ADMINISTRATIVE LAW

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Tutorials

Each student will have eight one-to-one tutorials. Judging from past experience, we will spend about two-thirds of the time on the essay, and one-third on the topic generally.

If you have a conflict with another (suitably important) appointment you can swap tutorial places, as long as everyone concerned (ie, the swappers and their partners if relevant) agree and I'm told by email at least 24 hours in advance. If you're ill, please email me confirming you are unable to attend a tutorial.

Essays

Write an essay in response to the essay question. When there is more than one question listed, choose one to answer.

Bring two hard copies of the essay with you to the tutorial.

There is no word limit, but remember that concision is a virtue.

Reading

Reading Lists and Topics

Administrative law is a big area, and the Faculty's approach to the reading is a bit unusual. On the Faculty's core reading list (available on WebLearn) there are 8 'core topics' and 4 'additional topics'. The list says:

> "Most tutors teach most of the core topics, but the order in which they are taught may vary and they may be grouped together in different ways. Many tutors include one or two of the additional topics on their reading lists."

We're doing all of the core topics and none of the additional topics. We're taking this approach for two reasons. First, the course is heavy enough as it is. Second, whereas every core topic is examined essentially every year, any one additional topic is examined only every second year or so.

Staying up to date

In this subject, new and important judicial decisions emerge every month. Don't panic! To learn the subject, you need to know some recent developments but not every new case. It is much more important to grasp the basic legal doctrines. Where there are new important cases, I will alert you to them. There is a helpful series of lectures which run in HT and I strongly encourage you to attend.

General note on textbooks

These are the two best textbooks aimed at students:

- Elliott & Varuhas, *Administrative Law: Text and Materials* (5th edn, 2016) ("Elliott & Varuhas");
- Endicott, *Administrative Law* (5th edn, 2021) ("Endicott").

We are mainly using Elliott & Varuhas. However I encourage you to try relevant bits of the Endicott book as well. It's good to have more than one perspective, and those who like Endicott tend to like it a lot.

Of the texts aimed at a wider audience (lawyers, academics, judges, etc), I like three:

- Craig, *Administrative Law* (8th edn, 2016);
- Wade & Forsyth, *Administrative Law* (12h edn, 2022); and
- De Smith's *Judicial Review* (7th edn, 2013) (available on Westlaw).

These books are classics and you often see judges citing to them. If you want a detailed discussion of a particular issue, they can be very useful. But they're also hard going in places, and not the best place to start. I suggest you look at them occasionally now, and more thoroughly when you come to revise.

Prioritization

The reading list is long and there are lots of cases on it. It would be difficult to do all of the reading on any topic in just one week, so you'll have to prioritize. Some guidelines:

- Start with the relevant chapter/section from Endicott or Elliott & Varuhas to situate yourself within the topic. Take notes but do not attempt to be exhaustive (3–5 pages would be sufficient). Then, move on to the rest of the reading list.
- Do all of the starred reading.
- Do as much of the non-starred reading as possible. For the non-starred cases, read at least the headnote or you'll be lost in the tutorial.
- Please do not neglect the academic material (even the non-starred academic material). It tends to be quite doctrinal and it will help you understand the cases, as well as come up with angles for your essay.

Plagiarism

Don't plagiarise. Look at the Blue Book (B.4.6) for more information on what it is and what the penalties are.

Questions?

If you have any questions while doing the reading or writing your essay, the tutorial is the time to raise them. But if something comes up after, or you have a question about your feedback, or about anything else relating to the course, you're always welcome to email me for a time to meet.

You're also very welcome to be in touch about any pastoral or welfare issues.

Don't be afraid to ask – I'm happy to help.

Faculty description

Administrative Law is concerned primarily with judicial control of the activities of the executive branch of government. The main topics covered in tutorials are: (1) the grounds on which decisions and rules made by the executive can be challenged in the court – some of these relate to the substance of the decision or rule and others to the procedure by which it was made; (2) the remedies which can be obtained by applicants challenging administrative decisions; (3) the liability of public authorities in contract and tort. Some tutors also deal with tribunals, public local inquiries, next steps

agencies, contracting out and public sector ombudsmen. Some of these topics are the subject of lectures, which also occasionally deal with more theoretical aspects of the subject.

Administrative Law covers material in the "foundations of legal knowledge" and so must be taken by those seeking a professional qualification in England.

The subject is taught in tutorials arranged by your college tutor.

Extract from examination decrees

Questions will not be set on the law of local government or of public corporations except as illustrating general principles of administrative law. Candidates will be required to show a sufficient knowledge of such parts of the general law of the constitution as are necessary for a proper understanding of this subject.

Students will be expected to know the general principles of the European Convention on Human Rights jurisprudence so far as they affect judicial review, the law of administrative procedures, remedies and claims for damages. Questions will not be asked which require a detailed knowledge of the meaning of a particular Convention right.

Teaching convention

Students will be expected to know the general principles of the European Convention on Human Rights jurisprudence so far as they affect judicial review, natural justice, remedies and damages actions. Questions will not be asked which require a detailed knowledge of the meaning of a particular Convention right.

This course is mainly about judicial review, and we start with the ways that judicial review proceedings differ from ordinary civil litigation. It is often said that these differences are there to protect public bodies against excessive litigation. But do public bodies need protection? In private law, it is usually obvious who the appropriate claimant is – if you are harmed by someone's tortious act, you can claim – but in public law, government decisions affect many people to a greater or lesser extent. Rules on standing are used to determine who can bring an application for judicial review.

WEEK 1: PROCESS, STANDING, REMEDIES

The phrase 'judicial review' is used in two senses. In one sense it refers to a body of substantive norms, applicable to decision-makers and enforced by courts. These norms are the 'grounds of judicial review'. They'll be our focus for most of the course. We also use 'judicial review' in a second sense to refer to a specific court procedure.

These two senses of judicial review – substantive and procedural – are related. In general, the judicial review procedure is used to test whether the grounds of review are satisfied, and the appropriate procedure to test whether the grounds of review are satisfied is judicial review. If you wanted to challenge a decision on some other basis (*i.e.*, *not* on the grounds of review), you shouldn't use the judicial review procedure. Conversely, judges don't look kindly on attempts to argue that public bodies have violated one of the grounds of review except by way of the judicial review procedure. That's the general rule, but there are exceptions to the second rule, meaning there are ways of getting out of the judicial review procedure.

General

- Elliott & Varuhas, ch 1 (primer on administrative law generally)
- Elliott & Varuhas, pp 438–9, 455–7, 461–66, ch 13, 14
- CPR Part 54 (http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54)
- Supreme Court Act 1981, s.31 (now cited as the Senior Courts Act)

Remedies & Procedure

Under the Civil Procedure Rules Part 54, the Administrative Court (a division of the High Court) and the Upper Tribunal may award the prerogative orders (quashing orders, mandatory orders, and prohibiting orders, previously known as *certiorari*, *mandamus*, and *prohibition*) in a claim for judicial review. The Senior Courts Act 1981 made the 'ordinary' remedies (damages, declarations, and injunctions) available in a claim for judicial review, as well.

