
1 Administration and the principles of the constitution

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Administrative law includes a complex variety of processes and doctrines that confer and control public power. This chapter outlines the underlying principles that make it into more than just a miscellaneous jumble.

LOOK FOR • • •

- **Good administration:** what it is, and how it is related to constitutional principles.
- The fundamental constitutional principle of **responsible government**, and the **system principles** that promote it.
- **Arbitrary government**, and the **rule of law**.
- The different roles of different institutions in restraining arbitrary government.
- The particular responsibilities of the courts: the **principle of legality**, and the requirement of **due process**.
- The **principle of relativity:** the requirements of constitutional principles are related to the context in which they are applied.

‘The King hath no prerogative, but that which the law of the land allows him.’
Case of Proclamations (1611) 12 Co Rep 74 (Lord Coke)

‘... the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, That the King ought not to be under any man but under God and the law.’

Prohibitions del Roy (1607) 77 ER 1342, 12 Co Rep 64 (Lord Coke)

1.1 Arbitrary government and the core of administrative law

After the invasion of Afghanistan at the end of 2001, United States forces captured more than 600 men suspected of links to Al Qaeda. They were imprisoned in Guantánamo Bay, a naval base in Cuba that the Americans hold on an indefinite lease. The point of keeping the men in Guantánamo Bay was to avoid interference from judges, which the American administration knew would follow if they imprisoned men on American soil. The President claimed the constitutional authority to detain the men as long as he chose, in conditions that he chose, with no recourse except what he chose to give them.

The families of the detainees claimed that the men should have access to an independent legal process. They also claimed that some of the detainees were aid workers; innocent visitors to Afghanistan and Pakistan, sold to the American forces by villagers for bounty money. In November 2002, the mother of Feroz Abbasi, a British detainee in Guantánamo Bay, asked the English courts to declare that the Foreign Secretary had a duty to take steps to get the government of the United States to release him (*R (Abbasi) v Foreign Secretary* [2002] EWCA Civ 1598). In the Court of Appeal, the judges concluded that Abbasi’s detention was arbitrary:

‘in apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a “legal black-hole”’. [65]

It was strong language for judges. By calling the detention ‘arbitrary’, they were saying that the United States government was claiming an uncontrolled power that lends itself to abuse. The detainees were being held at the say-so of the President, when the decision ought to be controlled by law. But although the judges frankly condemned the detention, they refused to tell the Foreign Secretary to say anything to the Americans, or even to give reasons for his decision not to say anything.

Meanwhile, the families’ claims were going through the U.S. federal courts. The Bush administration argued that the courts should not listen to complaints by a foreigner detained outside the U.S. The justices of the United States Supreme Court were deeply divided; they held 5–4 that the U.S. Constitution required that the detainees in

Guantánamo Bay should be able to challenge their detention in the U.S. federal courts through *habeas corpus*, the ancient remedy for arbitrary detention that the Americans inherited from English law (*Boumediene v Bush*, 553 US (2008)).

1.1.1 Habeas corpus

What if the British government tried to create an enclave abroad, like Guantánamo Bay, for uncontrolled executive detention? English law still includes *habeas corpus*. The phrase ‘*habeas corpus*’ (‘that you produce the body’) was used in a variety of early judicial writs (directions from a court issued in the name of the King), designed to get a person into the court to give evidence, or to respond to a claim. In the 1300s, the judges developed one such writ into an order to an official to explain why a person is being detained. If the official did not give a lawful reason for the detention, the court could order the detainee released.

The writ read as a command of the King, as follows:

‘We command you to produce before us the body of ____, with the day and the reason of his detention, to undergo and receive whatever our court then and there may order concerning him.’¹

It gave the judges power to order the release of a person who was being detained unlawfully. They still have that power today—so long as there is jurisdiction to hear the claim.

The late medieval English judges were able to invent *habeas corpus* because they could issue writs in the King’s name. Their role as the King’s judges gave them a far-reaching power of constitutional invention. But that role also endangered their independence. In *Darnel’s Case* (1627) 3 Howell’s State Trials 1, the judges refused to issue *habeas corpus* for detentions ordered by the King himself. It can’t have helped that the King had just dismissed an uncooperative Lord Chief Justice, and replaced him with a supporter. It would take an Act of Parliament to extend *habeas corpus* to control detention ordered by the King: the Habeas Corpus Act 1640. Since 1640, the courts have been able to review the lawfulness of any detention by the government. But English judges have never faced a situation like Guantánamo Bay. There is no settled law as to whether the courts have jurisdiction to hear a claim from a foreigner detained abroad. How would an English court decide the matter, if the British government set up a British version of Guantánamo Bay?

The decisions on *habeas corpus* show that the judges have a very wide discretion to decide their own jurisdiction. In the 18th century, Lord Mansfield held that the writ was available in Berwick-upon-Tweed, even though the town was outside the regular jurisdiction of the High Court. If the court did not give *habeas corpus*, he held, ‘there must, in many important cases, be a total failure of trial, and consequently, of justice’

¹ J H Baker, *An Introduction to English Legal History* (4th edn, 2002) 552.

(*R v Cowle* (1759) 2 Burr 834, 860). Lord Mansfield was uncertain whether *habeas corpus* was available to control detentions overseas, saying that where the judges ‘cannot judge of the cause, or give relief upon it, they would not think proper to interpose’. But they would listen to a claim, ‘where a writ of *habeas corpus* out of this Court would be the properest and most effectual remedy’ (856).

If people were detained in a British Guantánamo Bay, we could expect that the judges today would follow the lead of Lord Mansfield, and would assert *habeas corpus* jurisdiction if that was the only way to provide an effective remedy. The Court of Appeal suggested that view in the *Abbasi* decision. But the strongest reason for expecting the House of Lords to take the approach suggested in *Abbasi* is the decision in *A and X v Home Secretary* [2004] UKHL 56, on the effect of the European Convention on Human Rights.

In *A and X*, nine men were detained without trial, on suspicion of involvement in international terrorism. The men were held in Belmarsh Prison; the media called it Britain’s Guantánamo Bay, but it was different—and not just in the number of detainees. Belmarsh is in south London, not on foreign soil. The Belmarsh detainees had access to review hearings from the start (though not to the ordinary process of the courts). What’s more, they could have left the country. They were foreign nationals, whom the British government could not lawfully deport.² Unable to deport them, and not wanting to release them in Britain, the British Government decided to derogate from the right to liberty in Art 5 of the Convention (that is, they decided to make an exception to it). Parliament authorized detention without trial of people in that situation, in the Anti-terrorism, Crime and Security Act 2001 s 23.

The European Convention provides for derogations from Art 5, but only ‘in time of war or other public emergency threatening the life of the nation’, and only ‘to the extent strictly required by the exigencies of the situation’. The Home Secretary thought that the situation strictly required indefinite detention without trial. The Law Lords decided 8–1 that the detentions were not strictly required; Lord Hoffmann did not even think that the emergency was a threat to the life of the nation. Lord Walker alone thought that the judges ought to defer to the Home Secretary’s judgment as to whether the situation required the detentions. The majority thought that they could hold that the detentions were unnecessary, without interfering illegitimately with the Home Secretary’s work.

How does *A and X* relate to *habeas corpus*? It shows that if the British government created a Guantánamo Bay, the Law Lords would regard it as legitimate judicial business to question the detention. The history of *habeas corpus* gives the judges power to determine the extent of their own jurisdiction. If they are to use it responsibly, the judges have to use it with respect for the constitutional role of the Home Secretary—that is, with **comity** toward the Home Secretary. In the Guantánamo Bay litigation, the dissenting U.S. Supreme Court justices thought that they had to defer to the

² They would have faced inhuman or degrading treatment if they had been deported to their own countries, and the European Court of Human Rights has held that deportation in that situation would violate the right under Art 3 of the Convention, not to be subjected to torture or to inhuman or degrading treatment (*Chahal v UK* (1996) 23 EHRR 413).

Commander-in-Chief's judgment as to how to run a campaign that he called a 'war' (*Boumediene v Bush* (Scalia J)). *A and X* shows that the majority in the House of Lords would not defer to the Home Secretary's judgement as to whether it is necessary to detain people indefinitely.

Convention rights

If terrorism suspects were detained in a British Guantánamo Bay, the **European Convention on Human Rights** (see Chapter 3) would apply. The European Court of Human Rights has held that the Convention applies if a state 'exercises effective control of an area outside its national territory' (*Loizidou v Turkey* (1997) 23 EHRR 513 [62]). In *R (Al-Skeini) v Defence Secretary* [2005] EWCA Civ 1609, the Court of Appeal held that the Convention and the Human Rights Act 1998 apply in respect of a death in a British military prison in Iraq, though not in respect of a death in the streets of Basra patrolled by British troops.

So unless the United Kingdom derogated from Art 5, detainees in a British Guantánamo Bay would have a remedy under the Human Rights Act in the English courts. And if the Government did derogate from Art 5, *A and X v Home Secretary* [2004] UKHL 56 shows that the courts would decide whether the detentions were necessary, rather than deferring to the Home Secretary.

