptions which allows for a flexible application.

General principle: It is not an abuse of process for a claimant to use ordinary proceedings to enforce a private law right where it incidentally involved challenging a public law decision.

Roy v Kensington and Chelsea and Westminster Family Practitioner Committee (FPC) [1992] 1 AC 624
Facts: The claimant, a doctor practicing for the NHS, suffered a reduction of practice allowance of 20% by the Family Practitioner Committee because he was not dedicating enough time to his NHS missions. The claimant brought a private action against the Family

Practitioner Committee for breach of contract. The respondent sought to have the action struck out as an abuse of process given that he should have introduced judicial review.
Ratio: The House of Lord considered that it was not an abuse of process to use ordinary proceedings to enforce a private law right where it incidentally involved challenging a public law decision. In the present case, the claimant's main purpose was to enforce a private law right and the challenge of a public law decision was merely incidental. In the words of Lord Lowry, delivering the unanimous opinion: "an issue, which was concerned exclusively with public right, should be determined in judicial review proceedings. However, where a litigant was asserting a private law right, which incidentally involved the examination of a public law issue (the FPC's decision), he was not debarred from seeking to establish that right by ordinary action. Dr Roy had a bundle of private law rights, including the right to be paid for work done, which entitled him to sue for their alleged breach. It was not an abuse of the process of the court to proceed as Dr Roy had done".
Application: In this case, the House of Lords limited the scope of application of the principle of procedural exclusivity. One should look at the main purpose of the claimant where both private law and public law rights are involved.

General principle: Respondents have a right to invoke a public law issue and challenge a public law decision in their defence in private law proceedings.

Wandsworth London BC v Winder [1985] AC 461
Facts: A local council brought private legal proceedings against a council tenant for arrears of rent and possession of his flat. The respondent argued that the recent increase of rents, through a resolution of the local council, were abusive and *ultra vires*.
Ratio: The House of Lords held that, even though the respondent did not initiate the proceedings, he had a right to challenge the local authority's decision in his defence. In the present case, it considered that the local Council had acted unreasonably.
Application: The House of Lords accepted a defence based on the unlawfulness of a public decision to discharge defendant from an obligation under private law. It should be noted that this right to

raise a public law issue in an individual's defence also exists in criminal proceedings (see **Boddington v British Transport Police [1999] 2 AC 143**).

Another exception to the procedural exclusivity principle is the consent of the parties. As announced by Lord Diplock in **O'Reilly v Mackman [1983]** 2 AC 237, where the parties to a case jointly agree that a remedy can be sought under ordinary private procedures, the principle of procedural exclusivity cannot be applied against their will.

Standing in judicial review

The question here is to determine who can seek judicial review? A claimant should have sufficient interest in judicial review. This is the traditional *locus standi* which is one of the first requirements for introducing any legal proceedings. Section 31(3) of the Senior Courts Act 1981 stipulates that: "The court shall not grant leave unless it considers that the applicant has sufficient interest in the matter to which the application relates".

General principle: In complex cases on judicial review, standing may be assessed at the substantive hearing together with the merits.

IRC v National Federation of Self-Employed and Small Businesses [1982] AC 617
Facts: A national organization representing small businesses sought judicial review on the Inland Revenue's treatment of a category of workers that were given amnesty of past tax. The organization argued that this treatment was unlawful as it constituted discrimination between taxpayers. The Court of Appeal considered that they had standing.
Ratio: The House of Lords held that the organization had no standing to seek judicial review, thereby overturning the Court of Appeal's findings. It noted that a mere body of taxpayers did not have sufficient interest in asking the Court to investigate the tax affairs' of other taxpayers. As Lord Scarman stated: "It is wrong in law, as I understand the cases, for the court to attempt an assessment of the sufficiency of an applicant's interest without regard to the matter of his

complaint. If he fails to show, when he applies for leave, a prima facie case, or reasonable grounds for believing that there has been a failure of public duty, the court would be in error if it granted leave".
Application: In this case, the House of Lords made a distinction between the assessment of the standing of simple cases that can be definitively decided at leave stage and more complex cases which require an assessment when full factual and legal information about the case is available.

Individuals

Two categories of individuals may seek judicial review. The first category is individuals who are directly affected by a public law decision. Standing raises no issue where a decision was taken following an individual request of the claimant. For instance, where a public body refuses a construction permit for the claimant, they will have no difficulty to prove that they have been directly affected by this decision. However, individual "busybodies" (for example a friend who is upset on the claimant's behalf) cannot pretend to have been directly affected by the decision. The second category is an exception to this rule.

General principle: Individuals with a genuine public or constitutional interest in actions of a public body may have standing to challenge it in judicial review.