Prerogative orders originated as writs in the Court of King's Bench, in a proceeding in which the monarch asked the judges to decide whether a decision was lawful (in *certiorari*), or whether it would be unlawful for the defendant to act, or to refuse to act, in a certain way (*prohibition*,

mandamus). That explains the titles of judicial review decisions such as *R v Home Secretary, ex p Khawaja* [1984] AC 74: the Queen ('R' for 'Regina') went to the High Court on behalf of Khawaja, to ask her judges to decide whether the Home Secretary had acted unlawfully. Today the form is: *R (on the application of Abbasi)* v *Foreign Secretary and Home Secretary* [2002] EWCA Civ 1598.

Petitions for the prerogative writs had diverse procedural requirements which were reformed in a uniform application for judicial review by the Senior Courts Act 1981. A claim for judicial review is different from an ordinary claim because the claimant does not need to have a cause of action (i.e., a right to a remedy if the facts they allege are proven). And no trial is held; the court holds a summary hearing with facts ordinarily established by agreement between the parties or by sworn statements of fact. A claimant must ask for permission to bring judicial review proceedings, showing (ordinarily) that they have an arguable case. The claimant must have standing, which requires a sufficient interest in the matter of the judicial review. The process is also restricted by a short time limit of 3 months (Civil Procedure Rules 54.5).

Ordinary remedies: Several of the classic cases of administrative law (such as *Ridge* v *Baldwin* [1964] AC 40 and *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147) were actions for a declaration, rather than applications for a prerogative writ or order. A declaration is not an order; it is simply the court's statement of the legal position on the issues raised in the claim. It does not directly tell the defendant public authority what to do, but it may well reverse the legal effects of an administrative decision, and require action (as in *Ridge* and in *Anisminic*). Damages are only available in a claim for judicial review when the claimant would have a right to damages in an ordinary claim. And note that parties who assert a cause of action in private law against a public authority can bring an ordinary claim (or 'action') to seek the ordinary private law remedies (including damages, injunctions, and restitution of unjust enrichment; see special topics 11 and 12).

Peter Cane, 'The Constitutional Basis of Judicial Remedies in Public Law' in Leyland & Woods eds, *Administrative Law Facing the Future* (1997)
Dawn Oliver, 'Public Law Procedures and Remedies – Do We Need Them?' [2002] PL 91

Permission for judicial review

Senior Courts Act 1981, s 31
Criminal Justice and Courts Act 2015, ss 84–88

Under the Civil Procedure Rules, the application for permission is made on paper, but if permission is refused the claimant can request an oral hearing. No oral hearing is given, though, where a judge decides that the application is 'totally without merit' (CPR 54.12(7)).

Procedural exclusivity

•*O'Reilly v. Mackman* [1983] 2 AC 237
•*Clark v University of Lincolnshire & Humberside* [2000] 1 WLR 1988, Sedley LJ [14]–[17], Lord Woolf [22]–[34]).

Standing ('sufficient interest')

Senior Courts Act 1981, s 31(3)
Civil Procedure Rules 1998, Part 54, esp. Parts 54.1, 54.17

•R v IRC, ex p National Federation of Self-Employed [1982] AC 617
•R v Environment Secretary, ex p Rose Theatre Trust [1990] 1 QB 504; see Cane, [1990] PL 307
R v Foreign Secretary, ex p Rees-Mogg [1994] QB 552
•R v Inspectorate of Pollution, ex p Greenpeace (No 2) [1994] 4 All ER 329, [1994] 2 CMLR 548
R v Employment Secretary, ex p Equal Opportunities Commission [1995] 1 AC 1
•R v Foreign Secretary, ex p World Development Movement [1995] 1 WLR 386
R v Somerset CC, ex p Dixon [1998] Env LR 111, [1997] COD 323
•Al Haq v Parole Board [2018] EWHC 694 [105]–[115]
•Walton v Scottish Ministers [2012] UKSC 44 [90]–[97]
•R (DSD) v Parole Board [2018] EWHC 694 [105]–[115]

Peter Cane, 'Standing Up for the Public' [1995] PL 276
•Sir Konrad Schiemann, 'Locus Standi' [1990] PL 342
Harlow, 'Public Law and Popular Justice' (2002) 65 MLR 1

Independent Review of Administrative Law, March 2021, 88–94

Standing under the HRA 1998

Human Rights Act 1998, s 7

Joanna Miles, 'Standing under the Human Rights Act 1998' (2000) 59 CLJ 133; 'Standing in a Multi-layered Constitution', ch 15 in Bamforth & Leyland eds, Public Law in a Multi-layered Constitution (2003)

Consequences of unlawful official action

O'Reilly v Mackman [1983] 2 AC 237 at 284
Boddington v British Transport Police [1998] 2 WLR 639
R v Wicks [1998] AC 92
R (Corbett) v Restormel Borough Council [2001] EWCA Civ 330
•Ahmed v Her Majesty's Treasury [2010] UKSC 5
R (Hurley) v Secretary of State for Business Innovation & Skills [2012] EWHC 201
R (Miller) v Prime Minister No 2, Cherry v Advocate General for Scotland [2019] UKSC 41
•*Majera v Secretary of State for the Home Department* [2021] UKSC 46

•David Feldman, 'Error of Law and Flawed Administrative Acts' (2014) 73 Cambridge Law Journal 275
•Thomas Adams, 'The Standard Theory of Administrative Law Unlawfulness' (2017) 76 Cambridge Law Journal 289

Independent Review of Administrative Law, March 2021, 70-75
Judicial Review and Courts Act 2021, clause 1

What if a legal flaw in a decision makes no difference to the outcome?

•Criminal Justice and Courts Act 2015: a court must refuse relief in a claim for judicial review, 'if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred' (s 84).

•R (Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214, [267]-[280]

Connor Crummey, 'Why fair procedures always make a difference' (2020) 83 MLR 1221

Essay question

- ❖ 'There is not a grave lacuna in our system of public law just because some unlawful conduct cannot be brought before the court. But there will be a grave lacuna if there is no process for a person with sufficient interest to seek a remedy, when a remedy is owed to the claimant, or is called for in the public interest.' (ENDICOTT) Discuss with reference to the requirements of locus standi. (2019)

Discussion questions

- Does standing play any significant function in current administrative law?
- Did it really matter how many Greenpeace members lived in Cumbria?
- How would you go about defending the decision in *Rose Theatre Trust*?
- Should it matter whether a claimant is a busybody if she has a good case?
- Why are judicial review remedies discretionary? Should they be discretionary?