1.1.2 What is arbitrary government?

A decision is arbitrary if the decision maker is unresponsive to reasons for giving one decision rather than another. Sometimes arbitrary decision making is all right. In the National Lottery, the techniques for deciding the winning number are deliberately made as arbitrary as possible. That is all right because there *are no* reasons for picking a particular ticket holder as the winner of the lottery. An election is a public decision that leaves it up to the voters to respond to the reasons on which they ought to base their decision. It is not a lottery, and the voters shouldn't flip coins; they ought to decide on the relevant political considerations. But the law leaves it entirely up to them to decide what those considerations are. And because it leaves that up to them, it leaves them free to ignore the relevant considerations, and so it leaves them free to act arbitrarily. But of course, the freedom of the ballot box is legitimate—in fact, it is necessary for democracy. The law must treat the voter's decision as not needing any justification other than the fact that the voter made it.

A decision-making arrangement does not count as arbitrary government, if there is a good reason for leaving the decision maker free to act the way that he or she wishes, without requiring any justification for the decision other than the fact that the decision maker made it. To identify arbitrary government, we must be able to identify acts that call for—and lack—a technique for *other* institutions to decide what justification the acts may have, aside from the mere will of the initial decision-maker. So, for example, Parliament's power to levy an income tax is not an example

of arbitrary government, just because other institutions have no legal power to control it; that exercise of power needs to be controlled by the people, and control by any other institution would not make the decision less arbitrary. But a decision-making arrangement is arbitrary if it needs to be controlled by other institutions, and it is not. That would be a failure in the rule of law. And a particular decision is arbitrary, if legal institutions can identify it as a departure from responsible government.

- **Arbitrary government is government that is contrary to the rule of law.**
- **A decision is arbitrary in the sense relevant to the rule of law, if it is one that other institutions can identify as not responding to the relevant considerations.**

In *Abbasi's* case, why wasn't it arbitrary for the Foreign Secretary to refuse to demand the release of a man who was being arbitrarily detained abroad? If the court does not need to leave it to the government to decide whether detentions are necessary in a case like *A and X*, why leave it to the government to decide whether to demand *Abbasi's* release by a foreign power?

The judges held that the considerations at stake in the Foreign Secretary's decision included the answers to questions such as whether Britain ought to stand shoulder-to-shoulder with the Americans in combating terrorism and, if so, whether demanding the return of British detainees would damage the alliance, and how it would affect relations with other countries besides the Americans. The Court of Appeal held that those questions are not **justiciable** (see p 239). That is, they are not suitable for judges to decide. There were two crucial issues in both *Abbasi* and *A and X*: the first is whether there are considerations at stake that the courts cannot assess. The second is whether the interests of the claimant need to be protected by the court in spite of any such issues. If the British government is detaining suspects, as in *A and X*, the decision may affect relations with other countries in ways that the court cannot pass judgment on. But the court can still identify indefinite detention as arbitrary, regardless of the other issues at stake. A court is able to decide whether the Home Secretary is acting arbitrarily if he detains people indefinitely without a trial; but a court cannot determine whether the Foreign Secretary is acting arbitrarily, if he refuses to make representations to a foreign government.

Some of the most important executive decisions are simply not controlled by law (such as the decision to put a bill before Parliament), or are barely controlled by law (such as the decision to wage war, or to sign treaties). They can be exercised capriciously and with no regard to the relevant considerations, and then they are arbitrary in a sense. But they are not arbitrary in the sense that is contrary to the rule of law, because legal institutions are not capable of determining whether they respond to the relevant considerations, without damaging the constitutional function of the executive.

- **The core of administrative law is the provision of processes independent of the government, for the prevention of government action that can be identified as**

arbitrary with no breach of comity. That is, the core task of administrative law is to impose the rule of law on public authorities.

The main point of administrative law is to stand against arbitrary government, by imposing the rule of law on executive action. The law can often do more than that to promote good government. What more can the law do? There is no general answer to this question. The reason is that administration is extremely complicated.

FROM THE MISTS OF TIME

Under Henry VIII, Commissioners of Sewers were given statutory power to provide public services such as drainage ditches, and power to charge landowners for the expense. The Privy Council ordered that no actions should be entertained in the courts against the Commissioners of Sewers. Two centuries later, William Blackstone looked back on the early development of judicial review as follows: ‘The pretense for such arbitrary measures [preventing claims against the Commissioners] was no other than the tyrant’s plea, of the necessity of unlimited powers in works of evident utility to the public, “the supreme reason above all reasons, which is the salvation of the king’s lands and people.” But now it is clearly held, that this (as well as all other inferior jurisdictions) is subject to the discretionary coercion of his majesty’s court of king’s bench.’ *Commentaries on the Laws of England* (1765–1769), Book 3 Chapter 6.

● Pop quiz ●

The ‘tyrant’s plea’ was an argument of **comity**—i.e., an argument that judicial interference with the executive would damage the ability of the executive to carry out its constitutional function. If courts ought to act with comity toward the executive, what was wrong with that argument?

1.2 Administration

‘Administrative’ is used in a very broad sense in administrative law. Administration is more than just the operation of government departments and the carrying out of government programmes. The **executive** includes all public authorities except the courts and Parliament.³ **Administration** includes all the conduct of the executive except conduct in Parliament, such as presenting bills to the House of Commons or the House of Lords, or answering questions in the House of Commons. Administrative law controls decision-makers who are more or less independent from the government, such as the Crown Prosecution Service (see p 254), and decision makers who are almost as independent from the government as judges (such as tribunals (see Chapter 12) and ombudsmen (see Chapter 13)).

³ What about private agencies doing work for the government? See Chapter 15.

Jargon alert

‘Government’ is organized action on behalf of a political community; the phrase ‘the government’ can be used very widely to include all the agencies engaged in government, but it is usually used for the political leadership of the executive in an independent state. So in Britain, ‘the government’ usually means the Prime Minister and the other ministers of the Crown who are appointed on the advice the Prime Minister.

What’s more, ‘administrative law’ includes the legal control of much decision making that is not administrative at all, and is not done by the executive. It controls the operation of the courts that are traditionally called ‘inferior courts’—courts that have been created by statutes that specify their jurisdiction (I will call them ‘courts of specific jurisdiction’; the High Court, by contrast, has a general inherent jurisdiction over the administration of justice).

The sturdy skeleton of 21st-century administrative law was created in the 13th to 17th centuries, as the judges in the court of King’s Bench developed techniques for monopolizing the administration of justice. After the King’s special courts disappeared in the Glorious Revolution of 1688, the King’s Bench exercised supervisory jurisdiction over all other public authorities except Parliament and the courts of equity, in a process that has come to be called ‘judicial review’. For centuries more it was still thought that the prerogatives of the Crown could not be controlled by the judges. After the 17th century, prerogatives were always exercised on the advice of the ministers of the Crown. ‘On the advice of’ the ministers means, in effect, by the ministers, and it was long thought that the ministers’ responsibility to Parliament was the only constitutional control on prerogative. But in a line of cases running from the 1980s into this decade, the judges have asserted jurisdiction to decide the lawfulness of any exercise of government power, where the issues at stake are suitable for a court to determine.

So the ‘administrative’ in ‘administrative law’ refers to all public action that is not taken in the High Court or in Parliament. And in the 21st century, the judges use techniques that they developed in the Middle Ages to control almost all government action, including the government’s responses to terrorism.

1.3 The principle of relativity

Because administrative law controls such a vast and complex diversity of exercises of power, its effect depends quite radically on various features of a particular exercise of power. The way in which the law ought to control a decision—if at all—depends on:

- the type of power being exercised;
- the nature of the body (the expertise of its members and the degree to which they are independent of government, etc.);

- the processes by which it acts;
- the sorts of considerations that need to be taken into account if the power is to be exercised with integrity; and
- the way it affects particular people,

—and more. The variety of these features of decisions has two important consequences. First, it has led to the development of a complex assortment of institutions and legal processes for controlling the exercise of public powers. Secondly, it means that any particular legal process for the control of government must operate with attention to the diversity of forms of public power that may be under control. As a result, it is very hard to generalize about the rules that ought to govern the courts' general jurisdiction first, to control different powers and secondly, to supervise other techniques for controlling the exercise of power.

The requirements of administrative law, and the processes that it provides, must not depend on the whims of the government, or on the likes and dislikes of the judges. But they must depend on the context—on the nature of the body that makes an administrative decision, and on the type of decision, and on the nature of the impact it has on people who want to complain about it, and on the circumstances in which it is made. Lord Steyn said in *R (Daly) v Home Secretary* [2001] 2 AC 532, 548 that 'In law context is everything.' In *R (Persey) v Environment Secretary* [2002] EWHC 371 [43], Simon Brown LJ called that 'the most quoted dictum in all of administrative law'.

But Lord Steyn must have been speaking ironically: context is *not* everything. Contexts are the sets of circumstances in which everything plays out. The basic reasons for the rules of administrative law are, for the most part, very general constitutional principles that are just as sound in other countries and, as we will see, in the European Union (EU) (see e.g., p 293). And for the most part, those principles have been recognized for centuries. Administrative law has undergone significant transformations not only in the past century but in each of the past six decades. Even the abstract principles of the constitution have changed since the Middle Ages. But the common strands are remarkable.

The rest of this chapter outlines the principles; the rest of the book will explain how their application by various institutions, through various processes, depends on the contexts in which official power is exercised.