R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg [1995] 1 W.L.R. 386
Facts: A peer in the House of Lords, also former editor of an important Newspaper having written multiple articles on European affairs, sought to challenge in judicial review the decision of the Foreign Secretary to ratify the Maastricht Treaty. The question of standing arose.
Ratio: The House of Lords rejected the claimant's arguements on the merits. However, it accepted that the claimant had standing to challenge the decision as an individual with a genuine constitutional interest. As Lord LJ noted: "we accept without question that Lord Rees-Mogg brings the proceedings because of his sincere concern for constitutional issues".
Application: This second category of individuals who may seek

judicial review is an exception to the busybodies' rule. Where claimants cannot demonstrate that they had been directly affected by a public law decision, they can submit that they had a constitutional interest in challenging such a decision.

In the context of genuine public interest see **R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs [2003]** EWCA Civ 1546, where Dyson LJ considered that "if a claimant has no sufficient private interest to support a claim to standing, then he should not be accorded standing merely because he raises an issue in which there is, objectively speaking, a public interest".

It should be noted that Section 6(1) of the Human Rights Act 1998 creates a new head of incompatibility with human rights in judicial review proceedings, where standing is established if the claimant proves to be a "victim" for the purposes of Section 7 of the HRA.

Groups and organizations

Groups and organisations include *inter alia* associations, federations, foundations, NGOs, and pressure or interest groups. As for individuals, groups or organisations having standing in judicial review are divided into two categories. They are recognised bodies who are not only acting in their own interest but rather for the general public interest.

The first category of groups having standing in judicial review is composed of groups acting on behalf of the public interest. On this issue there had been jurisprudential debates over the appreciation of the action of such groups on behalf of the public interest when introducing judicial review proceedings.

General principle: Individuals who have no standing to challenge a public law decision cannot pretend to acquire it just because they formed themselves into a group or a company.

R v Secretary of State for the Environment, ex parte Rose Theatre Trust Co Ltd [1990] 1 QB 504
Facts: An interest group sought judicial review of a decision

refusing to schedule a theatre as an ancient monument. The group consisted of people with expertise in archaeology, theatre, literature, and other fields, and also included local councillors and an MP.
Ratio: The Court held that the claimant had no standing in judicial review as members of the public in general had insufficient interest in challenging the refusal of scheduling the building in judicial review. Schiemann J held that individuals who did not have standing would not gain it just because they formed themselves into a group or a company in order, as he saw it, to engineer this status.
Application: In this case, the Court adopted a quite restrictive approach to standing which has been heavily criticised following this judgement. Its authority should be assessed globally together with later case-law.

General principle: An organization may have standing where in the absence of its involvement in the proceedings, the people it represents might not have an effective way of bringing the disputed issues to court.

R v Secretary of State for the Environment, ex parte Greenpeace Ltd (No 2) [1994] 4 All ER 329
Facts: Greenpeace, a well-known NGO advocating for environmental protection sought judicial review to challenge decisions to vary authorisations concerning radioactive waste in Cumbria. The question of standing arose.
Ratio: The claimant was granted standing by the Court. It noted that the pressure group was a well-established organisation protecting the environment and noted that it had 2500 members in the region affected by the public law decision. The court's view was that, without Greenpeace's involvement, the people it represented might not have had an effective way of bringing the disputed issues to court. Individual members of the organization did not have the same expertise as the organization. Claims brought individually would have resulted on far less well-informed challenges of the decision.
Application: In this case, the Court adopted a rather liberal approach on standing. In the further development of case-law on this issue, this approach has been quite predominant (see, for

example, **R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd [1995]** 1 WLR 386).

The second category of groups that has standing in judicial review is groups acting on behalf of the interests of its members. These groups include trade unions, professional bodies or associations representing residents of a neighbour-hood.

Public bodies

Noteworthy, not only private persons can bring proceedings in judicial review against public law decisions but also public bodies. There are multiple examples in the courts case-law including a local government against a decision from a central authority or a Police department against a decision of the Magistrates' Court (see **R (Chief Constable of Great Manchester Police) v Salford Magistrates Court and Hookway [2011]** EWHC 1578).

Time limit

Part 54.5(1) of the CPR provides that: "a claim must be filed (a) promptly and (b) in any event no later than 3 months after the grounds to make the claim first arose". The time limit for bringing a judicial review complaint is short and strictly applied. Part 54.5(2) of the CPR stipulates that time cannot be extended by agreement between the parties.

The time limit is not particularly short compared to other European countries. For example, in France, the time limit to bring a *recours pour excès de pouvoir* before administrative courts is two months. This requirement of promptness ensures good administration. The administration cannot function properly if its actions are eternally challengeable before the courts.As a consequence, judicial review can sometimes be rejected because it was not filed promptly. However, under Section 26(1) of the Senior Courts Act 1981, a Court may only do so if it *"considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration".*

Since 2013 and following the 4th Amendment of the Civil Procedure, special rules regarding time limit for judicial review apply to planning decisions (6 weeks) and public procurement (30 days).

Ouster Clauses

An ouster clause is a provision included in a piece of legislation to exclude judicial review of acts and decisions of the executive. As result, the clause strips the courts of their supervisory judicial function over disputed action of a public body. Courts are generally reluctant to enforce such clauses considering that it represents a threat to the Rule of law.

General principle: Total ouster clauses are to be construed as narrowly as possible.