Past exam questions

- Does the requirement of 'sufficient interest' for standing perform any role which could not be taken over by the requirement for permission or the substantive law of judicial review? (2019)
- Do the problems caused by having a requirement of standing for judicial review outweigh the benefits of the requirement? (2013)
- Is there any point in having a standing test for judicial review? (2012)
- '[S]tanding rules in public law cases are best understood as a means of giving effect to particular conceptions of, firstly, different substantive approaches to entitlement to enforce individual rights and, secondly, the nature and function of public law adjudication' (MILES). Do you agree? (2010)
- 'Where the prevailing ethic is individualist, judicial review will be limited to enabling individuals to assert and protect their own (rather than the public's) interests in dealings with the state. On the other hand.. . there

is good reason to adopt relaxed standing rules for constitutional and public interest litigation, and to develop constitutional theories which will allow citizens to act to secure public interests such as observance of the rule of law and containment of governmental abuse of power. As long as judges resist the temptation to act as a surrogate legislature, public interest litigation by citizens can contribute to both participatory democracy and public scrutiny of government' (FELDMAN). Discuss with reference to the various doctrines of standing in English administrative law. (2009)

- 'The justifications given in *O'Reilly v Mackman* for the remedial regime applicable to public bodies were always questionable, and they have been undermined by subsequent judicial developments.' Discuss. (2008)
- Should the only factors in determining standing to seek judicial review be the nature and importance of the issue in question? (2007)
- How far is it true to say that the courts have created so many exceptions to *O'Reilly* v. *Mackman* that very little of the rule remains? Should the remnants of the rule be preserved? (2006)
- What function is performed by standing rules in judicial review, and how well do the rules serve that function? (2005)
- When will a person or organisation not directly affected by an administrative decision be permitted to challenge it? Do you agree with the law's approach to this question? (2002)

WEEK 2: JURISDICTION & ERROR

The courts have traditionally said that the purpose of judicial review is to prevent public bodies acting ultra vires, that is, outside their jurisdiction. Parliament gives public bodies a job to do, and the courts will make sure that they do that job and nothing else. But if the public body is within its jurisdiction – doing its proper job – the courts will not interfere. That's the idea, anyway. The difficult bit is drawing the boundary between what is reviewable and what is not. Nowadays, the courts have moved away from an analysis based on jurisdiction and instead apply different approaches depending on whether the error is one of law or fact. Your task is to figure out what those approaches are and to assess whether the courts are interfering too much.

General

Elliott & Varuhas, ch 2

Error of law

• Anisminic v Foreign Compensation Commission [1968] 2 QB 862 (CA) and [1969] 2 AC 147 (HL)
•R v Lord Chancellor, ex p Page [1993] AC 682
•R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd [1993] 1 WLR 23 HL
•R (Cart) v Upper Tribunal [2011] UKSC 28
•Jones v First Tier Tribunal [2013] UKSC 19
• R (Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22

Sir John Laws, 'Illegality: The Problem of Jurisdiction', ch 4 in Supperstone and Goudie, Judicial Review 2nd ed (1997)
•Paul Daly (2011) MLR 694 'Deference on Questions of Law'
•Mark Aronson, 'Should We Have a Variable Error of Law Standard?', ch 10 in Elliott and Wilberg eds, The Scope and Intensity of Substantive Review (Hart, 2015)

Error of fact

R v Hillingdon LBC, ex p Puhlhofer [1986] 1 AC 484 (HL) at p 517
R v Home Secretary, ex p Khawaja [1984] AC 74 (HL)

• E v Home Secretary [2004] EWCA Civ 49, [2004] QB 1044
• R (A) v Croydon LBC [2009] UKSC 8, [2009] 1 WLR 2557
Bubb v London Borough of Wandsworth [2011] EWCA Civ 1285

Questions of law and questions of fact

•Edwards v Bairstow [1956] AC 14 (HL)
•R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd [1993] 1 WLR 23 (HL)
Moyna v Secretary of State for Work and Pensions [2003] UKHL 44, [2003] 1 WLR 1929
•Jones v First Tier Tribunal [2013] UKSC 19

•Timothy Endicott, 'Questions of Law' (1998) 114 LQR 292
•Peter Cane, *Administrative Law* (5th edn, 2011) 58–62
•Rebecca Williams, 'When is an error not an error? Reform of jurisdictional review of error of law and fact' [2007] PL 793

Ouster of judicial review

• Anisminic v Foreign Compensation Commission [1969] 2 AC 147 (HL)
• R (Cart) v The Upper Tribunal [2011] UKSC 28
• R (Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22

Report of the *Independent Review of Administrative Law*, March 2021, 66–70
Judicial Review and Courts Bill 2021, clause 2

Essay question

- Is there a difference between a question of law and a question of fact? What is the difference?
- Should administrative bodies ever be entitled to adopt their own reading of statutes?
- Which errors of fact will lead to a court's intervention? Which should lead to a court's intervention?

Discussion questions

- To what extent does the concept of "jurisdictional error" retain any importance? Are all errors of law now "jurisdictional"?
- Does an inferior tribunal have any discretion over the interpretation over questions of law, or is its freedom limited to mixed questions of law and fact and questions of pure fact?
- Does a statute always have a correct interpretion?
- Are the courts moving to the view that they wish to control some questions of law more strictly than others? Why should the courts exercise stricter control over some issues more than others? For one view see Bell [1986] PL 117–9.

Past exam questions

- Is the law relating to judicial review for error of law satisfactory in the light of the decisions in R (Cart) v. The Upper Tribunal (2011) and Jones v. First Tier Tribunal (2013)? (2016)
- Are there circumstances in which a court will allow the reading of a statute adopted (and, where relevant, acted on) by another decision-making body to stand even if, addressing the matter afresh, it might itself have understood the statute differently? Is the present position acceptable? (2013)
- 'First, it seems now to be authoritatively established that the division between law and fact in such classification cases is not purely objective, but must take account of factors of "expediency" or "policy" ... Secondly, even if such a question is classed as one of law, the view of the tribunal of fact must still be given weight' (LORD CARNWATH, R (Jones) v. First Tier Tribunal (2013)).
- "The challenge, then, can be simply put. On the one hand, experience shows that any attempt to categorise cases in which the courts will intervene [for an error of law] results in the boundary of that category being manipulated so that in practice the courts simply intervene when they have pragmatically good reasons for doing so. On the other hand, if we accept that it is not possible to draw analytical distinctions between different categories of case and we thus conclude that in practice any error is prima facie reviewable, we open the door to potentially damaging levels of judicial intervention" (WILLIAMS, 2007). Discuss. (2012)
- What has been the impact of the decision in E v Secretary of State for the Home Department (2004)? How, if at all, should review of jurisdictional error be reformed? (2011)

- 'Review of jurisdictional error, as it has been known, is an area fraught with particular difficulties .... Cases such as Page [1993] and E [2004] have largely removed many of the old fictions concealing pragmatic case by case reasoning, but at the same time if new lines cannot be drawn the scope of intervention may become dangerously wide.' (WILLIAMS). Discuss. (2010)
- 'It is generally accepted that more deference should be accorded to factual findings than to questions of law. There are three reasons for this. First, respect should be accorded to the factual findings of a body which has taken evidence or developed expertise in a given area. Secondly, reviewing courts are unable to make factual determinations in an adequate manner because even after the recent procedural reforms it appears that they will normally rely on affidavit evidence, Finally, judicial intervention in factual matters is more likely to defeat legislative intentions in allocating the implementation of a policy to an administrative body' (BEATSON). Discuss. (2009)
- To what extent are errors of fact susceptible to judicial review? To what extent should they be? (2008)

WEEK 3: PROCEDURAL IMPROPRIETY

This week we look at the issue of 'procedural impropriety': what standards of procedural fairness do the courts impose on decision-makers? The common law generally entitles you to a fair hearing and an unbiased decision. Sometimes it also entitles you to reasons for the decision. The HRA is also an important source of procedural protections, particularly under Article 6. Discussion tends to be about (1) the reasons for procedural protections; (2) the haziness that surrounds the notion of a 'fair' hearing and the absence of 'bias'; and (3) emerging issues, especially the duty to give reasons and closed material procedures.