1.4 The principles of the constitution

Principles are abstract, basic rules—starting points for reasoning about what is to be done. A principle is a *constitutional principle* if:

- it regulates what constitutions regulate (that is, the framework of government), and
- it does so in the way that constitutions regulate things (that is, by putting issues off the agenda of day-to-day politics).

Freedom of expression is a principle of our constitution. What makes it so? First of all, the principle regulates the framework of government, since it protects the ability to criticize the government, and promotes accountability.⁴ But what takes political censorship off the agenda in day-to-day politics? Not just the fact that Britain has signed the European Convention on Human Rights, or that the Human Rights Act gives certain forms of legal effect to the Convention (see Chapter 3), or that it would be a tort for the government to close down a printing press by force for criticizing the government (see Chapter 14). In fact, a treaty (like the European Convention), a statute, and a rule of the common law cannot by themselves make anything into a constitutional principle, because Parliament can repeal its statutes, and change the common law, and the constitution does not prohibit the government from violating its treaty commitments. A constitutional principle cannot be repealed by a statute, and it must bind the government. Our unwritten constitution has no principles at all, unless the institutions of government adhere to them to some extent. But then, a country with a written constitution is the same—the institutions of government must adhere to the principles set out in the document to some extent, or they are only a sham.

Freedom of expression is a principle of the British constitution because the authorities that have power under the constitution regulate themselves and each other, to some extent, in a way that is guided by the principle. To identify a principle of a country's constitution, you must find support for it in the constitutional institutions' conduct. You must be able to say that it is *their* principle. Saying that can be consistent with a great deal of conduct that is contrary to the principle. So, for example, the separation of powers was already a British constitutional principle, even when the Home Secretary had the legal power to decide how long prisoners on life sentences would stay in prison (a power that violated the principle).

Parliamentary sovereignty (a law-making power that is not limited by law) is a principle of our constitution. Does that mean that the constitution has no other principles, because nothing is put off the ordinary political agenda? No: it only means that Parliament has lawful power to decide to what extent British law adheres to the principles of the constitution. Parliament has the power to infringe freedom of speech, or to empower others to do so.⁵ If it did, it would act against a constitutional principle. If Parliament infringes freedom of speech so extravagantly that the framework of our government is no longer generally committed to freedom of speech, then freedom of speech will no longer be a principle of the constitution at all.

Why have constitutional principles? The point of regulating the framework of government in a way that puts some issues off the political agenda is to support good government.

⁴ Freedom of speech protects much more than just speech criticizing the government; it is not just a constitutional principle.

⁵ Doing so might infringe the European Convention on Human Rights; that would violate Britain's treaty obligations, and would give judges a power under the Human Rights Act to declare that Parliament had acted incompatibly with the Convention, but Parliament's action would still have force in English law. See Chapter 3.

1.4.1 Good government

Government is organized action on behalf of the community. Good government acts justly on behalf of the community, and makes the community a good community. Or at least, it does the limited things that can be done for that purpose by organized action. The principles of good government include efficiency and compassion. They include the duty to pay attention to everything that is necessary for government to serve a community well.

Administrative law has a very important role in securing good government, but it is a strictly limited role. Administrative law only supports good government indirectly, by doing what the law can effectively do to secure *responsible government*. The first constitutional principle of administrative law is that good government requires responsible government.

1.4.2 Responsible government

Responsible government responds to the considerations that make for good government. So, for example, instead of pursuing the personal benefit of the rulers, responsible government responds to the needs of the community (for everything from good roads, to social security, to integrity in foreign relations). Responsible government means, primarily, that government action is taken in the interest of the governed (and not for the personal advantage of the officials). But it is only *primarily* in the interest of the governed, because responsible government does not abuse strangers to serve the interests of the governed. If military attacks on other countries and unjust policies toward refugees are in the interest of the people of this country, that does not mean that our officials are acting responsibly if they take those actions. And if abusing a few of us would benefit most of us, that does not mean that we will have responsible government if our officials do it. Responsible government, while acting in the interests of the governed, also responds to the community's duties of justice to the powerless, and to visitors, and to outsiders. Even then, you might say, it is still responding to the interests of the governed in a sense, since they need a way in which their community can act with justice.

What is the difference between responsible government and good government? The added ingredient in good government is simply success. Responsible government aims in good faith to serve the community; good government serves the community well.

⋮ **Responsible government is reasonable government** (see p 227 on what reasonableness is).

Irresponsible government, of course, is arbitrary government. Administrative law only indirectly promotes good government; it directly promotes responsible government, by standing against arbitrary government.

The constitutional principles of administrative law justify much of the law that is stated in this book. They also give good grounds for criticizing some important

aspects of the law. And they explain its limitations. This chapter will outline two basic, interwoven groups of principles: **system principles**, and **principles of accountability**.⁶ Both types of principle are against irresponsible government, so they indirectly promote good government. The two types are interwoven for various reasons: partly because adhering to the system principles makes government more accountable, and partly because non-legal forms of accountability can support that especially famous system principle, the rule of law.

1.5 System principles

1.5.1 The separation of powers

Like any good constitution, the British constitution allocates power to various distinct state institutions. It is very important (especially for administrative law) that the point of the separation of powers is not merely to spread power around among various bodies, but to create *two particular branches of government*—the courts and the legislature—that are distinct from the executive branch. And the separation of powers gives the executive, the courts, and the legislature *particular functions*.

In every constitution, the executive is the primary branch of government. The functions of the executive are open-ended, while the core judicial function (passing judgment on legal claims), and the core legislative functions (passing judgment on legislative proposals, and, in our constitution, scrutinizing and endorsing or removing the government) are much more limited functions of government action. The courts and the legislature can close down for the vacation, but the executive cannot.⁷ Neither the courts nor the legislature handle guns. So it is the executive that is chiefly responsible for the rule of law. In Britain, Parliament can change the constitution, and the courts can determine the law of the constitution, but it is the government that must uphold the constitution. And all the powers of the separate branches of the state are inherited from the unified executive power of the Crown. At the time of the Norman Conquest, the Crown was a symbol for the person of the monarch, who really did control the executive, judicial, and legislative power of the state. Today, the Crown is a symbol for a symbol. It is a symbol for the Queen, who is herself a symbol for the power of the state, which is exercised by the government. The judges are called the Queen's judges, and legislation is said to be passed by the Queen in Parliament. But even in countries like the United States and South Africa, the

⁶ Further principles, of less generality, are explained throughout the book; they mostly represent facets of the broad principles outlined here. Note, also, that many general substantive principles of the law are relevant to administrative law. For example, the principle of freedom of speech, discussed above, affects the way in which administrative law should regulate the use of public power.

⁷ But the courts cannot *altogether* close down: it is important for the rule of law that you should be able to find a judge in the vacation, or in the middle of the night, to issue a writ of *habeas corpus*: this was first achieved in the Habeas Corpus Act 1679.

executive is the primary branch of government. While these countries adopted constitutions approved through deliberation in assemblies, it took executive acts to set up the processes and to convene the assemblies.⁸

Why are powers separated into these three particular functions (judicial, legislative, and executive)? In any process of constitution formation, the executive has reasons to allocate powers to special institutions that are more or less independent of the executive, and to which the executive will be accountable:

- **Responsible government needs an effective agency for making clear, open, prospective, stable, general rules for the community.** So in the *Case of Proclamations* (1611) 12 Co Rep 74, Lord Coke held that the Crown has no prerogative to change the common law or statute, or to create new offences.
- **Responsible government needs an independent and effective agency to resolve disputes over the rules.** So in *Prohibitions del Roy* (1607) 12 Co Rep 63, Lord Coke held that the King could not decide cases in the courts. Coke explained it on the basis that the ‘artificial reason and judgment of law’ take special training, but he was being polite: if the King trained as a common lawyer, it would still be inappropriate for him to sit as a judge. The reason is the constitutional need to prevent the executive from certain sorts of abuse of power. The constitution does so by authorizing independent judges to determine the requirements of the law.

Finally, each branch needs to be well organized for its own tasks. That means, incidentally, that all three branches must carry out executive, legislative, and judicial tasks:

	Executive functions	Judicial functions	Legislative functions
Executive branch	...	Deciding some complaints against government departments	Delegated legislation, legislation under the prerogative
Judicial branch	Keeping order in the court and managing facilities	...	Making rules governing procedures and the costs of litigation
Legislative branch	Policing order in Parliament, administering the process for voting on bills	Deciding disputes over contempt and breach of privilege	...

Figure 1.1 Examples of the varied functions within branches of the state

Powers need to be separated within branches, and not just between branches. This is one reason for the complexity of administration. In the executive branch, it is

⁸ We can actually put England in the same category: after the Glorious Revolution in 1688, William of Orange summoned the irregular Parliament that declared him to be King and passed the Bill of Rights.

extremely important that police and prosecutors are able to operate independently of the government; some agencies act at arm's length from government with various forms of accountability to ministers (see Chapter 15), while departments act at the direction of ministers. The chambers of the legislature need speakers who can exercise executive power on behalf of the chamber. The courts need judges and administrators to carry out the legislative work of making rules and the executive work of allocating judges to cases, and so on.

The separation of powers has an importance to the constitution that is wider than its role in controlling the executive. What role does it have in administrative law? It has two roles: first, some administrative decision-making power needs to be separated from control by the government; separation of powers *within* the executive branch of government is a crucial feature of the statutory creation of a multitude of quasi-independent tribunals in the 20th century. The reconstruction of tribunals in the Tribunals, Courts and Enforcement Act 2007 has enhanced their independence, and made them more like courts (see Chapter 12).