Anisminic v Foreign Compensation Commission [1969] 2 AC 137
Facts: The Foreign Compensation Act 1950 provided that determinations of the Foreign Compensation Commission (FCC) "shall not be called into question in any court of law". The claimant sought judicial review of a determination of the FCC, on the ground of illegality.
Ratio: The House of Lords held that the ouster clause did not prevent the claimant from challenging the decision under judicial review. It noted that Ouster clauses (like those in the Foreign Compensation Act 1950) had to be construed as narrowly as possible such that the claim was not barred.
Application: The decision illustrates the courts' reluctance to give effect to any legislative provision that attempts to exclude their jurisdiction in judicial review. Even when such exclusion is relatively clearly worded, courts will generally hold that it does not preclude them from scrutinising the legality of the decision.

Partial ouster clauses on time limit are generally accepted. They provide that for a specific action of a public body, the time limit for challenging it under judicial review is shorter than the normal time limit of 3 months. In this respect, the Section 54.5(3) Civil Procedure Rule provides that the normal time limit does "not apply when any other enactment specifies a shorter time limit for making

the claim for judicial review".

Exhaustion of Alternative Remedies

The exhaustion of alternative remedies is another requirement for a judicial review application to be amenable.

General principle: In principle, judicial review is not granted if an alternative remedy is available to the claimant.

R v Inland Revenue Commissioners, ex parte Preston [1985] AC 835
Facts: The applicant was involved in a tax dispute with the Inland Revenue Commission. His claims were rejected in first instance. In most cases, the remedy of a taxpayer lies in the appeal procedures provided by the tax statutes. However, he decided to bring a claim under judicial review. The Court had to determine if this was possible.
Ratio: The House of Lords granted judicial review considering that the appeal procedure did not operate in the circumstances of his case. However, it emphasised that the taxpayer is expected to use the appeal procedure, where it is available, rather than resort to judicial review.
Application: When appreciating the admissibility of a judicial review application, one has to look at the alternative legal remedies available to the claimant. All of them should be exhausted or unavailable for a case to be amenable under judicial review.

Procedure in Judicial Review

The claimant (formerly the applicant) for judicial review, before bringing his case to the Court, should try to achieve a settlement with the public body. The Pre-action protocol requires the claimant to first write to the future defendant identifying the issues at stake. The claim for should be transmitted to the Court containing the public law decision being challenged and the remedy sought.

The second phase of the procedure is permission to apply for

judicial review. This is a filtering system which requires claimants to ask the Court for permission to apply. In practice, permission is granted to arguable cases. Indeed, it is a first *prima facie* assessment of the merits of a case. If the permission is rejected, the claimant can request reconsideration at an "oral renewal". If this is again rejected, the claimant can appeal to the Court of Appeal.

Most of the cases are rejected at the permission stage. In 2015, the Ministry of justice said that: "The proportion of all cases lodged found in favour of the claimant at a final hearing has reduced (…) to 1% in 2013 and has remained the same in 2014". However, it should be noted that it also reported that the vast majority of cases that settled (before the permission at the pre-action stage) did so in favour of claimants.

The final stage, the substantive hearing, enables the Court to assess whether or not the defendant has infringed one or more of the grounds of judicial review. The assessment of the grounds of review will be studied in the next chapters. It should be noted, however, that it rests on the claimant to prove that the defendant has acted unlawfully.

Summary

- Judicial review is often seen as the major way in which the legality of administrative action is controlled. It is the cornerstone of administrative law. Judicial review is the mechanism by which the courts are able to scrutinise the decision-making processes and the legality of actions or decisions taken by public authorities and officials.

- The Rule of law imposes on rulers to respect and act in compliance with law. Accordingly, the *rationale* behind judicial review stems from the core principles of the Rule of law.

- The purpose of judicial review was not to question a decision itself. Courts should not serve as appellate

jurisdictions but rather as operators of a review of the legality of decision-making processes.

- As a general rule, only public law decisions are amenable to judicial review. Judicial review can be brought against any public body, regardless of their rank in the hierarchy of the administration.

- Judicial review also represents a possible course of legal action against decisions of non-governmental bodies exercising public law powers. Powers which are sufficiently public in nature are powers that the administration of the State would have to exercise in the absence of performance by a private body.

- A claimant should have sufficient interest in judicial review. This is the traditional *locus standi* which is one of the first requirements for introducing any legal proceedings. Individuals, groups and public bodies may have sufficient interest to seek judicial review.

- The exclusivity principle provides that public law rights should be enforced through judicial review. This principle is subject exception is subject to several exceptions which allows for a flexible application.

- In principle, judicial review is not granted if an alternative remedy is available to the claimant.

- The time limit to bring a judicial review is 3 months after the grounds to make the claim first arose. Since 2013 and following the 4th Amendment of the Civil Procedure, special rules regarding time limit for judicial review apply to planning decisions (6 weeks) and public procurement (30 days).

- The Pre-action protocol requires the claimant to first write to the future defendant identifying the issues at stake in order to try to achieve a settlement. The second phase of the procedure is permission to apply for judicial review.

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