General

Elliott & Varuhas, chs 9, 10, 11

Fair hearing

Cooper v Board of Works for the Wandsworth District (1863) 14 CB (NS) 180
• Ridge v Baldwin [1964] AC 40
Home Secretary v AF [2009] UKHL 28, [2009] 3 WLR 74
• Osborn v Parole Board [2013] UKSC 61, [54]–[69]
Bank Mellat v Her Majesty's Treasury [2013] UKSC 39, [28]–[46]
R (Moseley) v Haringey LBC [2014] UKSC 56
•R (Begum) v Secretary of State for the Home Department [2021] UKSC 7 [88]–[95]

•Criminal Justice and Courts Act 2015, s 84
•Connor Crummey, 'Why fair procedures always make a difference' (2020) 83 MLR 1221

Notice

Cooper v Board of Works for the Wandsworth District (1863) 14 CB (NS) 180
R (Pathan) v Home Secretary [2020] UKSC 41 23 Oct 2020
D4 v Home Secretary [2022] EWCA Civ 33

Closed proceedings and special advocates

Chahal v United Kingdom [1996] ECHR 54
• R (Roberts) v Parole Board [2005] UKHL 45
Home Secretary v MB [2007] UKHL 46, Baroness Hale
Home Secretary v AF (No 3) [2009] UKHL 28

Note that there is a wide debate about closed proceedings in the civil justice system in general which has generated much litigation. The above authorities are focussed on the procedural obligations placed on the primary decision-maker.

Martin Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings' (2009) Civil Justice Quarterly 314 and 'Update on Procedural Fairness in Closed Proceedings' (2009) Civil Justice Quarterly 448

Special Advocates' submission to the Ouseley review of the operation of closed material procedures under the Justice and Security Act 2013, 8 June 2021, available at:
https://ukhumanrightsblog.com/2021/06/27/secret-justice-the-insiders-view/

Bias

• R v Gough [1993] AC 646, [1993] 2 All ER 724 (HL)
R v Bow Street Magistrate, ex p Pinochet (No 2) [2000] 1 AC 119, [1999] 1 All ER 577
• Porter v Magill [2002] AC 357

Bias in planning decisions

R v Amber Valley District Council, ex p Jackson [1985] 1 WLR 298
R (Lewis) v Redcar and Cleveland [2008] EWCA Civ 746
Broadview Energy v Secretary of State for Communities and Local Government [2016] EWCA Civ 562 and see the reasons of Cranston J at first instance: [2015] EWHC 1743, paras [44]-[49]

Impact of the Human Rights Act

R (Alconbury) v Secretary of State for the Environment [2001] UKHL 23, [2003] 2 AC 295
• R v Anderson [2002] UKHL 46, [2003] 1 AC 837, [2002] 4 All ER 1089
Begum v Tower Hamlets London Borough Council [2003] UKHL 5, [2003] 2 AC 430 (HL)

R (Brooke) v Parole Board [2008] EWCA Civ 29, [2008] 1 WLR 1950
• Ali v Birmingham City Council [2010] UKSC 8, [2010] 2 AC 39
Posthteh v Kensington & Chelsea [2017] UKSC 36

Giving reasons for decisions

• R v Home Secretary, ex p Doody [1994] AC 531
R v UFC, ex p Institute of Dental Surgery [1994] 1 WLR 242, [1994] 1 All ER 651
R (Hasan) v Trade and Industry Secretary [2008] EWCA Civ 1312, [2009] 3 All ER 539
• Dover District Council v CPRE Kent [2017] UKSC 79
R (Save Britain's Heritage) v SSCLG [2018] EWCA 2137, [2019] 1 WLR 929

•Mark Elliott 'Has the Common Law Duty to Give Reasons Come of Age Yet?' [2011] PL 56
•Joanna Bell, 'Reason-Giving in Administrative Law' (2019) 82 MLR 983

Essay question

- What is the relationship between a fair procedure and a fair result?
- If a hearing would not make any difference to the decision an authority would make, is there any reason to provide it?

Discussion questions

- 'The courts have increasingly conflated three closely linked but distinct concepts: (i) bias [...]; (ii) predetermination [...]; and (iii) lack of independence [...]. Arguably the *Porter v Magill* test is not particularly well-suited to circumstances where the second or third of these concepts is at issue'. (Havers and Henderson, 'Recent Developments (and Problems) in the Law of Bias' [2011] JR 80.) Do you agree?
- What does it mean to be an impartial judge? Is it invariably the case that an elected politician is partial, and, if so, partial towards whom?
- Is the use of special advocates ever justified?
- Should the Health Service be obliged to give detailed reasons for refusing to treat an individual? Why might they be unwilling to spell out the reasons for their decision? How would you balance the obligation to treat like cases alike, with patients' right to confidentiality?

Past exam questions

- '[P]rocedures are judged by the standards of fair treatment: they are instruments to fair treatment; and they are fair to the extent that they lead to fair treatment. There is no need to search for some more elusive quality of procedural fairness, for none exists' (GALLIGAN). Discuss. (2018)
- Consider the difficulties faced by the courts when adjudicating on procedural fairness that flow from statutory closed material procedures and from the need to comply with Article 6 of the European Convention on Human Rights (1950). (2016)
- It is sometimes claimed that an important objective of procedural fairness is to reinforce public confidence in official decision-making. How far is this reflected in practice? (2013)
- Does the case law concerning natural justice reveal a coherent approach to this ground of judicial review? (2012)
- 'I do not believe that it is possible to draw a clear distinction between a fair procedure and a procedure that produces a fair result (LORD PHILLIPS OF WORTH MATRAVERS, Secretary of State for the Home Department v AF (2009)). Discuss. (2011)
- How far do the requirements of a fair hearing at common law differ from those required by Article 6 ECHR? Are these differences best explained by viewing the requirements of each as furthering different purposes? (2010)
- 'The provision of reasons is an essential facet of natural justice and also facilitates meaningful substantive review.' Discuss. (2008)
- Is natural justice about protecting individuals' rights or about ensuring that sensible administrative processes are adhered to? Does the answer to this question make any difference in law? (2006)
- Critically assess the impact of the Human Rights Act 1998 on the law of natural justice and bias. (2006)

WEEK 4: ILLEGALITY

This week and next week, we consider the two main types of control over discretion exercised by the courts, illegality and unreasonableness (or irrationality). In broad terms, illegality is concerned with legal failures by the decision-maker: failing to exercise discretion at all, failure to reason only with relevant considerations, failure to act only for proper purposes, etc. By contrast, unreasonableness is concerned with decisions which have passed all the illegality tests but still seem fundamentally wrong, though the judges have a tendency to pick and choose between different grounds of review without following this logic. The test for unreasonableness was laid down in the famous *Wednesbury* case, though as you will see, it has evolved quite a bit since then.