Secondly, the separation of powers requires good decisions as to the limits of administrative power. It is a reason for taking certain decisions away from executive officials (and, therefore, right out of the domain of administrative law), and giving them to judges. The most dramatic example is the judges' use of the Human Rights Act to declare that it was incompatible with the European Convention on Human Rights for the Home Secretary to decide the 'tariff' of time to be spent in prison by a prisoner on a life sentence (see p 50). The executive should not have excessive legislative power, and it should not have powers that ought to be exercised by judges.

1.5.2 Subsidiarity

Subsidiarity is familiar to students of European law, because of the special role it has played both in political debates about European integration, and in the legal development of the effect of European law in member states. The principle is that government power ought to be assigned at the right level. Larger, more remote organizations should not take over tasks that can be carried out more effectively and justly at a level that is closer to the people whom the organizations ought to serve. So, for example, subsidiarity explains the dominant role that the EU plays in the international trade of member states, and the peripheral role that the EU plays in criminal law and family law.

But subsidiarity is not simply a European principle. It explains the special tasks of local authorities. And it is a principle of law in general: the law's role in regulating your action and mine ought to be subsidiary to our own responsibility for our lives, rather than treating us like slaves. As a constitutional principle, subsidiarity promotes responsible government. It is a guide to allocating power to the institutions that can exercise it most responsibly.

Margin of appreciation

The principle of subsidiarity can be seen at work in the leeway that the European Court of Human Rights in Strasbourg allows to the authorities of contracting states, in passing judgment on what the Convention rights require in the context of particular countries (see p 96).

1.5.3 Comity

Separation of powers and subsidiarity are principles of power allocation; comity is the respect that a public authority ought to show for the work of another public authority. You might say that it is respect for the separation of powers, and for subsidiarity. It is not enough to have separate branches of the state; we also need each public authority to act in a way that is compatible with the roles of other public authorities.

Article 9 of the Bill of Rights 1689 is a requirement of comity: ‘That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament’. The courts would be interfering with the constitutional function of Parliament if they allowed lawsuits for defamation against MPs for what they say in the House of Commons. The irony is that it is no better for someone to tell damaging lies about you in the House of Commons than it is anywhere else. The Bill of Rights thus prevents certain injustices from being remedied by the courts. That is not as shocking as it sounds, because although everyone has a right not to be defamed, no one has a right to a *remedy against* defamation that would interfere with the representation of the people. Comity always has this ironic effect: it prevents one institution from doing justice, in order to preserve the capacity of another institution for good government.

Comity is a crucially important principle of administrative law, because of the judges’ remarkable ability to invent powers for themselves. They have a general, inherent jurisdiction over the administration of justice, which we saw in the story of *habeas corpus*. Why shouldn’t they use that jurisdiction to replace all administrative decisions with their own decisions? The answer is complex, but bits of it are all too obvious: they wouldn’t necessarily be better at it than other public authorities (and they might be worse), they do not represent the people, and their processes are only good for resolving legal disputes. And, most obvious of all, the constitution forbids it. Comity is a principle of the constitution, because the framework of government is regulated by the principle that a public authority (such as a court) ought to respect the constitutional functions of other public authorities.

⋮ **A judicially enforceable rule that official action is unlawful if it is contrary to**
 ⋮ **good government would transform a court into a governing council.**

1.5.4 The rule of law

A community is not ruled by law unless:

- the life of the community is governed by clear, open, stable, prospective, general standards,
- government officials adhere to those standards, and
- there are independent tribunals (i.e. courts) that regulate the conduct of the other institutions.

Two facets of the ideal of government by law are easily overlooked, and they are especially important for administrative law. First, the rule of law requires not just standards, but also processes. Secondly, the rule of law does *not* require that *everything* be controlled by clear, open, stable, prospective, general standards, or by legal processes. We cannot decide whether the community attains the ideal, unless we know which aspects of the conduct of government must be regulated by law.

The importance of process

The rule of law requires not just a set of standards, but also a set of processes. The processes must be designed to give effect to the standards, but that is not their only purpose. The processes must also serve the same purpose that the standards serve: that is, to support responsible government. Consider the change in setting a tariff of imprisonment for life prisoners, which used to be decided by politicians and is now decided by judges (see p 50). The change is a step toward the rule of law, but not because life sentences are now governed by rules. The standards that judges use in determining the tariff are no more definite than the standards that the Home Secretary used to use. But the new process is less arbitrary, because the decision is made by someone who, unlike the Home Secretary, is under no pressure to respond to public opinion as to what should happen to a particular murderer. In this respect, the life of our community is no longer ruled by politics.

What is to be ruled by law?

For a community to attain the rule of law (and to escape arbitrary government), the law must control some executive functions of government—but not all. Which functions need to be controlled by law, and how?

Why does the rule of law demand that judges decide the time that life prisoners spend in prison, when it does not demand that judges decide government expenditure, or appoint ministers, or set the income tax? The answer is that we can attain the rule of law without everything being controlled by law. The point of the rule of law is to prevent arbitrary government,⁹ and for that purpose, we do not need legal standards or legal processes to control every governmental function. The rule of law

⁹ The rule of law is also opposed to *anarchy*, which means that effective executive decision making (and, e.g., the capacity to respond to emergencies without being prevented by legalities) is itself a requirement of the rule of law.

only requires a decision to be controlled by legal standards or processes if that will help to prevent arbitrary government.

As Lord Steyn put it, ‘In our system of law the sentencing of persons convicted of crimes is classically regarded as a judicial rather than executive task.’ (*R v Home Secretary ex p Anderson* [2002] UKHL 46 [39]). A sentencing decision by the executive is arbitrary, but the appointment of a minister on the mere say-so of the Prime Minister is not arbitrary. Not that it is all right for him to make bad appointments! But legal control of his decision cannot improve the appointment of ministers.

So the separation of powers and the rule of law are linked, in a way that is very important to administrative law. Attaining the rule of law requires that *some* official decisions be controlled by legal standards and processes; we cannot decide which decisions those are, without a clear understanding of the rationale for the separation of powers. And because the rule of law does not require all official decisions to be controlled by law in the same way, **comity** between the courts and the executive is a requirement of the rule of law. The executive branch must accept judicial decisions; conversely the law should not give legal institutions forms of control over the executive that they cannot exercise with respect for the function of the executive.

The judges’ role in achieving the rule of law is more limited than it is sometimes thought to be. Yet they still have a critically important role, because the rule of law is a *reflexive* ideal: it requires the system to regulate itself. The judges’ independence and effective power enable them to provide the self-regulation that a system of government needs, if it is to attain the rule of law. And for the same reason, the rule of law demands that the judges craft and abide by rules for their own conduct that will distinguish their actions from their arbitrary say-so. So, for example, *habeas corpus* gives judges a wide discretionary power, since it provides for a detainee to undergo ‘whatever our court then and there may order concerning him’. But it gives the judges no power to release a detainee who is lawfully imprisoned.

The rule of law is not necessarily improved when judges interfere with administrative decisions. *More judicial control* of official action, and *more legal regulation* of the life of the community, do not necessarily bring the community closer to the ideal. In fact, excessive interference with administration at the whim of judges will actually detract from the rule of law. That is why comity is a requirement of the rule of law.

1.5.5 Principles allied to the rule of law

The principle of legality

An obvious, central requirement of the rule of law is that public officials should be bound by the law. That means that no administrative authority has discretion to violate the law or to suspend it. One aspect of this principle was enacted in Art 1 of the Bill of Rights 1689: ‘the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal.’ The rule applies even to national defence: the government has a very wide discretionary power under the royal prerogative to defend the United Kingdom, but it cannot do so by raising taxes, or using land, or conscripting people, unless Parliament authorizes it by statute.

This principle of legality has a much broader application that is of great importance in the law of judicial review. First, if a statute sets out to protect administrative action from judicial review, judges will bend over backwards to apply the legislation restrictively, so that they can still prevent abuse of power (or even, so that they can simply quash a decision that is incompatible with their interpretation of legislation; see p 63). Secondly and more generally, the courts will read down general grants of administrative power, so that the power must be used in a way that is compatible with certain basic legal values. It is a ‘familiar and well-established’ principle that ‘general words . . . should not be read as authorising the doing of acts which adversely affect the basic principles on which the law of the United Kingdom is based’ (*Jackson v Attorney General* [2005] UKHL 56 [28]).

Which values do those basic principles protect? This is an aspect of the question of what must be ruled by law, and what can justly be left to executive decision. There is no authoritative catalogue of legally protected values, and the result is that judicial review is dynamic: it is up to the judges to decide which basic values should be protected against the general powers of public authorities. The foremost examples involve the value of access to the courts themselves: it is the sphere in which the judges feel most able to interfere with a general executive power. So the courts have quashed a decision to raise the fees for commencing litigation and to remove the exemption from fees for claimants on income support (*R v Lord Chancellor, ex p Witham* [1998] QB 575). And because prisoners may need access to their solicitors, and even to journalists, in order to pursue a campaign to right a miscarriage of justice, it has been held unlawful for the Home Secretary to use a general power to regulate prisons in a way that interferes disproportionately with a prisoner’s correspondence with a solicitor (*R (Daly) v Home Secretary* [2001] UKHL 26), or to impose a blanket ban on journalists using interviews with prisoners (*R v Home Secretary ex p Simms* [2000] 2 AC 115 (HL)).

Even though there is no authoritative catalogue, the principle of legality protects other values besides access to the courts. English law has always had a special regard for property rights, and general powers to interfere with property have been controlled since the Commissioners of Sewers cases of the 1600s. We can add freedom of expression to the list of protected values (not only in a case like *Simms* where it affects access to the courts, but generally), but with a proviso: the protection that the judges give to it varies widely depending on the other interests at stake in an administrative decision that controls the media (*R v Home Secretary, ex p Brind* [1991] 1 AC 696). It is an instance of the principle of relativity: varying forms of protection are given to different legally protected interests in varying circumstances.

The principle of legality has been ‘expressly enacted’, as Lord Hoffmann put it, in the Human Rights Act 1998:

‘s 3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.’¹⁰

¹⁰ *R v Home Secretary ex p Simms* [2000] 2 AC 115, 132.

That applies to legislation granting general administrative powers, so that they cannot be used to violate Convention rights, unless the legislation authorizes it. And there is an authoritative catalogue of the protected values for the purpose of the Human Rights Act: they are the values protected by the Convention rights (see Chapter 3). But even under the Convention, the context is still essential: the protection given to freedom of speech, for example, depends on the other interests at stake in a decision.

On the role of the principle of legality in judicial review, see p 266.

Due process

All governmental decisions ought to be made by processes that put the relevant considerations effectively before the decision makers. Very often, the only effective way to achieve that goal is to give people affected by the decision an opportunity to participate in the process. If a public authority is deciding whether you committed murder, you ought to be able to participate in ways that would be superfluous or damaging when a public authority is deciding whether to build a new school in your town. The role that you ought to have in the process varies radically, depending on the nature of the decision, and the way in which it affects you, and whether the decision maker needs your input in order to grasp the relevant considerations. There is no general right to any form of participation in official decisions, but there is a right to a form of participation that is due, in the circumstances.

FROM THE MISTS OF TIME

Due process (see chapter 4) is an ancient English idea. If you are familiar with the phrase ‘due process’ from Hollywood lawyer movies, that is because the Americans inherited it from the time of the Plantagenets, and wrote it into their Bill of Rights: the Fifth Amendment provides that ‘No person shall be . . . deprived of life, liberty, or property, without due process of law.’

By the Middle Ages, it was already an accepted legal principle that a person should be given the form of participation in a decision-making process that is due—that is, appropriate in the context. In the Petition of Right 1628, Parliament reminded King Charles that Parliament had guaranteed ‘due process of law’ nearly 300 years earlier: ‘And in the eight-and-twentieth year of the reign of King Edward III, it was declared and enacted by authority of parliament, that no man, of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disinherited nor put to death without being brought to answer by due process of law.’¹¹

¹¹ ‘. . . nul homme, de quel estate ou condicion q’il soit, ne soit oste de titre ne de tenure, ne pris, n’emprisonne, ne desherite, ne mis a la mort, saunz estre mesne en repons par due process de lei’ 28 Ed III c 3 (1354).

There is an especially close relation between due process and the principle of legality. Courts protect legally recognized values not only by reading down general powers, but also by conferring special procedural protections on persons when a decision affects a basic legal value. So, for example, where a statute undeniably gives a public authority power to destroy property, the courts hold that the common law requirement of due process calls for the public authority to give a hearing to the person who owns the property (see p 108).

As a result of the close relationship between due process and the principle of legality, the law of due process gives us a deeper understanding of the values that both principles protect. For example, we can find a catalogue of legally protected values in the 1354 statute of due process: it protected title, land tenure, personal liberty, inheritance, and life. Compare the values protected 700 years later, in the European Convention on Human Rights: life, freedom from torture¹² and from slavery, personal liberty, freedom from retrospective punishment, privacy, family life, freedom of religion, expression, and association, freedom from discrimination, and (in the Protocols), property, education, free elections, freedom of movement, and freedom from expulsion. The Protocols also prohibit the death penalty.

What about the Bill of Rights 1689?

Its catalogue of protected values was a response to abuses of executive power under the Stuart Kings, and its focus was on protecting Parliament from the King. The Bill of Rights prohibited suspension of laws by the executive, taxation without approval by Parliament, prosecutions of people who bring petitions to the Crown, and the raising of a standing army. It protected the bearing of arms by Protestants, free elections, free speech in Parliament, freedom from excessive bail, freedom from cruel and unusual punishment, the proper use of juries, and frequent Parliaments. It was mostly a bill of Parliament's rights.

Access to justice

The legal processes for controlling government will be no good if people cannot get at them. Since they are legal processes, they are cumbersome and expensive. The challenge is partly for legal aid to provide public funding to challenge public authorities (which is outside the scope of this book), and partly for advocacy groups to undertake litigation in the public interest (see section 11.2 on campaign litigation).

¹² Torture was inflicted before the Civil War on warrants issued by authority of the King. In *A and others v Home Secretary* [2005] UKHL 71, Lord Bingham said that the common lawyers had regarded torture as “totally repugnant to the fundamental principles of English law” and “repugnant to reason, justice, and humanity” [12]. Lord Bingham said that no warrant authorizing torture had been issued since 1640. The House of Lords unanimously held in *A and others* that the common law allows no admission of evidence obtained by torture.

Legal certainty

In *R v Bolton* (1841) 1 QB 66, the parish claimed that Bolton was occupying one of its houses as a pauper, and threw him out; he claimed that he had been paying rent for it. The magistrates decided against him, and in judicial review the court of Queen's Bench refused to hear evidence that the magistrates had got the facts wrong. Lord Denman CJ said, 'It is of much more importance to hold the rule of law straight than, from a feeling of the supposed hardship of any particular decision, to interpose relief at the expense of introducing a precedent full of inconvenience and uncertainty in the decision of future cases.'

English judges today lack Lord Denman's relish for leaving an injustice unremedied. Instead, they would rather run the risk of downplaying the value of legal certainty—'the principle that parties should know where they stand' (*R (Thomas) v Central Criminal Court* [2006] EWHC 2138 [20]). Legal certainty is one of the general principles of EC law developed by the European Court of Justice (ECJ).¹³ It is especially important in the European Court of Human Rights,¹⁴ because the Convention could be read to give the Court an open-ended power to revisit administrative decisions in a way that would have shocked Lord Denman. For example, the requirement of hearings by an independent tribunal in Art 6 of the Convention could have been read to require judges to review the merits of a vast range of administrative decisions. But the courts have declined to do so (see p 87–9). And in *R (Beeson) v Dorset County Council* [2002] EWCA Civ 1812, Laws LJ said, 'There is some danger, we think, of undermining the imperative of legal certainty by excessive debates over how many angels can stand on the head of the Art 6 pin' [15]. Lord Hoffmann added, 'Amen to that, I say' in *Begum v Tower Hamlets LBC* [2003] UKHL 5 [59].

The more power that judges are given to generate uncertainty, the more attention they need to pay to the principle of legal certainty. It is not generally an overriding value, but it is enough to generate a **presumption of non-interference** (see p 222)—that is, a rule that a decision made by a body to whom a power has been allocated is not to be interfered with merely because a different decision ought to have been made. There has to be some justification for undoing what has been done. In the High Court, such a justification is a 'ground of judicial review'.

1.5.6 What happened to justice?

Think of Mr Bolton, thrown out of his house and told by the Lord Chief Justice that it is more important to hold the rule of law straight than to do justice in a way that might create uncertainty. And let's suppose for the moment that the parish council's decision was unjust (we don't know, because the Court never heard the matter). Should the court have done justice in the case, or held to the rule of law?

¹³ See, e.g., Case C-61/05 *Commission v Portugal* [2006] 3 CMLR 36, and Case C-310/04 *Spain v Council* [2006] ECR I-7285 [141].

¹⁴ See *Evans v United Kingdom* (2006) 43 EHRR 21.

It is an injustice for a government agency to fail in its duty to act with due regard for the public interest and for the private interests that are at stake in public decisions. But not all injustices are controlled by law. And they cannot all be put right by judges. Every police officer, housing officer, teacher, politician—and in one way or another every one of our 6,000,000 public sector employees—has a responsibility for justice. So have decision-making institutions such as school boards and local councils. The role of the law in controlling all that is extremely important and strictly limited. Its importance can lead people to discount the limits or to forget them. The role of courts is *even more strictly limited* than the role of the law, because there are so many other legal institutions for controlling administration, and resort to the courts is meant to be a last resort (see p 60).

Imagine that the Prime Minister were to choose a crony as Chancellor of the Exchequer, instead of a person who could do the job much better. That would be an injustice to the whole nation, but the rule of law does not require a remedy for it. In fact, comity would forbid the High Court to interfere. If a politician who had been overlooked went to the High Court and asked the judges to quash the Prime Minister's decision on the ground that the decision was unjust, the Court should not even give permission for the claimant to seek judicial review. Even in the face of an allegation of injustice, the court's role is limited by its responsibility for the rule of law. It would be a breach of comity, and not an assertion of the rule of law, for judges to review the decision. This limitation on the courts' role allows judges to remedy many injustices, but not all.