The Human Rights Act 1998 has had an impact on both illegality and irrationality review. The HRA has created a new type of illegality: failure to comply with the European Convention on Human Rights. But the task of assessing whether or not a public authority has complied with the Convention is made more complex by the fact that many Convention rights are 'qualified rights': in other words, public authorities may interfere with them provided that they act 'proportionately'. You need to work out what the proportionality test means and how it differs from Wednesbury. You should also consider the role of the notion of 'deference' which has featured in some decisions, and has given rise to a substantial literature. The use of proportionality under the HRA has raised the question of whether the Wednesbury test should still be applied in non-HRA cases. You also need to form a view on this issue.

General

Elliott & Varuhas, ch 5, ch 7

Delegation

- Carltona v Commrs of Works [1943] 2 All ER 560
- R v Adams [2020] UKSC 19

- Deregulation and Contracting Out Act 1994; Mark Freedland [1995] PL 21
Rory Gregson, 'When Should There be an Implied Power to Delegate?' [2017] PL 408

Fettering of discretion: rules, policies and discretion

• British Oxygen v Minister of Technology [1971] AC 610
R (Corner House Research) v Director of Serious Fraud Office [2008] UKHL 60
R (Purdy) v DPP [2009] UKHL 45, [2009] 3 WLR 403
• R (Sandiford) v Foreign Secretary [2014] UKSC 44

Adam Perry, 'The Flexibility Rule in Administrative Law' (2017) CLJ 375
McHarg, 'Administrative Discretion, Administrative Rule-making, and Judicial Review' (2017) 70 Current Legal Problems 267

Note: To understand the ways in which the law allows a public authority to restrict its own discretion, you need to consider the cases on legitimate expectations in Topic 5, and on contractual liability, in Topic 11.

Challenging policies

R (Samuel Smith Old Brewery) v North Yorkshire CC [2020] UKSC 3
•R (BF (Eritrea)) v Secretary of State for the Home Department [2021] UKSC 38

Abuse of discretion

Improper purposes

• Padfield v Minister of Agriculture [1968] AC 997 (Lords Pearce and Reid)
Wheeler v Leicester CC [1985] AC 1054 (HL plus Browne-Wilkinson LJ in the CA)
R v Lewisham LBC, ex p Shell [1988] 1 All ER 938
•R v SS Foreign and Commonwealth Affairs, ex p World Development Movement [1995] 1 WLR 386
•R (Palestine Solidarity Campaign Ltd) v Secretary of State for Housing, Communities and Local Government [2020] UKSC 16

Relevant/irrelevant considerations

•Bromley LBC v GLC [1983] 1 AC 768 (HL only)
Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759
R (Abbasi) v Foreign Secretary and Home Secretary [2002] EWCA Civ 1598

R v Home Secretary, ex p Venables and Thompson [1998] AC 407
•R (Corner House Research) v Director of Serious Fraud Office [2008] UKHL 60

•Hannah Wilberg, "Deference on Relevance or Purpose? Wrestling with the Law/Discretion Divide", ch 11 in Wilberg and Elliott eds, The Scope and Intensity of Substantive Review (2015)

Common law constitutional rights and principles

R (UNISON) v Lord Chancellor [2017] UKSC 51; Bogg (2018) 81 MLR 509
R (Miller) v Prime Minister No 2, Cherry v Advocate General for Scotland [2019] UKSC 41
R (Elgizouli) v Home Secretary [2020] UKSC 10
R (Dolan) v Secretary of State for Health and Social Care [2020] EWCA 1605 [66]–[83]

See also Osborn v Parole Board [2013] UKSC 61 (above), [54]–[63] on common law principles and administrative due process.

Christina Lienen, 'Common Law Constitutional Rights: Public Law at a Crossroads?' [2018] PL 649–667
Jason Varuhas, 'The Principle of Legality' (2020) 79 CLJ 578

Essay question

- 'Any process of statutory construction which is not purely literal is [...] likely to start with a judicial instinct about what Parliament should be assumed to have wanted. Inevitably, the question becomes: what ought a good and wise Parliament have wanted to achieve, and what did it need to enact in order to achieve it? The search for an ideal Parliamentary intention, to be applied in the absence of sufficient and admissible evidence of the actual one, is nominally an exercise in interpretation. But it is in reality an inherently legislative exercise. It involves a judicial assessment of the very issues that were before Parliament' (LORD SUMPTION). Discuss in relation to judicial review on the grounds of improper purposes and irrelevant considerations.
- Is illegality as a ground of review based on legislative intent?

Discussion questions

- How does the rule against fettering discretion relate to the rule against bias? Is one biased if one adopts a policy?
- Should courts defer to officials as to whether a consideration is relevant or irrelevant? Should courts defer to officials as to whether a purpose is proper or improper?
- When are public authorities allowed to base their decisions on cost considerations?
- Set A: failure to exercise discretion, delegation, surrender, fetters. Set B: relevancy, improper purposes. Question: what, if anything, do set A and B share? Why group them under the same ground of review, namely, illegality?

Past exam questions

- 'Any process of statutory construction which is not purely literal is [...] likely to start with a judicial instinct about what Parliament should be assumed to have wanted. Inevitably, the question becomes: what ought a good and wise Parliament have wanted to achieve, and what did it need to enact in order to achieve it? The search for an ideal Parliamentary intention, to be applied in the absence of sufficient and admissible evidence of the actual one, is nominally an exercise in interpretation. But it is in reality an inherently legislative exercise. It involves a judicial assessment of the very issues that were before Parliament' (LORD SUMPTION). Discuss in relation to judicial review on the grounds of improper purposes and irrelevant considerations. (2019)
- 'The line between illegality review for failure to take account of relevant considerations and acting for improper purposes, and review for irrationality or proportionality is unhelpful both in theory and in practice'. Discuss. (2016)
- Can a defensible distinction be drawn between policies that are permitted to regulate discretion and those decisions which are deemed to fetter it unlawfully? (2013)
- 'Whatever the Secretary of State's intention or purpose may have been, it is, as it seems to me, a matter for the courts and not for the Secretary of State to determine whether, on the evidence before the court, the particular conduct was, or was not, within the statutory purpose' (ROSE LJ, R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement (1995)). Do you agree? (2011)
- To what extent is a divide sustainable between control of discretion directed towards consideration of whether the defendant took account of

irrelevant considerations or acted for improper purposes, and control of discretion directed towards the rationality of the decision that was made? (2008)

- To what extent do the courts apply the same approach towards fettering of discretion by a pre-existing rule or policy and fettering of discretion by contract? To what extent should they do so? (2006)
- Critically evaluate how the courts have used the concepts of 'irrelevant consideration' and 'improper purpose" in judicial review cases. (2000)

WEEK 5: UNREASONABLENESS & PROPORTIONALITY

General

Elliott & Varuhas, ch 8

Wednesbury unreasonableness

• Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223 (CA)
R v Environment Secretary, ex p Hammersmith and Fulham LBC [1991] 1 AC 521 (HL)
• R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd [1999] 2 AC 418, [1999] 1 All ER 129
• Kennedy v Charity Commissioners [2014] UKSC 20, [51]–[55]
Secretary of State for Work and Pensions v Johnson [2020] EWCA Civ 778