So in Mr. Bolton's case, the Court was right to refuse to consider the magistrates' decision, if it would have been a breach of comity to question their decision on the facts. But if the Court could have reviewed the decision without damaging the magistrates' ability to do their job, then the Court missed an opportunity to do justice according to law.¹⁵

How to reconcile justice and the rule of law

Comity is a system principle that requires constitutional institutions *not* to act on principles of justice! But the reasons for the principle of comity are themselves reasons of justice: it will promote just government under the constitution, if the institutions allow each other to function without undue interference. And interference with a decision can be inappropriate, even if the decision itself was unjust.

Comity is a requirement of responsible government.

Consider **proportionality** (see section 8.3). It is a crucial principle of justice: a decision maker must not impose a greater burden on someone than is justified by the attainment of some good goal. All government action ought to respect this principle. But its *legal* effect is strictly limited, and its limited role in the law reflects the limited role of administrative law in doing justice. The judge or other legal authority

¹⁵ The courts today would take a different approach from Lord Denman's; they would hear the case, but would quash the magistrates' finding of fact only if it were plainly untenable (see section 9.2.4).

applying the principle of proportionality may not be best placed to decide what is proportionate.

Proportionality is a principle of good government, but it is not a principle of the constitution, because the framework of government cannot generally be regulated by giving one institution authority to pass judgment on whether decisions of another institution are proportionate. And the circumstances in which courts can quash an administrative decision purely on grounds of proportionality are limited: they depend on the requirements of due process and the principle of legality. The separation of powers is a fundamental principle of the constitution that requires that different kinds of decision as to what is proportionate be allocated to different institutions. The judges have no general jurisdiction to impose justice on other officials.

1.6 Accountability

An accountable government faces up to people. Accountability is a fundamental requirement for responsible government, because public officials cannot be trusted to act responsibly if they don't have to face up to anyone.

The principle of accountability is unspecific. The reach of the principle is much broader than law: the most constitutionally important accountability techniques are the political techniques of democracy. At the national level, democracy is secured through the combination of:

- elections to Parliament;
- the constitutional rule that entrusts the government to the party with the confidence of the House of Commons;
- the rule that ministers of the Crown must answer questions in Parliament;
- the practice of debating policy in Parliament as well as deliberating over legislation; and
- the rule that the power of the Crown is to be exercised on the advice of the ministers.

Democracy is also secured at different levels, through different democratic mechanisms, in the European Union¹⁶ and in local government. At all these levels of government the law regulates elections, and gives legal effect to legislative decisions. But effective government accountability depends on much more than just law. It depends on party politics, on participation by voters, on independent and critical media, and on the commitment and integrity of Members of Parliament and other representatives. The role of the media gives a healthy reminder of the limited role of

¹⁶ Those mechanisms are not found chiefly in the role of the European Parliament (it is not the legislature; it shares legislative power with the Council). Democracy in the EU depends on democratic processes in the Member States, whose representatives make up the Council; Member States also nominate Commissioners (subject to approval by the European Parliament). See http://europa.eu/abc/12lessons/lesson_4/index_en.htm.

law in the accountability of the government: the law needs to protect the newspapers from political censorship, but the government will not be held to account unless the companies that run the newspapers actually allow journalists to do their job, and the journalists are committed to their work. And all that will happen only if people buy the newspapers that criticize the government.

Accountability needs to take diverse forms in a complex 21st-century state. Parliament imposes certain forms of political accountability on government and the courts impose certain forms of legal accountability, but accountability has to reach far beyond the courts and Parliament. Auditors hold public authorities to account for their finances, and their decisions may be backed by massive financial penalties for officials involved in corruption. Rewards (such as promotion processes) provide a form of accountability. Other accountability techniques are effective because they create publicity that has crucial political effects. Some are effective merely because they are embarrassing to the individuals involved who make decisions on behalf of public authorities. Public authorities ought to be accountable in a wide variety of ways to a wide variety of people and institutions—to ombudsmen, to public inquiries, to police investigations, to school inspectors, to a variety of tribunals, to the voters, to the media, to the courts, to the institutions of the European Union, to the states that are party to the Geneva Conventions, to the United Nations . . .

This book is about a limited set of accountability techniques: the legal ones. Legal accountability is imposed by laws that give one institution or public official legal power to call another to account. It encompasses a relatively limited yet still vast array of accountability techniques. Legal accountability is neither more nor less important than other forms of accountability. It is often thought that Parliament is failing to provide proper political accountability, and that the courts have had to step into the breach, through judicial review. But that depressing view of parliamentary control of the executive is actually irrelevant to public law. Judicial control of government decisions has a limited scope, but it is not secondary to Parliament's very different power to control government (see p 53). Parliament and the courts each have distinct supervisory functions over the government. So the political and legal processes serve as complementary accountability techniques.

Securing accountability

Special legal problems arise when the government contracts out operations to private companies. If a local authority provides housing, the law controls its decisions. For example, Art 8 of the European Convention requires the authority to respect the tenants' privacy. Tenants can challenge the lawfulness of the local authority's decisions, under the Human Rights Act. What happens if the local authority pays a private company to provide housing, and the service provider invades the tenants' privacy? The local authority will say that it has not invaded the tenants' privacy, and the company will say that the Human Rights Act does not apply to it because it is not a public authority. Chapter 15 deals with the ways in which legal accountability can be disrupted by contracting out.

1.6.1 Open government: a new constitutional principle?

In *Local Government Board v Arlidge* [1915] AC 120, the court refused to order a government department to disclose advice it had received from a planning inspector. Lord Shaw said that a court order of disclosure would be inconsistent ‘with efficiency, with practice, and with the true theory of complete parliamentary responsibility for departmental action’ (137). In 1947, Lord Greene approved of the *Arlidge* approach, saying that ‘the idea that a Minister can be compelled to disclose to anybody information . . . which he has obtained as a purely administrative person, is alien to our whole conception of government in this country’ (*B Johnson & Co v Minister of Health* [1947] 2 All ER 395, 401).¹⁷ The theory of parliamentary responsibility for departmental action, and in fact ‘our whole conception of government’, have changed since those cases were decided. The result is a massive gain in accountability, because a minister becomes more accountable, if he or she has to disclose the information on which a governmental decision is based. The change has partly been the result of legislation.

The **Freedom of Information Act 2000** (it only came into full effect in 2005) provides a right to *some* government information. Before that, no one outside Parliament had any right to demand information from the government, except (1) under the duties that public authorities have to give reasons for some decisions (see Chapter 6), and (2) in litigation (if they are given permission to seek judicial review, claimants can get disclosure of information relevant to their claims).¹⁸ The new right to information is general: that is, you don’t need a reason for asking for it. You have a right to information *unless* the public authority has some reason not to give it to you. But statutory exemptions restrict the right, and they give public authorities some dangerous grounds for withholding information.

After an initial rush, the volume of requests under the Freedom of Information Act has averaged just over 2,500 per month, adding up to more than 60,000 in the first two years;¹⁹ just over 60% of requests are granted initially. Most refusals have been based on the exemptions for personal or confidential information, or for information on investigations by public authorities. But hundreds of requests have been refused on the basis of the rather worrying exemptions: for information on ‘the formulation or development of government policy’ (s 35(1)(a)), and information that might ‘inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation’, or might ‘prejudice the effective conduct of public affairs’ (s 36(2)). Those exemptions are tailor-made to preserve a culture of secrecy in government; they mirror the objections that governments used to make to passing freedom of information legislation at all.

¹⁷ He approved of the approach of the House of Lords in *Arlidge*.

¹⁸ Another exception was audit information; see below.

¹⁹ Statistics are available at <http://www.foi.gov.uk/reference>. Note that we have no measure of how much information has been made publicly available as a result of the Act, by public authorities that know they will need to release it if a request is made.

Rejected

The following are examples of requests turned down under the exemption for disclosures that would harm the development of government policy (s 35(1)(a)):

- Home Office reports on ‘the impact of its plans for compulsory ID cards’;
- the Health Department chief economic adviser’s report into the relation between MRSA and bed occupancy; and
- policy discussions on the future of school funding.

Information on the public cost of guarding Prince Charles and Camilla Parker Bowles was refused on the ground of the potential threat to royal security, and Tony Blair’s Christmas card list was withheld on the ground that disclosure would be harmful to international relations.²⁰

The ‘policy’ and ‘prejudice’ exemptions are a bar to accountability, and they give public authorities a potentially arbitrary power. Is the power adequately controlled? You can ask for an internal review if a public authority does not disclose information you request. If you are still not satisfied, you can complain to the Information Commissioner, who can issue a notice requiring disclosure. You and the public authority can appeal to the Information Tribunal if you are not satisfied with the Commissioner’s decision.²¹ The Tribunal’s decision can be appealed on a question of law to the High Court (Freedom of Information Act 2000 s 59). The ‘policy’ exemption and the ‘prejudice’ exemption will provide a cloak for the embarrassing things that secretive officials would really rather not disclose, unless the Information Commissioner, the Information Tribunal, and, ultimately, the courts, are prepared to act on their own judgment on the effect of the disclosure on administration.

The **Public Interest Disclosure Act 1998** supplements public access to information—and public accountability—by protecting ‘whistleblowers’ who disclose information about malpractice. Malpractice includes a criminal offence, a failure to comply with any legal obligation, a miscarriage of justice, a danger to health or safety, or environmental damage (s 1).²² If the disclosure is to the media, though, it is only protected if the whistleblower first raised the matter internally or with a regulator, or reasonably believed that doing so would result in victimization or a cover-up. Victimization in breach of the Act entitles a complainant to damages in an employment tribunal. In July 2005, an employment tribunal awarded Carol Lingard £470,000 in compensation for constructive dismissal, after she was victimized for telling her superiors of claims that prisoners were being bullied at Wakefield high-security jail.

²⁰ *The Independent* (London 28 December 2006) 2.

²¹ See <http://www.dca.gov.uk/foi/guidance/proguide/chap09.htm>.

²² The Act does not protect members of the armed forces, intelligence services, or police forces.

As with the Freedom of Information Act, there are still tensions in the government's moves toward openness. In 2000, a whistleblowers' charity successfully asked the High Court to order that Employment Tribunal records of cases should provide enough information for them to be able to identify whistleblower cases that had settled before a hearing.²³ The Department of Trade and Industry played for time by appealing, while they prepared regulations that would cancel the effect of the decision. The Parliamentary Ombudsman investigated the DTI, and reported 'I strongly criticise them for that.'²⁴

The **Audit Commission Act 1998** governs the independent inspection of the accounts of local authorities, health authorities, and police and fire authorities. The audits themselves open a window on the public authorities, because the reports are public, and the authorities must consider them at meetings which are at least partly open. But the Act also provides that 'any persons interested may...inspect the accounts to be audited and all books, deeds, contracts, bills, vouchers and receipts relating to them' (s 15). The provision has been interpreted broadly to include as a 'person interested' a local TV company wanting to use the information for a programme on a private landlord who provided care services funded by the local authority for vulnerable people: *R (HTV Ltd) v Bristol City Council* [2004] EWHC 1219.

In spite of the tensions, these three new statutes form one aspect of a general trend toward more open government. The courts have also taken important steps; the most notable are described in the account of the changes in the law of due process in Chapters 4 and 6: the increase in availability of oral hearings, duties of disclosure of information before a hearing, and enhanced duties to give reasons for decisions. And since the 1970s, the doctrine of legitimate expectations (see Chapter 8.4) has made it much more difficult for the government to make secret changes in its policies and practices. In one leading case, Lord Mustill identified a general trend: 'I find in the more recent cases on judicial review a perceptible trend towards an insistence on greater openness, or if one prefers the contemporary jargon "transparency", in the making of administrative decisions' (*R v Home Secretary, ex p Doody* [1994] 1 AC 531, 561).

What's more, judicial review itself has become an aspect of the trend. Public interest litigation (bringing a claim to pursue a campaign in the public interest rather than to obtain personal benefit) has turned the court into a new kind of forum in which political activists can hold the government to account (see section 11.2). And remarkably, the courts have given permission to seek judicial review to claimants who have no prospect of success, just because they raise issues so important that they deserve an airing (such as the government's refusal to hold a public inquiry into its decision to invade Iraq: *R (Gentle) v Prime Minister* [2006] EWCA Civ 1078; see p 370).

²³ *R v Employment Tribunals, ex p Public Concern at Work* [2000] IRLR 658.

²⁴ Parliamentary Commissioner for Administration report PA-3002/0058, 1 August 2005 [85]. On ombudsmen, see Chapter 13.

Public interest immunity

Until *Conway v Rimmer* [1968] AC 910, public authorities had a ‘Crown privilege’ to withhold documents in litigation (see *Duncan v Cammell Laird and Co Ltd* [1942] AC 624). It was a legally uncontrolled power (like the privilege of private parties not to disclose correspondence with their solicitors). In *Conway*, the House of Lords held that the courts’ responsibility for the administration of justice required them to decide whether there was a sufficiently urgent public interest to justify non-disclosure. The decision in *Conway* increased disclosure in litigation, and was a landmark in the dismantling of the generalized deference to government that judges had (sometimes) shown in the first half of the 20th century.

Consultation

The government has contributed to its own openness, partly through the expanded use of public consultation in policy development. The Cabinet Office has a code of practice for consultation on plans for central government policies and regulations. It recommends clear, concise, and widely accessible consultation involving ‘a minimum of 12 weeks for written consultation at least once during the development of the policy’. The code also calls for departments to give feedback on the responses received and to explain how the consultation process influenced the policy.²⁵ Statutes often require consultation on proposals that affect a group of people in such a way that they ought to have a say in the policy decision (such as a proposal to close a school (*R v Leeds City Council, ex p N* [1999] ELR 324), or to close a coal mine (*R v Trade and Industry Secretary, ex p Vardy* [1993] 1 CMLR 721), or to sell a council estate (*R v Environment Secretary, ex p Walters* (1998) 30 HLR 328)).

In principle, consultation offers a better democratic connection between government and the people, because it focuses specifically on an urgent problem for the community, and gives the people affected a chance to give information and to make argument. It is only meant to contribute to the government’s policy formation, and not to turn it into a judicial process. As Lord Woolf has said,

‘It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.’²⁶

²⁵ <http://www.berr.gov.uk/whatwedo/bre/consultation-guidance/page44420.html>.

²⁶ *R v North and East Devon Health Authority, ex p Coughlan* [2000] 3 All ER 850 [112].

But consultation *generates* litigation, because the people consulted often end up thinking that the ‘consultation’ was window-dressing for a decision that had already been taken. The classic administrative mistake is to make the decision before the end of the so-called consultation. That will be held to be procedurally unfair (*R (Parents for Legal Action Ltd) v Northumberland County Council* [2006] EWHC 1081). In judicial review, the courts will consider whether consultation required by statute was carried out in accordance with the statute, and will add duties of fairness not specified in the statute. But they will not overturn a decision where there is a technical defect in the consultation, if the purpose of the consultation has been accomplished (see *Walters*).

Consultation is a form of openness that the government brings upon itself. But the courts in the 21st century have made their auxiliary role in supervising consultations into a real nuisance for the government:

- if consultation is undertaken, it must be done properly (*Coughlan* [108]);
- if the government promises to consult before taking a decision, the courts will quash the decision if the consultation does not happen or is inadequate (*R (Greenpeace) v Trade and Industry Secretary* [2007] EWHC 311); and
- the United Kingdom has entered into a treaty requiring consultation before taking certain decisions with serious environmental impact,²⁷ and it seems that the courts will hold that such decisions are unlawful if the consultation has not been taken: ‘in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive’ (*Greenpeace* [49]).

Consultation in Europe

The European Commission has guidelines for consultations on policy initiatives before the adoption of a proposal; the principles of the scheme are ‘participation, openness and accountability, effectiveness and coherence’. Its minimum standards include allowing eight weeks for written contributions from the public, the holding of public meetings, and response to contributions.²⁸

Is openness a new constitutional principle?

We should not exaggerate the transforming effect of these developments: openness in government is not altogether new, and it is not guaranteed. To get things in perspective, keep in mind the forms of openness that the government has had

²⁷ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (‘the Aarhus Convention’).

²⁸ http://ec.europa.eu/civil_society/consultation_standards/index_en.htm#_Toc46744748.

to live with for centuries. The most important is the power of MPs to ask questions of ministers in Parliament. The openness of the courts themselves is an important aspect of open government, and it is much older than the effective scrutinizing role of MPs. The independence of police and prosecutors is more recent, but it predates the 20th century.

And various forms of public inquiry are ancient. Since 1276 coroners—independent judicial investigators—have had a statutory duty to investigate ‘the deaths of persons slain, drowned, or suddenly dead’ (see *R (Amin) v Secretary of State* [2004] 1 AC 653 [16]), and even that statutory rule only confirmed the common law of the time. In Amin’s case, Lord Bingham said that the point of the coroner’s inquiry is ‘to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others’ [31]. In this century, the European Court of Human Rights has enhanced the ‘transparency and effectiveness’ that are needed for public confidence in the investigation (*Jordan v United Kingdom* (2003) 37 EHRR 2 [144]).

Public inquiries have been required for decisions on land use planning for generations—both for government projects, and for the approval of private projects. In hearing the many challenges from opponents of planning decisions, the judges have enhanced procedural rights in inquiries.

And in certain respects, the role of judicial review in promoting open decision making goes back centuries. In *Bentley’s Case* (1748) Fort 202, the court of King’s Bench held that the University of Cambridge had to comply with natural justice by giving a doctor a hearing before depriving him of his degree. Fortescue J cited a decision of 1470 by the Chancellor and Judges, ‘that it is required by the law of nature that every person, before he can be punish’d, ought to be present’ (206). For more than five hundred years, it has been unlawful (unless specially authorized by statute) for the government to use administrative means to make a secret decision to punish anyone for anything.

Open government is only partly new, and cannot be taken for granted. But the principle that administrative information in general is to be open (subject to exemptions) really is a radically new principle, which has only developed since the 1990s. It is of constitutional importance. The value of transparency is partly that it can contribute to political control of government (by giving the opposition the opportunity to embarrass the government, and by letting MPs know what questions to ask in Parliament). It can also contribute to the rule of law (by exposing unlawful official conduct, and specifically by giving a potential claimant useful information in deciding whether to bring a legal claim against a public authority). But it has a more basic importance, because it makes the government face up to people: it is in itself an accountability technique.