•Stephen Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' (1989) 62 Southern California Law Review 913, esp 936–941
•John Gardner, 'The Many Faces of the Reasonable Person' in *Torts and Other Wrongs* (2019 OUP), esp 273–278
•Paul Craig, 'The Nature of Reasonableness Review' (2013) CLP 1
•Hasan Dindjer, 'What Makes an Administrative Decision Unreasonable?' (2021) 84 MLR 265

Proportionality

Smith and Grady, ECtHR Judgment of 1999, (2000) 29 EHRR 493
R v Home Secretary, ex p Daly [2001] UKHL 26, [2001] 2 AC 532
• R (Begum) v Denbigh High School Governors [2006] UKHL 15, [2007] 1 AC 100
• Huang v Home Secretary [2007] UKHL 11
Miss Behavin' Ltd v Belfast City Council [2007] UKHL 19, [2007] 1 WLR 1420
R (Quila) v Home Secretary [2011] UKSC 45
• Bank Mellat v Her Majesty's Treasury [2013] UKSC 39, [19]–[27], [71]–[75]
Carlile [2014] UKSC 60, [11]–[53], [75]–[82], [95]–109], [147]–[180]
Pham v Home Secretary [2015] UKSC 19
• Keyu v Froeign Secretary [2015] UKSC 69

•Browne v Parole Board [2018] EWCA Civ 2024 (noted by Christopher Knight, (2019) 78 CLJ 5)

Julian Rivers, 'Proportionality and the Variable Intensity of Review' (2006) 65 CLJ 174
Aileen Kavanagh, Constitutional Review under the UK Human Rights Act (CUP 2009), 243–253

Manifestly without reasonable foundation?

R (DA) v Secretary of State for Work and Pensions [2019] UKSC 21
R (SC) v Secretary of State for Work and Pensions [2021] UKSC 26

Jed Meers, 'Problems with the "manifestly without reasonable foundation" test (2020) 27 Journal of Social Security Law 12–22

The rationality/proportionality debate

• Sir Philip Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 LQR 223
• Rebecca Williams, 'Structuring Substantive Review' [2017] PL 99
Timothy Endicott, 'Why Proportionality is not a General Ground of Judicial Review' (2020) 1 Keele Law Review 1–23
Paul Craig, 'Reasonableness, Proportionality and General Grounds of Judicial Review: A Response' (2021) 2 Keele Law Review 1–24

Essay question

- What makes an administrative decision unreasonable?
- Should proportionality be a general ground of judicial review?

Discussion questions

- To what extent are the courts willing to control discretion by reference to fundamental human rights? To what extent should they be?
- Does proportionality provide a more structured and transparent means of review than reasonableness?
- Does the Human Rights Act mean the end of Wednesbury? How does it change review of discretion?
- In Pham, Lord Reed distinguished 'proportionality as a general ground of review of administrative action, confining the exercise of power to means

which are proportionate to the ends pursued, from proportionality as a basis for scrutinising justifications put forward for interferences with legal rights' (at [113]). Is the distinction important?

Past exam questions

- '[I]t is one thing to apply a proportionality analysis to an interference with, or limitation of, a fundamental right and another thing to apply it to an ordinary administrative decision' (BARONESS HALE, Keyu v Secretary of State for Foreign and Commonwealth Affairs (2015)). Discuss. (2018)
- 'The concept of what may be "necessary in a democratic society" has to take into account the comparative importance of the right infringed in the scale of rights protected. What may be a proportionate interference with a less important right might be a disproportionate interference with a more important right. The concept of what is "necessary in a democratic society" also has to accommodate the differing importance attached to certain values in different member states' (LADY HALE, R (Countryside Alliance) v. Attorney General (2008)). Consider the application of proportionality under the Human Rights Act 1998 in the light of this quotation. (2016)
- Does the concept of deference have any useful role to play in the practice of administrative law? (2014)

- 'The European [proportionality] test... must ultimately result in the question 'Is the particular decision acceptable?' and this must involve a review of the merits of the decision' (Lord Ackner, Brind). Discuss. (2013)
- 'The court's role is to assess for itself the proportionality of the decision-maker's decision... The court will not require a decision-maker to put itself through the hoops of a complex series of questions.' (Lord Mance, Miss Behavin') Discuss. (2013)
- Answer EITHER (a) OR (b):

  (a) What is the relationship between the Human Rights Act 1998 and the grounds of judicial review?; or

  (b) 'Judicial deference does not entail an abdication of judicial responsibility for the protection of rights or the rule of law. On the contrary, whilst deference involves the exercise of a constitutionally appropriate degree of restraint where the context justifies it, it does not preclude ... "rigorous scrutiny of governmental action" and assertive protection of human rights'. Discuss. (2012)

- Given the existence of the Human Rights Act 1998, how should courts approach substantive review which does not take place under the Human Rights Act 1998? (2011)
- What is meant by 'deference' and should courts exhibit it? (2011)
- In the context of judicial review of administrative action, a doctrine of judicial deference 'is either empty or pernicious' (ALLAN). Do you agree? (2010)
- '[I] think that the day will come when it will be more widely recognised that Associated Provincial Picture Houses Ltd v. Wednesbury Corpn [1948] 1 K.B. 223 was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd' (LORD COO!CE, R (on the application of Daly) v. Secretary CifState for the Home Department (2001). Consider the case law on judicial review for unreasonableness in the light of this quotation. (2008)
- Does Wednesbury unreasonableness retain a meaningful role in administrative law? Is it important for it to do so? (2007)
- Has the adoption of a proportionality test under the Human Rights Act 1998 led to more searching judicial review than prevails when the courts review under the Wednesbury test? (2006)
- 'I consider that even without reference to the [Human Rights] 1998 Act the time has come to recognise that this principle [proportionality] is part of English administrative law, not only when judges are dealing with Community acts, but also when they are dealing with acts subject to domestic law' (LORD SLYNN, R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions (2001)). Discuss. (2006)
- 'It appears likely that Wednesbury unreasonableness will either be replaced altogether by proportionality or blended with it somehow' (TAGGART). Discuss. (2005)

WEEK 6: LEGITIMATE EXPECTATIONS

The doctrine of legitimate expectations has been developed by the courts to deal with cases in which a public body has suggested it will do one thing and then done something quite different. For a long time it was unclear whether the courts would require the public authority to remedy the situation by affording procedural protections to the aggrieved citizen, or whether they would go further and insist that the public authority give the citizen the substantive benefit he or she had been promised. This has now been resolved, but uncertainty still surrounds the exact requirements of a successful legitimate expectations claim. There's disagreement about what the doctrine of legitimate expectations includes, and even about whether there is a single doctrine.

Genearl

Elliott & Varuhas, ch 6

Procedural protection for legitimate expectations

Schmidt v Home Office [1969] 2 WLR 337
R v Liverpool Corp, ex p Liverpool Taxi Fleet Operators [1972] 2 QB 299
• Att Gen for Hong Kong v Ng Yuen Shiu [1983] 2 AC 629
• R v Home Sec, ex p Khan [1984] 1 WLR 1337, [1985] 1 All ER 40
R v SS for Health, ex p US Tobacco International [1992] QB 353, 368–372
• R v Devon CC, ex p Baker [1995] 1 All ER 73

Substantive protection for legitimate expectations

R v MAFF, ex p Hamble Fisheries [1995] 2 All ER 714 (esp pp 722–736)
• R v Devon Health Authority, ex p Coughlan [2000] 2 WLR 622
• R v Dept for Education and Employment, ex p Begbie [2000] 1 WLR 1115 at 1129
R (Bibi) v Newham LBC [2002]1 WLR 237
• R (Nadarajah) v Home Secretary [2005] EWCA Civ 1363
R (Niazi) v Secretary of State for Home Department [2007] EWCA Civ 1495
R (Bancoult) v Home Secretary [2008] UKHL 61
Re Finucane's Application for Judicial Review [2019] UKSC 7

Paul Craig and Soren Schonberg, "Substantive Legitimate Expectations after Coughlan" [2000] PL 684

A doctrine of consistency?

R (Rashid) v Home Secretary [2005] EWCA Civ 744
• Mandalia v Home Secretary [2015] UKSC 59 at [29]–[31]
R (Lee-Hirons) v Secretary of State for Justice [2016] UKSC 46 [17]
•R (Gallaher Group Ltd) v Competition and Markets Authority [2018] UKSC 25

Coherence and disaggregation

Mark Elliott 'Legitimate Expectations and the Search for Principle: Reflections on Abdi and Nadarajah (2006) Judicial Review 281
Adam Perry and Farrah Ahmed, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73 CLJ 6
Rebecca Williams, 'The Multiple Doctrines of Legitimate Expectations' (2016) 132 LQR 639

Ultra vires representations

• Rowland v Environment Agency [2005] Ch 1
Stretch v United Kingdom (2004) 38 EHRR 12

Paul Daly, 'Vires Revisited' [2016] PL 190

Essay question

- Can legitimate expectations cases best be seen as examples of disguised irrationality review?
- Must authorities act consistently?

Discussion questions

- What is the significance of the decision in *Mandalia*?
- What does the doctrine of legitimate expectation protect? Contrast procedural and substantive expectation after Coughlan.
- Suppose a statutory body treats you differently than its policy requires. If you then brings a claim based on legitimate expectations, should it

matter whether you knew of the policy? Should it matter whether you relied on the policy?
- Is the doctrine of legitimate expectations coherent?
- Should it be possible to base a legitimate expectation on an ultra vires representation?
- Is there a conflict between the protection of legitimate expectations and the rule against fettering of discretion?

Past exam questions

- How far can legitimate expectations be upheld without imposing an unacceptable fetter on the discretion of decision-makers? (2018)
- 'The real question is one of fairness in public administration. It is difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision-maker than it is to frustrate a legitimate expectation that the applicant will be listened to before the decision-maker decides whether to take a particular step' (SEDLEY J., R v. Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd (1995)). How far does this provide the foundation for the doctrine of substantive legitimate expectations, and to what extent does it provide assistance in determining its scope of application? (2016)
- 'The law of legitimate expectations, if it operated in a clear and predictable fashion, could provide benefits both for individuals and for public authorities.' Do you agree? (2014)
- Can legitimate expectations cases best be seen as examples of disguised irrationality review? (2013)
- Is legitimate expectation a separate ground of review or is it an extension of other grounds of judicial review? What difference would your answer make to an applicant claiming to have a legitimate expectation? (2012)
- '[I]t is a principle of public law that the decision-maker must act within his powers; that he must not close off (or "fetter") the exercise of his discretion, but that he may exercise that discretion in accordance with a "policy", provided that he operates that policy consistently but not too rigidly; and that he must act fairly. Sometimes a tension arises between these principles in practice... It is in this kind of situation that reliance may be placed on legitimate expectation' (TREASURY SOLICITORS, THE JUDGE OVER YOUR SHOULDER (2006). Discuss. (2011)

- What is the appropriate standard of review to be adopted by the courts in cases concerning legitimate expectations? (2010)
- 'There are three crucial issues in any case concerning legitimate expectations: did the public authority act so as to create the legitimate expectation; did the individual detrimentally rely on the expectation; and is the public authority able to resist the claim by arguing that it would be contrary to the public interest to allow the expectation to be enforced.' Discuss. (2008)
- Which legitimate expectations does administrative law seek to protect? How, and to what extent, can the protection of such expectations be justified? (2007)
- To what extent, if at all, should the court insist on reliance before upholding a claim based on legitimate expectations, and what test should it apply when a decision-maker seeks to depart from or go back on a legitimate expectation? (2006)
- 'Moving on from the important early cases which established the existence of the doctrine of legitimate expectations in our public law, the objective now must be to arrive at a set of reasonably determinate rules' (SALES AND STEYN). Discuss, in relation to substantive (rather than procedural) protections generated by legitimate expectations. (2005)
- Should it be possible to base a claim of legitimate expectation on an ultra vires representation? (2004)

WEEK 7: PUBLIC/PRIVATE DIVIDE

This week, we consider three entangled questions. The judicial review procedure can only be used to challenge the decisions of bodies in the exercise of a 'public function'. How should we understand that phrase? In other words, what is the scope of the judicial review procedure? That's the first question. The second is: which bodies (and which decisions) are subject to public law norms, such as reasonableness or the doctrine of legitimate expectations? Finally, which bodies (and which decisions) are subject to the HRA's requirements? The first question is about procedure, while the second and third are about substance. Note that the relationship between public law procedure and substance must be understood in light of the exclusivity principle, discussed last week.

General

Elliott & Varuhas, ch 4

When are private bodies subject to judicial review?

• R v Panel on Take-overs & Mergers, ex p Datafin [1987] 1 QB 815
• R v Disciplinary Committee of the Jockey Club, ex p Aga Khan [1993] 1 WLR 909
Bradley v Jockey Club [2005] EWCA Civ 1056
R (Mullins) v Jockey Club [2005] EWHC (Admin) 2197 [14]-[46]

Colin Campbell, 'The Nature of Power as Public in English Judicial Review' (2009) CLJ 90
Mark Elliott, 'Judicial Review's Scope, Foundations and Purposes: Joining the Dots' (2012) NZLR 75
Alexander Williams, 'Judicial Review and Monopoly Power: Some Sceptical Thoughts' (2017) LQR 656

The public law / private law divide and the Human Rights Act 1998

• Poplar Housing v Donoghue [2002] QB 48
R (Heather) v Leonard Cheshire Foundation [2002] 2 All ER 936, [2002] HRLR 30
Aston Cantlow PCC v Wallbank [2003] UKHL 37
• YL v Birmingham City Council [2007] UKHL 27, [2007] 3 WLR 112

R (Weaver) v London and Quadrant Housing [2009] EWCA Civ 587, [2009] 4 All ER 865

Dawn Oliver, 'The Frontiers of the State' [2000] PL 476
Paul Craig, 'Contracting Out, the Human Rights Act and the Scope of Judicial Review' (2002) 118 LQR 551
• Catherine Donnelly, 'Leonard Cheshire Again and Beyond' [2005] PL 785