1.7 Europe and the principles of the constitution

A breach of European Community law is unlawful in English law,²⁹ so acting incompatibly with Community law is a ground of judicial review. But Community law has a much broader significance for administrative law, because of the sophisticated techniques that the EJC uses in controlling the action of the institutions of the European Union. The EU has borrowed freely from the traditions of member states, and has developed new devices and doctrines aimed at enhancing the effectiveness of Community law, while imposing the rule of law on the EU institutions. In this book, you will find those devices and doctrines in sections on some of the trendiest topics—the role of ombudsmen (Chapter 13), the doctrine of proportionality (section 8.3), the protection of legitimate expectations (section 8.4), the practice of consultation on policy, and the very un-English doctrine of state liability to compensate for loss caused by unlawful state conduct (see p 553). These developments have become integral parts of the practice of administrative law in this country; they originate in the administrative law doctrine of the ECJ, and lawyers and judges have used them as sources of analogies to support arguments in the English courts.

The administrative law of the EU institutions is a creature of the treaties, and of the decisions of the ECJ. The ECJ reviews the legality of some acts of the institutions (the European Parliament, the Council, the Commission and the European Central Bank). An EU institution or a member state can bring a claim in the ECJ to annul a decision or measure taken by an institution (including the making of regulations). And any person can challenge a decision that is ‘addressed to that person’ or ‘is of direct and individual concern’ to him or her. This test for **standing** for private persons to challenge a decision is more demanding than the test of standing in English judicial review (see section 11.6). The restrictive test corresponds to the legislative nature of many of the measures that private parties might want to challenge; the ECJ has not wanted to offer a forum for the continuation of political battles that the EU law-making process was designed to resolve.

Article 230 of the EC Treaty provides that, ‘the Court of Justice shall declare the act concerned to be void’ if a claimant succeeds in showing that any of the following grounds apply:

- ‘lack of competence,
- infringement of an essential procedural requirement,
- infringement of this Treaty or of any rule of law relating to its application, or
- misuse of powers’.

These grounds reflect the same concern for the rule of law that underlies the English law of judicial review. ‘Essential procedural requirements’ are the demands of due

²⁹ European Communities Act 1972, s 2; see *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716.

process. Lack of competence (called ‘jurisdiction’ in English law) and infringement of any rule of law are grounds of review for the same reason in Community law as in English law: the judges are given jurisdiction to impose the law on the other institutions of the Community.

The really interesting problems of judicial review in the ECJ are remarkably similar to those in the English courts. ‘Misuse of powers’ gives the ECJ an opportunity to craft for itself the same sort of far-reaching supervision of some acts of the institutions that the English courts have crafted. And in its case law, the ECJ has developed ‘general principles of Community law’ that enhance its supervisory jurisdiction: they include the protection of fundamental rights, proportionality, and protection of legitimate expectations.³⁰ There are really crucial differences between the work of the ECJ and the work of the English courts: the ECJ determines the validity of legislative instruments made by European institutions, and (very importantly) those instruments are all meant to be passed for the accomplishment of limited objectives specified in the treaties. But one similarity with English judicial review is really striking: the case law of the ECJ reveals the same tension over the requirements of comity. This one basic question of constitutional principle poses the same challenges in Luxembourg as in London: how can a court promote responsible government without taking over a responsibility that the constitution gives to other institutions?

When we look at the doctrines of legitimate expectations and proportionality (in which English judicial review has been particularly influenced by the analogies with Community law) we will look closely at one recent case on judicial review of reforms to the Common Agricultural Policy, in order to see how the ECJ copes with the same problems of comity and accountability that English courts face.³¹

European laws

Don’t confuse European law with the law of the European Convention on Human Rights. Both are European, but if you use the term ‘European law’ at all, it is best kept for the law of the European Union (also commonly called ‘Community law’). The European Convention is the creature of a set of institutions under a separate treaty organization, the Council of Europe. See section 3.3.

1.8 Conclusion: ‘the properest and most effectual remedy’

The main task for law-makers and judges in developing administrative law is to fashion what Lord Mansfield called ‘the properest and most effectual remedy’ against irresponsible government.³² Over the past eight centuries, the judges have developed

³⁰ Under Art 230, decisions that breach the general principles of Community law will be held to have been a misuse of a power, or to have infringed a rule of law.

³¹ Case C-310/04 *Spain v Council*; see section 8.6.

³² *R v Cowle* (1759) 2 Burr 834, 856.

a variety of techniques for controlling administrative decisions. Over the past century, Parliament and the government have created an enormous variety of new institutions and processes for the same purpose. The most effectual remedy depends on the context. So the requirements of administrative law depend very substantially on the context.

For judges (in courts and in tribunals), for ombudsmen, and for other people who have the opportunity to right injustices in public administration, giving a proper and effectual remedy means doing justice while acting with comity toward other public authorities. That is why the new techniques of administrative law vary in their application: they are tailored to the complexity of modern administration. The courts retain (in fact, they have enhanced) their role of intervening, but as in Lord Mansfield's day, their job is to do so only when their techniques for controlling government provide the properest remedy. So you cannot generally say that judges will or will not substitute their own judgment for that of an administrative official: it depends on the circumstances.

Administrative law cannot guarantee good government. In fact, it cannot even guarantee responsible government. But it does have a core role of curtailing exercises of public power that can be identified as arbitrary by the institution given power to interfere with official action. The story of *habeas corpus* reflects that core role, and also reflects the remarkable power that the judges have to confer powers on themselves. By restraining the arbitrary use of power, administrative law can give effect to the constitutional principles that support responsible government (system principles and principles of accountability). The core role of administrative law is to impose the rule of law on the executive.

Administrative law can improve administration in various ways that go beyond its core role. So, for example, ombudsmen promote good administration directly, by investigating complaints of bad administration. But like judicial review, that can only succeed if the ombudsmen who are interfering with an administrative decision do so with respect for the role of the public authorities in question. Comity is a general principle that applies to ombudsmen and tribunals as well as to judicial review, and also to the processes for enforcing liabilities of public authorities in ordinary claims.

Judicial review has a special importance for understanding those general principles. That is not because the judges control everything. In fact, judicial review is of limited importance as a process for resolving disputes with the government (see section 2.7). But two features of the judges' work are important for learning administrative law. First, the judges give reasons for their conclusions as to what the law requires. The courts have tried to articulate the principles of public law in a way that no other public institution has the capacity or the authority to do.

Secondly—and most remarkably—unlike any other institution, the courts have power to determine the nature and the scope of their own power. That is why we began with the story of *habeas corpus*, which is perhaps the most dramatic instance of that constitution-making power. It is a power that has pervasive importance in the law of judicial review. In judicial review, the judges not only have to resolve a dispute

between two parties; they have to work out the limits of their own power to interfere with the work of another public authority. The case law of judicial review determines the court's own power to control the administration. So judges do not have the luxury of simply quashing a decision if there was something wrong with it. When they interfere with another public authority's use of its power, they are crafting standards for the control of their own power. And even if a decision was unlawful, the common law gives them a discretionary power to decide whether to interfere (see p 381).

The special importance of comity in that process means that the study of judicial review is a good way to approach the general problem of administrative law. Chapter 2 introduces that problem: how can one public authority interfere with another, in a way that promotes responsible government?

TAKE-HOME MESSAGE • • •

- The real objective is good government (that is, just government that makes the community better). But administrative law promotes good government indirectly, by providing techniques for achieving responsible government.
- Administrative law can promote responsible government by giving effect to constitutional principles: a general principle of **accountability**, and system principles (that is, principles that govern the role of government decisions in a system of institutions): **the separation of powers, subsidiarity, comity, the rule of law (which includes the principle of legality and due process), access to justice, and legal certainty**.
- The core task of administrative law is to impose **the rule of law** on public authorities. But the institutions that impose the rule of law on other public authorities must do so with **comity**—that is, with respect for the capacity of another public authority to do its job.
- The application of those principles to governmental decision making depends on the type of decision that needs to be controlled, and on the context in which it is made. But not everything depends on the circumstances: the general principle of **accountability**, and the **system principles** of the constitution, are very old and are recognized (though they are applied in varying ways) in the law of many countries and in European Community law.

Critical reading

R (*Abbasi*) v Foreign Secretary [2002] EWCA Civ 1598
 A and X v Home Secretary [2004] UKHL 56

CRITICAL QUESTIONS • • •

- 1 Why do you suppose that *habeas corpus* is used very little in Britain today? Why didn't the Belmarsh detainees ask for *habeas corpus* in *A and X v Home Secretary* [2004] UKHL 56?
- 2 Suppose that the government detains people without statutory authority, and says in *habeas corpus* proceedings that there is reason to think that they are terrorists, that the reason for the suspicion is not something that can be put to the court in evidence, and that the court should not interfere because the freeing of the men would create a catastrophic danger to the United Kingdom. What should the court do?
- 3 Are tribunals (Chapter 12) and ombudsmen (Chapter 13) part of the executive branch of government?
- 4 Should one public authority ever *abandon* comity toward another public authority?

Further Questions:

- 5 Could there be responsible government in an absolute monarchy?
- 6 Who decides what is to be ruled by law?



Visit the online resource centre to access the following resources which accompany this chapter: links to legislation and online reports of judicial decisions, summaries of key cases and legislation, updates in the law, suggestions for answering the pop quizzes and questions, and links to useful websites.