Merits and de-merits of the public law / private law distinction

Duncan Kennedy, 'The Stages of Decline of the Public/Private Distinction' (1982) U Penn LR 1349
• Nicholas Bamforth, 'The Public Law-Private Law Divide', ch 6 in Leyland & Woods eds, Administrative Law Facing the Future: Old Constraints and New Horizons (1997)
• Dawn Oliver, 'Common Values of Public and Private Law' [1997] PL 630; 'Public Law Procedures and Remedies – Do We Need Them?' [2002] PL 91
Peter Cane, 'Accountability and the Public/Private Distinction', ch10 in Bamforth & Leyland eds, Public Law in a Multi-layered Constitution (2003)

• Civil Procedure (Amendment) Rules 2000 (SI 2000 No 2092), Rule 54
• Senior Courts Act 1981, s 31

Essay question

- 'Courts should be wary of finding public law and human rights obligations to apply to a body unless that body's source of authority lies directly in statute.' Discuss. (2018)
- Is there an important distinction between public and private law?

Discussion questions

- Is it appropriate to link judicial procedures to the distinction between public and private law?
- To what extent is 'contracting out' a way for a public body to avoid incurring obligations under the HRA?
- Lord Nicholls suggested that the definition of 'public function' in the HRA be given a 'generously wide' interpretation. Has his suggestion been followed?
- In Scots law, the scope of "judicial review" is very different. The public

or private nature of a body or function is not decisive. What matters is whether power has been delegated by one person or body to another (by statute, contract, or some other instrument). Is there anything to be said for this approach?

- Why should the courts refuse to intervene where an alternative remedy is available? Does this help preserve the residual function of judicial review?

Past exam questions

- 'The centrally relevant words, "functions of a public nature", are so imprecise in their meaning that one searches for a policy as an aid to interpretation. The identification of the policy is almost inevitably governed, at least to some extent, by one's notions of what the policy should be, and the policy so identified is then used to justify one's conclusion. Further, given that the question of whether section 6(3)(a)) applies may often turn on a combination of factors, the relative weight to be accorded to each factor in a particular case is inevitably a somewhat subjective decision' (Lord Neuberger, *YL v. Birmingham City Council* (2007)). Is this true of the process by which courts determine whether a particular body is a 'public authority' for the purpose of the Human Rights Act 1998? Is it true of the process by which courts determine whether a particular body should be subject to judicial review more generally? (2009)
- 'The existence of a distinction between public law and private law is inevitable. The real issue is how best to define it.' Do you agree? (2013)
- Is it essential for administrative law to distinguish between public and private law? (2012)
- Consider critically the courts' interpretation of 'public authority' under section 6(3)(b) of the Human Rights Act 1998. (2008)
- 'There is no public law–private law divide' (Oliver). Is this statement correct? Should there be a public law–private law distinction? (2007)
- Is the meaning of 'functions of a public nature' in s. 6(3)(b) of the HRA 1998 the same as the meaning of 'public function' in Part 54 of the Civil Procedure Rules ('judicial review of a decision, action or failure to act in relation to the exercise of a public function')? Should it be? (2005)

WEEK 8: THEORY

General

• Carol Harlow & Richard Rawlings, Law and Administration (3rd ed, 2009), chs 1, 2 and 3

Law, politics and political theory

Albert Venn Dicey, Introduction to the Study of the Law of the Constitution (10th ed, 1959), ch 4
Sir Ivor Jennings, The Law and the Constitution (5th ed, 1959), appendix 2
• Harry Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 70 Osgoode Hall LJ 1
Martin Loughlin, Public Law and Political Theory (1992), chs 4, 7, 8, 9
• John Laws, 'Law and Democracy' [1995] PL 72
Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 OJLS 157
• Jonathan Sumption, 'Judicial and Political Decision-making: The Uncertain Boundary' [2011] JR 301
Sir Stephen Sedley, 'Judicial Politics' [2012] JR 95

Independent Review of Administrative Law, March 2021

The conceptual foundations of judicial review

Dawn Oliver, 'Is the Ultra Vires Rule the Basis of Judicial Review?' [1987] PL 543
• Christopher Forsyth, 'Of Fig Leaves and Fairy Tales' (1996) 55 CLJ 122
• Paul Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57 CLJ 63
•Mark Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting' (1999) 58 CLJ 129
Paul Craig and Nicholas Bamforth, 'Constitutional Analysis, Constitutional Principle and Judicial Review' [2001] PL 763
Trevor Allan, 'Constitutional Dialogue and the Justification of Judicial Review' (2003) 23 OJLS 563
•Timothy Endicott, 'Constitutional Logic' (2003) 53 University of Toronto Law Journal 201
Thomas Adams, 'Ultra Vires Revisited' [2018] PL 31

Consider the debate about the conceptual foundations of judicial review in relation to these cases:

CCSU v. Minister for the Civil Service [1985] AC 374
R. v. Panel on Take-overs & Mergers, ex parte Datafin [1987] 1 QB 815
R. v. Hull University Visitor, ex parte Page [1993] AC 682
Boddington v. British Transport Police [1999] 2 AC 143
R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61; [2008] 3 WLR 955
Lord Steyn, 'Democracy Through Law' [2002] EHRLR 723 at 725

Does administrative law protect rights or prevent wrongs?

Sir Harry Woolf, 'Public Law – Private Law: Why the Divide?' [1986] PL 220
Joanna Miles, 'Standing under the Human Rights Act 1998' (2000) 59 CLJ 133
• Michael Taggart, 'Reinventing Administrative Law', ch 12 in Bamforth & Leyland eds, Public Law in a Multi-layered Constitution (2003)
Tom Poole, 'The Reformation of English Administrative Law' (2009) 68 CLJ 142
• Jason Varuhas, 'Taxonomy and Public Law', ch 1 in Elliott, Varuhas and Wilson Stark eds, The Unity of Public Law (2018)
Paul Craig, 'Taxonomy and Public Law: A Response' [2019] PL 218

Essay question

- 'The rule of law ideal forms the central background theory against which the principles of administrative law operate, while at the same time acting as a governing principle.' (HARLOW) Discuss. (2019)
- Is administrative law unjustified?

Past exam questions

- 'The central issue in the debate concerning the constitutional foundations of judicial review is whether legislative intent is required in order to prevent such review from being a strong challenge to Parliamentary sovereignty'. Discuss. (2016)
- What role should Parliament's intentions be seen as playing in the operation of judicial review? (2013)

- Is it possible to provide a coherent constitutional justification for judicial review of administrative action in the United Kingdom today? (2012)
- Does the successful practice of administrative law require a secure grasp of public law theory? (2009)
- 'Public law theory enables us to understand the foundations and purposes of judicial review.' Discuss. (2008)
- How can, and how should, judicial review be justified? (2007)
- What light if any does public law theory shed on the principles of administrative law? (2006)
- What contribution does an understanding of public law theory make to our understanding of administrative law? (2005)
- Does the concept of the rule of law provide a sufficient foundation for judicial review? (2004)
- Why should administrative lawyers care about the constitutional basis of judicial review? (2003)